Failure to prevent the facilitation of tax evasion

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FLA and YFLA

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Background and Policy

- Swiss and Liechtenstein amnesties
- Prosecutions rare
- Senior bank management denied knowledge of staff activity
- Government desire to change corporate behaviour
- Make it more difficult for tax evaders by making employers monitor staff

Timetable

- 2 versions of the legislation have been consulted on
  - Final draft legislation (unseen) to be introduced before Parliament after Party Conference season
- Expected operational date – 30 September 2017 at the latest
  - This is the first data exchange under the ‘CRS’
- Draft guidance published for consultation – to be updated when legislation introduced

First principles

- There has to be fraudulent tax evasion
  - Needs to be a liability
  - Taxpayer needs to know/not care about the liability
  - And take dishonest steps – including omission
  - Dishonesty can be before or after filing of a tax return

- What is the difference between evasion and avoidance?
- What if the avoidance is <u>unsuccessful</u>?

Facilitation

- Likewise, facilitation involves a mental element – it must be <u>knowing</u> facilitation
  - So does not include knowing facilitation of avoidance
  - Or unknowing facilitation of evasion
- **NB**: ‘turning a blind eye’ or recklessness can be amount to the necessary criminal intent

Facilitation - some examples

- A bank employee accepts a ‘CRS’ declaration from a customer knowing it to declare false tax residency
- An employee of offshore trust company falsifies the trust’s accounts to change character of a distribution from taxable to non-taxable
- An employee of an offshore trust company has managed a trust for 10 years and has never been asked for accounts or other information realistically required for beneficiary to complete a tax return…?

More examples

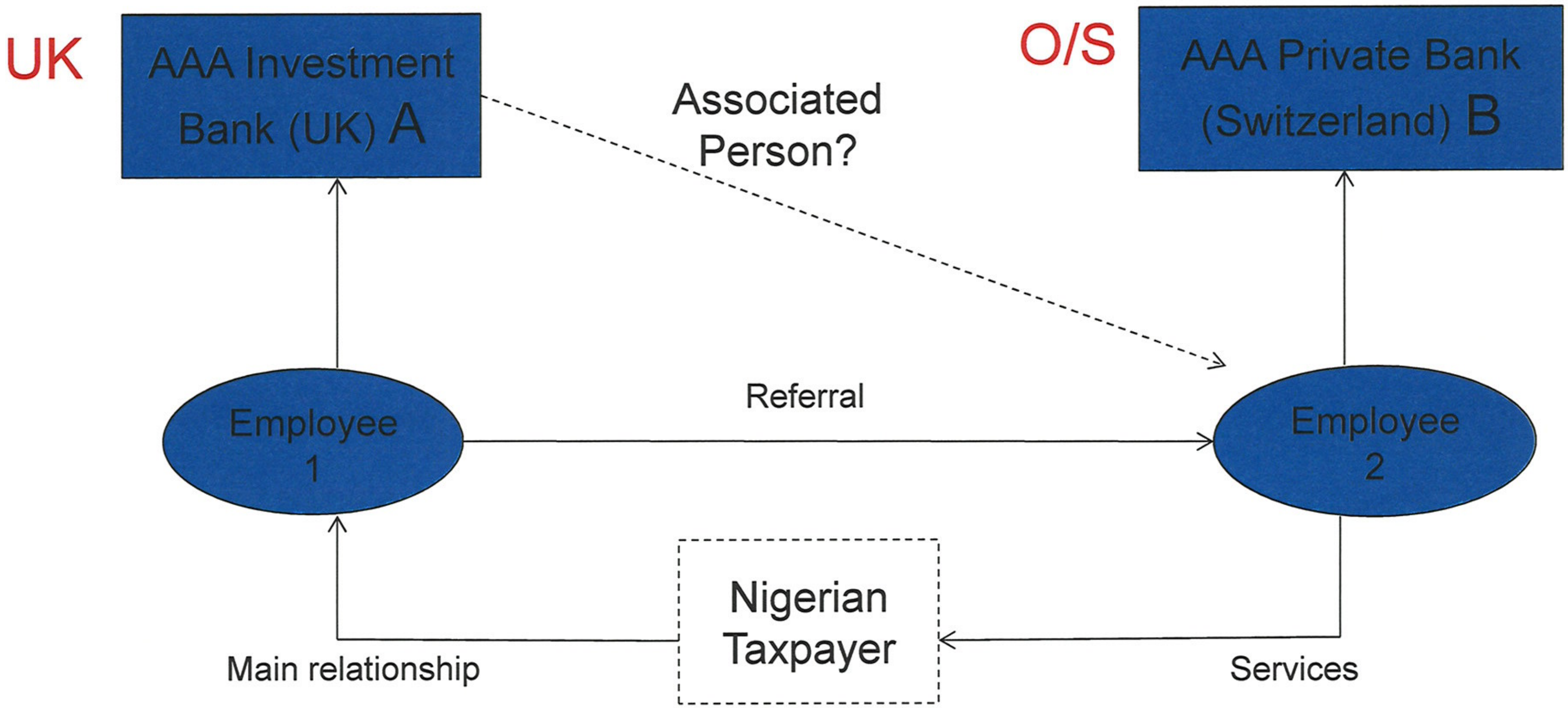
- A site manager encourages workers to provide false information to suggest they are self-employed rather than employed in order to save tax cost
- A buyer in a company buys stock knowing that supplier is not going to be accounting for the VAT on that sale
- A third party agent makes a corrupt payment to an official (unlikely that the payment would be declared for tax)

Territoriality

AP linked to a…	UK Tax	Non-UK tax
UK incorp. company	√	√
Foreign incorp. company with UK establishment	√	√
Foreign incorp. company – no UK establishment	√	X unless conduct in UK

- Foreign companies
  - Any foreign company in scope re UK tax evasion, cf Bribery Act
  - To escape non-UK tax offence, must have no UK establishment and conduct must take place entirely outside the UK
- Branch rule impacts banking sector adversely – capital adequacy rules
- NB: Public interest test

Linking Associated Persons



Procedures - Six principles

- Principles based, like the Bribery Act
- Backed by statutory guidance

1) Proportionality of reasonable procedures
2) Top level commitment
3) Risk assessment
4) Due diligence
5) Communication (including training)
6) Monitoring and review

Procedures - overview

- Identify associated persons
- Explain to APs what tax evasion is and remind how suspicions must be reported
- Explain ethical standards
- Identify where rogue AP might facilitate evasion and improve procedures
- Encourage ‘whistle-blowing’
- Implement random checks and monitoring
- “Reasonable” = proportionate to risk the company faces.
- Risk assessment is key – get into the mind of your staff

HMRC's investigative approach …

- CRS and other transparency initiatives will provide unprecedented levels of information
- HMRC is joining the dots on facilitators – 'centres of infection'
- Will culminate in prosecutions under this new offence
- NB: Need to prove the evasion and facilitation
- But …
  - Taxpayer given immunity from prosecution?
  - And the Facilitator, if a whistle-blower…?

Also … civil penalties

- For enabling offshore evasion
  - **or** offshore careless behaviour
- To enable is ‘to encourage, assist or otherwise facilitate’
- Start date not yet clear
- Penalties can be levied on individuals or companies
- Penalty equivalent to the amount of tax evaded
- Publication of details of the enabler

Hot off the press – new consultation on civil penalties for enablers of avoidance.

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