



THE FRAUD
LAWYERS ASSOCIATION

8.10.15

Dear Sirs

Response from the Fraud Lawyers' Association ('FLA') to the HMRC consultation paper dated 16th July 2015 entitled 'Tackling offshore tax evasion: A new corporate offence of failure to prevent the facilitation of evasion.'

This document is submitted by the FLA in response to the above named consultation.

The FLA is an organisation established in 2012 to educate and train its 350 members in all matters relating to their practice as fraud lawyers. Its membership consists of solicitors and barristers who practise mainly in the area of criminal and civil fraud:
www.thefraudlawyersassociation.org.uk.

Q1. We believe that that a corporation should be held accountable where it

fails to prevent its agents from facilitating tax evasion, regardless of the type of tax involved. Do you agree that the new corporate criminal offence should cover failure to prevent its agents from criminal facilitation of evasion of all taxes?

Yes, subject to the definition of 'agent'. On the face of it, this is very wide. We believe that the potential criminal liability of a company ('Company A') should be restricted to the activities of its employees. If it is extended to include the activities of intermediary companies, over whom Company A has in reality little control, then this places Company A in an unduly burdensome



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and potentially unfair situation. Any corporate liability for the actions of individuals at the intermediary companies should be restricted to those companies themselves.

Q2. If a new corporate failure to prevent offence is created, should the offence be limited to corporate failure to prevent criminal facilitation in the offences of cheating the public revenue and the fraudulent evasion of income tax outlined above?

These would seem the most obvious examples but it is not clear why the new offence should be limited to these offences.

Q3. Alternatively, should the new offence also be committed where a corporation fails to prevent its agents from criminally facilitating other tax offences? Which additional tax offences do you believe should be included in any corporate failure to prevent offence?

We see no reason why the offence couldn't be extended to all potential tax offences, provided that they required dishonest intent on the part of the ultimate client, and also dishonest intent on the part of the employee in helping him/her to evade the tax.

Q4. We do not envisage that under the new offence it would have to be shown that the agent who is facilitating the evasion of taxes was acting for the benefit of the corporation, for example, to obtain or retain business for the corporation, as under s.7(1) of the Bribery Act 2010, do you agree with this approach?

No. We believe that it should be restricted in the same way as the Bribery Act. If individuals within a company are acting for their own financial advantage, it is likely that the offending will be that much more difficult for the company to detect. Seeking to impose criminal liability in these circumstances is a step too far.



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Q5. Do you agree that the offence should cover all of the above entities? Do you have any comments on the entities which you believe the offence should apply or not apply to?

We see no reason why it should not apply to all of the listed entities.

Q6. Do you agree that the offence should apply to both corporations with a presence in the UK and non-UK based corporations whose agents criminally facilitate the evasion of UK taxes?

In principle, we see no difficulty with this approach, although given the unsatisfactory state of the common law on jurisdiction, the statute will require the necessary extra territorial provisions.

Q7. Do you agree that the offence should apply to UK based commercial organisations whose agents criminally facilitate the evasion of taxes in other jurisdictions, provided tax evasion is a recognised crime in those jurisdictions?

We believe this is a step too far. The UK should be concentrating on regularising the position in this jurisdiction before concerning itself with taxes which might have been evaded elsewhere. It may be that the UK businesses (or individuals within them) could be prosecuted for other offences (eg money laundering) in any event.

Defences to the new offence

Q8. Do you believe that a defence of having taken reasonable steps to prevent the facilitation of tax evasion by an agent is appropriate? Are there any other defences you feel should be considered for the new offence?

We believe that this defence is appropriate.



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In addition, we would add that it is essential, of course, that the Act is not of retrospective effect. In other words only the unreasonable failure by a company to detect facilitation undertaken by an employee post implementation should be capable of prosecution.

We would also suggest that no offence should be prosecuted when no audit has taken place between the date of the alleged facilitation and the date of the decision to issue the summons. It will often be during the course of the audit that these matters are picked up. If they are so detected, that should amount to a complete defence to the charge (on the basis that the reasonable due diligence test has been met).

Q9. We welcome views on the nature of guidance that corporations would find helpful to enable them to identify the best way for them to prevent criminal facilitation of tax evasion by their agents.

Guidance similar to that produced in relation to the Bribery Act would be helpful. Whilst this guidance needs to be sufficiently detailed to be meaningful, we would however suggest that sometimes 'less is more' and that hugely lengthy guidance (such as that produced for the Money Laundering Regulations) is not of great assistance.

There should also be guidance as to the circumstances in which DPA's may be available.

Q10. We also welcome any relevant observations about experiences with existing guidance, either domestic or overseas, that may help inform guidance for the new offence.

See above.



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Assessment of impacts

Q11. Do you have any views, comments or evidence which may help inform our understanding of likely impacts?

No.

Yours faithfully

pp Clare Huntley

The Fraud Lawyers' Association