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Failure to Prevent the Facilitation of Tax Evasion – Corporates on the Rack

A presentation by Christopher Coltart QC

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- An overview of the regime to date:
 - Variety of provisions by which tax evasion (offshore or domestic) is prosecuted (eg cheating the public revenue; being knowingly concerned in the fraudulent evasion of tax).
 - All require proof by Crown of mens rea (dishonesty).
 - Unsurprising - tax evasion is by definition a crime of dishonesty.

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- Identical considerations apply to the prosecution of companies in relation to tax evasion (whether directly involved, or whether they have simply facilitated it).
- Crown must prove (a) that the 'directing mind and will' of the company (ie the directors) knew what was being done and (b) that they dishonestly participated in that activity.

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- What's changed?
 - For individual taxpayers, a new strict liability offence of offshore tax evasion. No requirement on the part of the prosecution to prove dishonesty. Punishable by imprisonment.
 - New corporate offence (also strict liability) of failing to prevent the facilitation of tax evasion (whether offshore or domestic).

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- The new corporate offence:
 - Why needed?
 - Historical difficulties in (a) identifying with precision the 'directing mind and will' of a company and (b) proving to the criminal standard that he/she was sufficiently proximate to the events in question.
- New offence modelled on s.7 Bribery Act 2010, which removes this requirement.

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- The draft legislation:
- Company [X] is guilty of an offence if [Y] (a person “associated with” [X]) commits a “tax evasion facilitation offence” when acting in the capacity of a person associated with [X].
- It is a defence for [X] to show either (a) that it had “reasonable procedures” in place to prevent [Y] from committing tax evasion facilitation offences, or (b) it was not reasonable to expect [X] to have any such procedures in place.

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- Points to note:
 - [Y] is “associated” with [X] if [Y] performs services on behalf of [X]. [Y] need not be an employee - could be an agent or subsidiary of [X].
 - A “tax evasion facilitation offence” is committed by [Y] when he facilitates the commission by [Z] of the following offences: cheating the public revenue (or any other tax offence which could be construed as such); being knowingly concerned in the fraudulent evasion of tax.

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- [Y] facilitates such an offence by (a) assisting in or encouraging its commission by [Z], (b) by aiding and abetting, counselling or procuring its commission by [Z] or (c) by being knowingly involved (or taking steps towards) the fraudulent evasion of the tax by [Z]. In each case, [Y] must act with the necessary knowledge or intent.
- In order for company [X] to be guilty of the strict liability offence of failing to prevent the facilitation, both [Y] and [Z] must have been acting dishonestly.

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- Tax evasion facilitation offences are not limited to the evasion of tax arising out of offshore income, assets and activities. They can be committed by the evasion of taxes, howsoever the liability arises.
- Can even be committed by the evasion of taxes payable in another jurisdiction. In these circumstances, [X] will be liable if (a) [X] is incorporated in the UK, or (b) [X] carries on business here, or (c) some act or omission constituting part of the offence takes place in the UK and (d) the tax evasion in question would be illegal both in that jurisdiction and in the UK.

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- Re the “reasonable procedures” defence, what is reasonable will depend on all the circumstances.
- HMRC has published formal guidance on this issue (per talk from Jason Collins).
- No prosecutions in relation to the failure to prevent the facilitation of overseas tax offences to be brought without the personal consent of the DPP or Director of the SFO.

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- New corporate offence is triable either way.
- Punishable with an unlimited fine.
- Closing remarks/questions

Christopher Coltart QC

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