Failure to prevent the facilitation of tax evasion

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Agenda

• FTP Overview and rationale
• The three ingredients of the FTP offence
• Associated persons
• Reasonable procedures
• De-risking, designing and implementing an FTP response
• Investigation & prosecution - procedure and practicalities
• Questions
FTP Offence – Overview

• New strict liability offence for companies and partnerships if an associated person criminally facilitates third party tax evasion

• Sanctions include confiscation and fines

• Implications include costs and reputational damage

• Defence of reasonable prevention procedures applies
Rationale

• 2015 *Panorama* ‘exposé’ - re-energised in wake of ‘Panama Papers’
• Swiss and Liechtenstein amnesties - prosecutions rare
• Senior bank management denied knowledge of staff activity
• Current law makes it very difficult to prosecute big corporates
• New offence will make corporates *vicariously* liable for acts of their ‘associated persons’
• Based on the Bribery Act model
• Government desire to change corporate behaviour
Three stages

• **Stage One (current)**: criminal tax evasion by a person

• **Stage Two (current)**: criminal facilitation (e.g. aiding and abetting) of the offence in One by another person

• **Stage Three (new)**: the person in Two commits the offence whilst acting in the capacity of a person ‘associated’ with a ‘relevant body’
  – Defence: ‘reasonable prevention procedures’

• Relevant body means ‘body corporate’ or ‘partnership’
Associated persons

Section 36(4) Criminal Finances Bill:

A person (P) acts in the capacity of a person associated with a relevant body (B) if P is—

(a) an employee of B who is acting in the capacity of an employee,
(b) an agent of B (other than an employee) who is acting in the capacity of an agent, or
(c) any other person who performs services for or on behalf of B who is acting in the capacity of a person performing such service
Two distinct offences

• Failing to prevent the facilitation of UK tax evasion
• Failing to prevent the facilitation of non-UK tax evasion
• The UK tax offence applies to all ‘relevant bodies’, wherever incorporated or organised
• The overseas tax offence applies more narrowly, but still very wide in scope
UK tax offence

• Limited to tax evasion offences which require a dishonest intention (i.e. excludes strict liability offences)
• Likewise, criminal facilitation involves a mental element – it must be dishonest facilitation
  – So does not include knowing facilitation of avoidance
  – Or unknowing facilitation of evasion
• Dishonesty might involve non-disclosure, misrepresentation, concealment
• ‘Turning a blind eye’ or recklessness can amount to the necessary dishonest intent
Overseas tax offence

Requires ‘dual’ criminality – i.e. must involve:

1. conduct which amounts to a tax evasion offence in the country levying the tax; and (to match the UK) the conduct involves dishonesty/knowledge

2. conduct which amounts to a facilitation offence in the foreign country and (to match the UK) the conduct would have amounted to a UK facilitation offence had it concerned UK tax
Overseas tax offence – territoriality

Section 38(2): It only applies where any of the following conditions is satisfied —

(a) that the relevant body (B) is a body incorporated, or a partnership formed, under the law of any part of the United Kingdom

(b) that B carries on business or part of a business in the United Kingdom

(c) that any conduct constituting part of the foreign tax evasion facilitation offence takes place in the United Kingdom
Interaction with AML

• Employees may already be under obligation to report suspicions of tax evasion
• New offence applies when an AP dishonestly facilitates the evasion - Self-evidently AP is unlikely to AML report…
• “The legislation does not hold relevant bodies to account for the crimes of their customers, nor does it require them to prevent their customers from committing tax evasion”
  – This offence is about preventing staff and other APs from criminally facilitating evasion
  – Watch staff not just customers/suppliers
FTP Defence - Overview

- Defence to have ‘reasonable prevention procedures’
- Modelled on existing UK Bribery Act 2010 offence
- Uses 6 principles underpinning Bribery Act defence

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“The top-level management of a relevant body should be committed to preventing persons associated with it from engaging in criminal facilitation of tax evasion. They should foster a culture within the relevant body in which activity intended to facilitate tax evasion is never acceptable.”

(HMRC draft guidance)

- Communication and endorsement of FTP policies
- Involvement in development of FTP procedures
- Commitment to zero tolerance to facilitation
- Clearly articulated consequences and benefits
- Key personnel & management line of sight
Risk Assessment

“The relevant body assesses the nature and extent of its exposure to the risk of those who act for or on its behalf engaging in activity during the course of business to criminally facilitate tax evasion.”

- Inclusion of tax evasion as part of risk assessment
- Identify and prioritise risks based on information gaps eg transaction / customer / market / sector / country
- ‘Sit at desk’ exercise to mitigate associated persons risk motive / opportunity / means
- Detection and monitoring current and emerging risk
- Embedded due diligence
Due Diligence

“The organisation applies due diligence procedures, taking an appropriate and risk based approach, in respect of persons who perform or will perform services on behalf of the organisation, in order to mitigate identified risks.”

• Current DD procedures are a logical starting point
• Tailor DD to the risks within each part of the business
• Proportionate and risk-based DD
• Can out-source DD
• Dependent on the control that can be exercised
• Reviewed and updated to meet risk
The Reasonable Prevention Procedures should cover:

• Formal policies adopted to prevent facilitation of tax evasion
• Practical steps taken to implement, enforce compliance and monitor effectiveness
• Nature, scale and complexity of activities
• Level of control and supervision
• Proximity
• Not excessively burdensome
• Demand more than mere lip service
Training and Communication

“The organisation seeks to ensure that its prevention policies and procedures are communicated, embedded and understood throughout the organisation, through internal and external communication, including training. This is proportionate to the risk to which the organisation assesses that it is exposed.”

- Clearly articulated commitment to deter facilitation
- Risk assess relevance of awareness & training
- Ensure those who need it get bespoke training
- Design and implement training & awareness packages
- Training roll out should be monitored for audit trail
- Effectiveness of training should be evaluated
Monitoring and Review

“The organisation monitors and reviews its prevention procedures and makes improvements where necessary.”

• Risks will evolve over time so procedures need to be flexible
• React to risks reasonably assessed
• Monitoring can be out-sourced to independent body
• HMRC suggests it should incorporate:
  – internal feedback
  – formalised periodic review with documented findings
  – peer review
FTP Compliance Solution

- Risk Assessment
- Project Management and Implementation
- Training & Awareness
- Specific Due Diligence
- Monitoring & Review
FTP Risk Exposure Exercise

- Organisations are starting to plan their response now
- De-risking corporate exposure to offence will require planning

  - Step 1  Understand and identify the 3rd party tax evasion **offences** that may trigger corporate offence exposure
  
  - Step 2  Obtain certainty on which of their **relevant bodies** are in jurisdictional scope
  
  - Step 3  Determine which of those relevant bodies’ **associated persons** could facilitate the 3rd party tax evasion
Reasonable procedures

- 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” means proportionate to the risks the business faces
- Risk assessment is key – get into the mind of your staff
HMRC’s investigative approach …

• Transparency initiatives will provide unprecedented levels of information to tax authorities to investigate tax fraud
• HMRC is looking to see who may have facilitated
  – Will ask why did the associated person not spot the fraud?
• Will culminate in prosecutions under this new offence
• The taxpayer may be given immunity from prosecution
  – So might the facilitator if a whistle-blower
  – But the corporate…?
Law enforcement co-operation

• Enhanced cooperation between law enforcement authorities
  – Automatic exchange of beneficial ownership information
  – Joint Money-Laundering Intelligence Taskforce, a public/private initiative to detect, prevent and disrupt money laundering
  – Centre of excellence for financial intelligence units
  – Anti-corruption coordination centre
The Landscape in the future…

- Tax transparency will continue to generate public interest
- More employee leaks and ‘whistle-blowing’
- The continued rise of ‘hacktivism’
- HMRC actively targeting ‘facilitators’ and ‘enablers’
- Offshore offence priorities:
  - High risk jurisdictions with emerging markets
  - Those historically viewed as ‘beyond reach’
- UK offence priorities:
  - Household names who market on trust
  - Those with previous sanctions for breach
FTP First steps

- Identify project team (Financial Crime, Tax and Legal?)
- Carry out gap analysis and risk assessment
- Develop training and awareness
- Design and embed policy
- Adapt procedures where necessary
- Discuss and agree difficult areas with HMRC?
Reasonable prevention procedures

- Risk assessment is key
  - identify all APs - key
  - Get into the mind of your staff/other APs
- Clear, written policies – explaining what is ‘evasion’
  - Train internal APs
  - Impose conduct rules on external APs?
- Improve customer and supplier DD?
- Encourage ‘whistle-blowing’
- Implement random checks and monitoring
- “Reasonable” = proportionate to the risks faced