



British
Private Equity &
Venture Capital
Association

Failure to Prevent the Facilitation of Tax Evasion

BVCA

Introduction for venture capital and private equity firms



Introduction

- HMRC has found success with behaviour influencing initiatives e.g. DOTAS.
- Corporate offence of failure to prevent facilitation of tax evasion another such initiative.
- Concerns raised within the industry to the BVCA.
- BVCA have spoken to HMRC.

Session outline

- Overview of legislation.
- Examples and discussion.
- Q&A.
- Key takeaways.





Failure to prevent the facilitation of tax evasion – basics

- Two new offences: an offence of failure to prevent the facilitation of UK tax evasion (the "Domestic Offence" enforced by HMRC) and an offence of failure to prevent facilitation of foreign tax evasion (the "Foreign Offence" enforced by the SFO). In relation to both the Domestic Offence and the Foreign Offence, a body corporate or a partnership (referred to as a "relevant body"), whether established for business or non-business purposes, may be prosecuted for failure to prevent the facilitation of tax evasion if:
 - a person ("T") evades tax;
 - an associate ("A") of the relevant body criminally facilitates that evasion while acting in the capacity of an associate of the relevant body; and
 - the relevant body is unable to show they had in place "reasonable prevention procedures" (or that it wasn't reasonable for prevention procedures to be in place).



Failure to prevent the facilitation of tax evasion – further points

- Strict liability – no knowledge or intention required and no requirement for T to have been prosecuted for evasion, or for A to have been prosecuted for criminal facilitation.
- T (or A) may in fact have made a disclosure of the evasion (or criminal facilitation) in order to secure immunity from prosecution.
- A person is an "associate" of the relevant body if the person "performs services for or on behalf of" that body (for example, as an employee, agent or subcontractor). The substance of the relationship will be key, not just the form. A relevant body will not, however, commit the offence if the associate commits the offence of facilitation on a "frolic" of their own – must be in their capacity of an associate of the relevant body. Capacity key according to HMRC.



Failure to prevent the facilitation of tax evasion – territorial scope

- Domestic Offence can be committed by a relevant body irrespective of where they are established or carry on business, and whether or not any part of the criminal facilitation took place in the UK. In other words, wholly non-UK conduct by an non-UK entity can be covered, if it is directed at the evasion of UK tax.
- The Foreign Offence (failing to prevent the facilitation of foreign tax evasion) can only be committed where:
 - the relevant body is established in the UK, or carries on any part of their business in the UK (for example, through a branch);
 - any part of the criminal facilitation took place in the UK.
- Like the Bribery Act 2010, this gives the law a broad extra-territorial scope: a body corporate may fall within scope and be capable of committing the Foreign Offence merely by virtue of having a UK branch, even if that branch is not itself involved in the facilitation or the evasion.



Failure to prevent the facilitation of tax evasion – what is evasion by T (Domestic Offence)?

- For the Domestic Offence, a UK tax evasion offence means:
 - the common law offence of cheating the public revenue (which, broadly speaking, includes any form of fraudulent conduct which results in depriving the Exchequer of the money to which it is entitled), and
 - an offence in any part of the United Kingdom consisting of being knowingly involved in, or taking steps with a view to, the fraudulent evasion of tax.

Not intended to catch clerical errors etc. which result in underpayment of tax.



Failure to prevent the facilitation of tax evasion – what is facilitation by A (Domestic Offence)?

- A person will commit a UK tax facilitation offence if that person:
 - is involved in or knowingly concerned in, or takes steps with a view to; or
 - aids, abets, counsels or procures, the fraudulent evasion of UK tax by another person.

The fact that something is relatively common practice does not make it any less evasive – e.g. invoicing a non-EU entity for VAT reasons, paying a party for the services of another to reduce tax, taking a pay cut and employing spouse to do very little for disproportionate remuneration etc.



Failure to prevent the facilitation of tax evasion – what is facilitation by A (Domestic Offence)?

- Broadly, the person must do an act anticipating that it will assist another person to evade UK tax.
- Examples in the guidance as potentially amounting to facilitation (if conducted with the necessary intention to assist the evader), include:
 - Delivery and maintenance of infrastructure - for example, trust and company formation and setting up and maintaining bank accounts.
 - Financial assistance – helping an evader move money around, providing banking services.
 - Acting as a broker or conduit – i.e. arranging access to others in the supply chain.
 - Providing planning advice.



Failure to prevent the facilitation of tax evasion – facilitation and evasion (Foreign Offence)?

- As with the offence of failure to prevent the facilitation of UK tax, a foreign tax evasion offence must have been committed by "T", and a foreign tax facilitation offence must have been committed by "A" in order for liability to arise.
- For an offence to constitute a foreign tax evasion offence it must be:
 - a criminal offence under the law of the foreign territory relating to tax imposed under the law of that country, and
 - conduct which would be regarded by the UK Courts as an offence of being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax (if it had occurred in the UK).
- Such "double criminality" is also required in relation to the facilitation by "A".



Failure to prevent the facilitation of tax evasion – prevention procedures defence

- It is a complete defence to both of the offences if the relevant body can prove that, when the tax evasion facilitation offence was committed, either (a) the relevant body had in place reasonable prevention procedures; or (b) in all the circumstances it was not reasonable to expect the relevant body to have any prevention procedures in place.
- Prevention procedures are those designed to prevent associates from committing tax evasion facilitation offences.
- Draft Government Guidance issued in October 2016 and will be updated with minor changes on enactment of the legislation.
- Note that reasonable prevention procedures is a defence – hence by the time it is relevant there will already have been an arrest, questioning under caution etc.



Failure to prevent the facilitation of tax evasion – prevention procedures defence

- As with the Bribery Act Guidance, the Guidance states that the formulation of measures to prevent facilitation should be informed by the following six principles:
 - Risk Assessment;
 - Proportionality of risk-based prevention procedures;
 - Top level commitment;
 - Due diligence;
 - Communication (including training); and
 - Monitoring and review.
- The Guidance recognises that procedures may leverage existing controls. However, the appropriateness of controls will need to be informed by a considered risk assessment, and simply tagging "and tax evasion" on to a list of prohibited activities under existing ethics policies is not expected to be sufficient.



Failure to prevent the facilitation of tax evasion – prevention procedures defence

Unlimited fines can be imposed upon conviction and orders for confiscation of assets may also be made. In order to encourage self-reporting by relevant bodies, Deferred Prosecution Agreements ("DPAs") will also be an available tool for prosecutors. DPAs, which are a mechanism for resolving certain types of offending by corporate entities, involve charges being laid but the prosecution being suspended for a specified period provided certain agreed conditions are met, such as:

- the payment of a financial penalty (broadly comparable to that available on conviction following an early guilty plea), compensation and disgorgement of benefit arising from offending;
- compliance remediation steps, potentially including the appointment of a monitor; and
- co-operation in any subsequent prosecution of individuals.

Clear focus on “information gathering”

HMRC have advised that an appropriate regulator may be involved for regulated businesses.



Failure to prevent the facilitation of tax evasion – entry into force

- Likely to be quick; only requires commencement order.
- HMRC have advised they will press ahead as soon as they have briefed the new Financial Secretary to the Treasury, Mel Stride.
- Entry into force still anticipated to be September 2017.

Failure to prevent the facilitation of tax evasion – action points



- Focus first on risk assessment – HMRC expect work to have been done on this by September.
- Think about associated persons, especially lower down in structures.
- Consider jurisdictional issues.



Example 1

May Limited is a portfolio company owned by Westminster Fund LP, which is managed by Westminster LLP. A client event at MayCo goes disastrously wrong when the notorious Red Gang gatecrash the occasion and emergency help is needed to clean up the mess. May Limited finds it hard to find anyone available and eventually calls on Boris Blots Blemishes for help. Theresa, office head at May Limited, has come across Boris, owner of BBB, before and she is well aware that he engages in some questionable practices, including paying many of his cleaners in cash without deductions for tax/NI, knowing they never plan to declare the income. However, Theresa is desperate and turns a blind eye to such shortcomings this time.



Example 1 - discussion

- Tax evasion offence – yes, BBB is evading PAYE/NI and the cleaners are evading income tax and NI.
- Criminal facilitation – probably; Theresa knows that BBB will use the amounts she pays to evade tax.
- FTP offence – potentially.
- Who are possible associates of which entities?
- Would things be different if Theresa were a member of Westminster Fund LLP called in to help deal with an unexpected situation?
- What about if Theresa were a director of May Limited appointed by Westminster Fund LLP?
- What reasonable prevention procedures might help address this?

Example 2



Corbyn Limited is a portfolio company owned by Far Left Fund LP, whose manager is Far Left LLP. Corbyn Limited engages the services of Magic Money Tree Limited to assist in a publicity campaign. When MMT is about to issue its invoice (plus VAT), MMT asks if they can actually issue the invoice from a separate company so that the VAT will be recoverable. Diane, an employee of Corbyn Limited, agrees, but has absolutely no idea what VAT is and words like “recoverability” are beyond the limits of her vocabulary.



Example 2 - discussion

- Tax evasion offence – yes; MMT reclaiming VAT to which it is not entitled.
- Criminal facilitation – no; Diane has no idea what she is doing.
- What if Diane was well aware that the arrangement was designed to enable MMT to evade tax?
- What if Diane was a bit suspicious but was pleased with MMT's work and did not want to alienate them so gave them the benefit of the doubt?
- If there is facilitation what is the scope of the FTP offence?
- What sort of procedures might be helpful to address this type of issue?



Example 3

Remain Limited is a portfolio company of Brexit LP, managed by Brexit Capital LLP. Brexit Capital is entitled to appoint the chairman of the board of Remain. Their appointee, Nigel, asks to enter the engagement via his personal service company so that he does not have to pay tax on his earnings. Nigel produces an opinion from his tax advisers, Dumb & Dumber LLP of Slough, stating that the arrangements are perfectly legitimate. Angela, finance director at Remain is highly sceptical and initially refuses to enter into the requested arrangements. A furious Nigel speaks to David, an old friend and member of Brexit LLP. David tells Angela that these arrangements are common, tax efficient structuring and she needs to lighten up and just go with what Nigel wants. Angela complies.



Example 3 - discussion

- Tax evasion offence – possibly; need to know more facts on Nigel’s arrangements.
- Criminal facilitation – possibly; how much does David know? What is Angela’s scepticism based on?
- FTP offence – potentially.
- Which entity or entities are exposed and who are their associates?
- What if Angela or David telephoned the tax adviser used by their entity who said it was “probably ok” having heard an overview of the facts?
- What sort of prevention procedures might help address this situation?

Example 4



Kremlin Limited, a UK portfolio company uses a Russian based distributor, Putin Co. to deliver supplies to consumers. Putin Co. insists that a portion of the payments are made to a Panamanian bank account. Vladimir, CEO of Putin Co., asks for payments to be made in this way specifically so that he can divert funds from Putin Co. to his personal accounts and minimise the Russian tax payable by both Putin Co. and him personally.



Example 4 - discussion

- Tax evasion offence – presumably, Vladimir and Putin Co. are committing offences under Russian law.
- Facilitation offence – yes, Vladimir is insisting on payment being made in this way knowing it will help Putin Co. evade tax.
- FTP offence – potentially.
- How would the territorial scope rules operate?
- Who could be “associates” of Kremlin?
- In what capacity would they have to act?
- What reasonable prevention procedures might address this?

Example 5



Trump UK LLP manages a Luxembourg limited partnership in which Melania, a Slovenian individual, is an investor. The fund disposes of an investment and profits are available for distribution. Donald, an employee of Trump (based in Luxembourg) arranges for Melania's share of the profits to be paid into an offshore bank account. Melania does not declare her income and gains to the Slovenian tax authorities.



Example 5 - discussion

- Tax evasion offence – presumably, Melania is committing an offence under Slovenian law.
- Facilitation offence – possibly; depends upon Donald's level of knowledge.
- FTP offence – potentially.
- How would the territorial scope rules operate?
- What reasonable prevention procedures might address this?

Example 6



Tiddles is an employee of Fat Cats, a US intermediary that has been engaged to raise money for a new private equity fund to be managed by Nice Mice LLP. Tiddles agrees to help conceal the UK tax residence of Rover, a high net-worth investor. The result is that the employees of Nice Mice LLP innocently pay the proceeds of the fund's disposals into an offshore bank account.



Example 6 - discussion

- Tax evasion offence – yes; Rover is evading UK tax.
- Facilitation offence – yes; Tiddles has knowingly helped Rover.
- FTP offence – yes; Fat Cats is an associate of Nice Mice LLP as it is providing capital raising services for it and Anna is acting as an intermediary for Nice Mice when she facilitates the evasion of tax.

- What reasonable prevention procedures might address this?

Q&A



Key takeaways

- Risk assessment is key first step.
- Associated persons likely to be trickiest area.
- Possible examples to HMRC?





Future BVCA Workshops

- Workshop 2: Friday 30 June (8:30-10am, Travers Smith, London) – small and mid-market private equity houses
- Workshop 3: Tuesday 4 July (8:30-10am, Deloitte, London) – larger private equity houses
- Workshop 4: Monday 10 July (8:30-10am, Macfarlanes, London) – individual issues and the facilitation offence



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