



British  
Private Equity &  
Venture Capital  
Association

# Failure to Prevent the Facilitation of Tax Evasion

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Issues for small and mid market firms

BVG



## 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.
- Core issues for smaller and medium sized PE houses.
- Q&A.
- Follow up.



# 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.

## Core issues - structure

- Size isn't everything – smaller private equity houses may still have complex issues e.g. if structure complicated, multi-jurisdictional or investing in perceived “high risk” industries.







## Core issues – areas of risk

- Fund and manager level – investors, personnel and contractors.
- Portfolio level – personnel.
- Portfolio contractors?
- Key foreign jurisdictions.
- Areas of risk will be fact specific – think about jurisdictions, level of involvement with portfolio companies, relationship with contractors etc.



## Core issues – who are associates?

- Associates can be entities or individuals.
- Persons can be associates of more than one entity – thus an individual could be an associate of both a fund manager and a portfolio company.
- Are portfolio companies associates of the fund manager? Always?
- What about contractors engaged by the manager? And the portfolio company?
- How can capacity be addressed in procedures?

## Core issues – how much knowledge is required to “facilitate”?

- Facts and circumstances are important.
- Genuine errors and legitimate ignorance not caught.
- A certain level of knowledge is likely to be assumed depending upon the circumstances.
- How might procedures address this?



## Core issues - jurisdiction

- Scope and enforcement.
- 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?



## Core issues – how are HMRC approaching this?

- Definite behaviour influencing approach.
- When do procedures become relevant?
- Openness to discussion and industry concerns.
- Regulatory interaction.



# Q&A



## Key follow up

- What are areas which most concern you?
- What would you like to see from HMRC?
- What can the BVCA do?





## Future BVCA Workshops

- 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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