Tackling Tax Evasion: An update on recent developments and how they will impact offshore service providers

Thursday 29 September 2016
Introduction

Overview – The Current Climate – Kevin Cowley, PwC

Corporate Criminal Offence – Jennifer Haslett, HMRC

No Safe Havens - Jon Preshaw, PwC

Closing remarks and questions
Corporate Criminal Offence

29th September 2016
Tackling the enablers of tax evasion

“there will be no place for facilitators of offshore evasion”

No Safe Havens HMRC’s offshore evasion strategy 2014

“Next, we will take another major step forward in dealing with those who facilitate corruption. Under current legislation it is difficult to prosecute a company that assists with tax evasion, but we are going to change that. We will legislate this year for a new criminal offence to apply to corporations that fail to prevent their representatives from criminally facilitating tax evasion”

– Prime Minister’s statement to the House 11 April 2016

HM Revenue & Customs
No Safe Havens: the strategy

Our offshore evasion strategy is to:

• reduce the opportunities to evade offshore

• increase the likelihood of evaders, and those who make offshore evasion possible, being caught

• strengthen the severity of the punishments for those who are caught
No Safe Havens: Objectives

The objectives of the No Safe Havens strategy are to ensure:

- there are no jurisdictions where UK taxpayers feel safe to hide their income and assets from HMRC;
- would-be offshore evaders realise that the balance of risk is against them;
- offshore evaders voluntarily pay the tax due;
- those who do not come forward are detected and face vigorously enforced sanctions;
- there will be no place for facilitators of offshore evasion.
Key policy announcements of the past 12 months

The 2015 Budget announced a package of measures to tackle offshore evasion, including:

• the early closure of existing disclosure facilities at the end of 2015, and the opening of a new time-limited facility in 2016;

• a requirement for all financial institutions and tax advisors to notify their customers about new automatic exchange of information agreements;

• more investment in rewards for significant information on offshore tax evasion; and

• a package of new measures:
  • a new strict liability offence for those who have not paid the tax due on offshore income;
  • new civil penalties for enablers of tax evasion;
  • a new offence of corporate failure to prevent the facilitation of tax evasion;
  • toughening of the range of penalties available to HMRC, including naming those who have evaded tax
Timeline

**2015**
- September 2015: First Exchange of information under FATCA
- Dec 2015 / Jan 2016: Reporting starts for CRS early adopters
- Nov-Dec 2015: National media and awareness raising on new exchange of information agreements

**2016**
- September 2016: First Exchange of information under CDOT IGAs
- Dec 2016 / Jan 2017: Reporting starts for CRS late adopters
- LDF and CDDF Close 31st December 2015
- 2016 – onwards: New disclosure facility
- 2016: FIs and Advisors required to notify customers of AEOI

**2017**
- September 2017: First exchange of information under CRS (early adopters)
- 2017 – onwards: New Legal requirement to correct
- 2017- New simple criminal offence for offshore tax evasion comes into force
- Pre-Sept 2017: New corporate criminal offence to come into effect

**2018**
- September 2018: All CRS adopters will have begun exchanging data
- 2016/2017 - New civil penalties for individuals come into force
- 2016 - New civil penalties for enablers come into force
- 2017- New civil penalties for enablers come into force
- New disclosure facility
- New corporate criminal offence to come into effect
- New disclosure facility
- New corporate criminal offence to come into effect
- New corporate criminal offence to come into effect
- New corporate criminal offence to come into effect
Difficulties with the existing law

Why is the UK introducing a new criminal law?

Under existing UK Law it is difficult to hold corporation criminally liable for the acts of their representative. It requires knowledge and involvement of the “Directing Mind and Will” of the corporation, e.g. Director level involvement.

The following situations may be difficult if not impossible to prosecute at the company level:

• The individual(s) may be operating without the knowledge of the senior members of the company and due to a lack of supervisory controls and culture of compliance their criminal acts are undetected and unreported. For example, deliberately turning a blind eye or falsifying documents

• The individual(s) may be operating with the knowledge and implied approval of senior members of the company and steps are deliberately taken to conceal this knowledge and approval.

• The facilitation may be solely directed by senior members of the company and be a deliberate part of the corporation’s business model, but individuals at the lower levels of the company are used to disguise the involvement of senior members of the company.
New criminal offences to apply to corporations involved in facilitating tax evasion

In 2015 the UK announced that it would introduce new criminal laws to apply to corporations who fail to put in place reasonable procedures to prevent their representatives criminally facilitating tax evasion, both in the UK and overseas.

This has resulted in two new offences:

- Failure to prevent the criminal facilitation of a UK tax evasion offence
- Failure to prevent the criminal facilitation of an overseas tax offence

The new offences will come into force prior to September 2017 (before information exchange under the Common Reporting Standard).
Who can be liable under the new offence?

The law applies to “relevant bodies”, which is defined as “any body corporate or partnership”, this includes charities.

The UK Tax Offence

- Any body, wherever based or incorporated, that is providing services to UK taxpayer.

The Overseas Tax Offence

- Any body, wherever based or incorporated, whose representatives are providing the criminal services in the UK
- Any body with a permanent establishment in the UK i.e. carrying out a business or part of a business in the UK, this includes branches
How the domestic offence works

• **Stage one**: criminal tax evasion by a taxpayer (either an individual or an entity) under the existing law

• **Stage two**: criminal facilitation of this offence by an “associated person” of the corporation, as defined by the Accessories and Abettors Act 1861.

• **Stage three**: the corporation failed to prevent its representative from committing the criminal act outlined at stage two.

• **Defence**: the corporation may choose to put forward a defence (on the balance of probabilities) of having put in place reasonable procedures to prevent the action at stage two.

See hand out
The Overseas Fraud Offence

- **Stage one:** criminal tax evasion by a taxpayer (either an individual or an entity) under the existing law of the overseas jurisdiction, that would amount to a criminal offence in the UK. The category of tax does not have to equivalent, but the criminal offence does.

- **Stage two:** criminal facilitation of this offence by an “associated person” of the corporation, i.e. deliberate and dishonest involvement in aiding a criminal offence. This act, if carried out in the UK would amount to a criminal offence and constitutes a criminal offence in the jurisdiction suffering a tax loss.

- **Stage three:** the corporation failed to prevent its “associated person” from committing the criminal act outlined at stage two.

- **Defence:** the corporation may choose to put forward a defence (on the balance of probabilities) of having put in place reasonable procedures to prevent the action at stage two.
The Overseas Fraud Offence

**Stage A:** Would this be a crime if carried out entirely in the UK?

**Stage B:** Does the overseas jurisdiction have the equivalent laws at Stage 1 and 2?

If yes
Who can a corporation be liable for?

A corporation is liable for failing to prevent a person associated with it from criminal facilitating tax evasion.

Who is an “associated person?”

A person (A) is associated with a relevant body (B) if A performs services for or on behalf of B and for this purpose—

(a) the capacity in which A performs services for or on behalf of B does not matter (so, for example, A might be an employee, agent or subsidiary of B), and

(b) subject to subsection (5), whether or not A provides services for or on behalf of B is to be determined by reference to all the relevant circumstances and not merely by reference to the relationship between A and B.

“associated person” goes beyond employees and looks beyond the formal contractual relationship to the substance of the relationship to consider if a person is providing services for or on behalf of the corporation. A corporation cannot sub-contract out of its liability.
Failure to prevent “criminal facilitation”

The corporate offences do not criminalise anything new at the individual level, but rather make a corporation liable for failing to prevent existing criminal offences by its representatives.

What is “criminal facilitation” under the existing law?

We are talking about deliberate and dishonest behaviour.

The associated person must:

- intend to do the act of facilitation
- believe that his act is capable of assisting the perpetrator to commit the offence; and
- know the essential matters that constitute the perpetrator’s offence.

An omission can be an act of facilitation if the individual fails to fulfil a statutory duty, for example deliberately not submitting a suspicious activity report or failing to declare tax residency for the purposes of the CRS, with the intention or knowledge that he is helping to facilitate a tax fraud.
How does it apply to legacy cases?

Employee of corporation provides service to client with the intent of facilitating tax fraud

Employee of corporation leaves employment. Services are maintained to client in good faith, but without the knowledge or suspicion of client’s tax fraud

Commencement of corporate offence pre- September 2017

Associated person of corporation becomes aware on clients tax fraud

---

A. If the employee continues to provide the service they are doing so knowing that they are facilitating the tax fraud.

B. If they fail to fulfil a statutory obligation, e.g. submitting a SAR they may also be liable.

If A or B, the corporation is now liable.
Corporate Criminal Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion (Guidance)

The Government guidance aims to:

• Provide guidance to firms on steps they can take to reduce the risk of their representative facilitating tax evasion

• Enhance understanding of Government expectations and help firms to assess the adequacy of their systems and controls and remedy deficiencies

• Help firms adopt a more effective, risk-based and outcomes-focused approach to mitigating tax crime risk.
Principle-based approach to “reasonable procedures”

Stakeholders requested that the top-level guidance for the new corporate offence follow the principle-based approach of the guidance for the Bribery Act.

Principled-based approach:

• Proportionality of reasonable procedures
• Top level commitment
• Risk assessment
• Due diligence procedures
• Communication and training
• Monitoring and review

Similar to the Bribery Act guidance, each section has commentary and case study examples.
Thank you

HM Revenue & Customs
Jennifer Haslett
03000 557864
jennifer.haslett@hmrc.gsi.gov.uk
No Safe Havens

HMRC approach to tackling offshore tax evasion and avoidance

29 September 2016
Reflections on Corporate Criminal Offence
**Practical example**
Bens have not declared distributions/benefits received

How does the offence apply?

- **Stage 1** – Bens have not disclosed ‘matched’ income tax and or capital gains tax. Offence of cheating the public revenue by the Bens.

- **Stage 2** – If the trustees are aware that the Bens are not declaring distributions/benefits and continue to administer the trust knowing that by doing so they are assisting the Bens to evade tax, they will have criminally facilitated the cheat (ultimately, this will be up to the court to decide).

- **Stage 3** – If the above are made out, then the offence is strict liability so the corporate is within the offence.

- **Stage 4** – The corporate will have a defence if it has taken reasonable steps to prevent the facilitation at Stage 2 - HMRC will request sight of such reasonable procedures prior to any prosecution.
Practical example
New client referred by associated third party

How does the offence apply?

• **Stage 1** – Work is referred to you by an associated third party (e.g. an agent engaged by you to find UK clients). Both the third party and underlying client have the requisite criminal intent, however all relevant KYC/AML checks do not raise any concerns.

• **Stage 2** – The administration of the trust continues. As the associated third party has the requisite intent, the offence is made out.

• **Stage 3** – If the above are made out, then the offence is strict liability so the corporate is within the offence.

• **Stage 4** – The corporate will have a defence if it has taken reasonable steps to prevent the facilitation at Stage 2 - HMRC will request sight of such reasonable procedures prior to any prosecution.
The 5 step process to Reasonable Procedures

1. Initial impact assessment
   o Talking to key stakeholders to understand the touch points.
   o Defining associated persons.

2. Risk assessment
   o Discussing and documenting risks with stakeholders.
   o Bespoke risk assessment of criminal facilitation conducted across the business.
   o Risk areas graded and reviewed.
The 5 step process to Reasonable Procedures

3. Gap analysis
   - No business will have sufficient procedures at this point, as the guidance on reasonable procedures demands engagement with the offences.
   - Mapping identified risks onto existing controls to understand where current controls are able to form the basis of a reasonable procedures defence.

4. Enhancements
   - Redesigning or enhancing processes or controls to address residual risk.
   - Includes due diligence with third parties and cultural and behavioural change.
   - Technical and cultural training.
The 5 step process to Reasonable Procedures

5. Ongoing monitoring, review and reporting
   - Building an audit and review programme (internal and external) to capture the ongoing monitoring and review requirements.
   - Implementing technology tools, alongside CRS and FATCA tools, to highlight and identify risks.
   - Reporting of suspected or actual breaches to HMRC.
   - Responding to criminal conduct and subsequent investigation and prosecution.
   - Ongoing staff training.
Time frame to implement

- **December 2016** – legislation and guidance to be published.
- **January 2017** – earliest date the offence could come into effect.
- **1 September 2017** – latest date by which offence is expected to come into effect.

Day One Compliance

- Organisations will have to be compliant from the commencement date. This leaves roughly 12 months (at most) to build a reasonable procedures defence.
Trusts comb client lists for tax cheats

Vanessa Houlder

Trust companies are trawling through their client lists to identify any tax cheats who could drag them into a crackdown on evasion that followed the Panama Papers scandal, advisers say.
Where are we now?

HM Revenue & Customs

HM Revenue & Customs
Fraud Investigation Service
Proceeds of Crime Team
Long Room,
Custom House
20 Lower Thames Street
London

Phone
Fax
Email
Web www.gov.uk

Date 2nd September 2015
Our ref
Your ref

Dear,

I am writing to you because you recently came to an agreement with HM Revenue & Customs to settle your previously undeclared tax liabilities.

We are keen to understand what involvement any third parties might have had in relation to your previously undisclosed liabilities, and if they influenced your decision not to declare tax that was due.

I would like to arrange a time to visit you at home, along with a colleague, to discuss this further, and suggest if you are not available at this time, or if you would like to arrange an alternative date, please contact me.

We have informed your advisor that we have made contact with you to arrange a visit, and it may be that you wish them to attend the meeting.

Yours sincerely
‘No Safe Havens’ strategy – further measures
Requirement to Correct (‘RTC’) 

A Requirement To Correct (“RTC”) 

• Legislation to be introduced in Finance Act 2017 
• Taxpayers will be obliged to correct UK tax errors relating to offshore assets or investments 
• Subject to Royal Assent of FB 2017, window to correct will run from April 2017 to September 2018 
• Taxpayers who fail to meet the requirement and are subsequently found to have compliance issues relating to ‘offshore matters’ will face Failure to Correct penalties
A Requirement To Correct (“RTC”)  

- To apply to Income Tax, CGT and IHT  
- Expectation is that correction will be iro 2015/16 tax year and earlier  
- Penalties will apply to all ‘in date’ years for assessment  
- Penalties likely to be between 100% and 200% of tax lost  
- Asset-based penalty?  
- Importance of proactive review
Some specific risk areas

• Legislative changes
• Subjective judgements (eg around motive defence)
• Complex factual analysis (eg remittances/mixed funds)
• Evolving case law
Additional measures

New individual criminal offence of offshore evasion

- Strict liability offence - failing to give notice of being chargeable to tax, failing to deliver return and making an inaccurate return. Applies to income tax and capital gains tax.
- Sentence: fine, imprisonment of up to 51 weeks, or both.
- ‘Reasonable excuse’ defence

Civil sanctions for enablers of offshore evasion

- New civil penalties for those who have enabled others to carry out offshore tax evasion and knew that their actions were enabling.
- Penalty is higher of 100% of the tax or £3,000.
- ‘Naming and shaming’ provisions.
Links to other HMRC initiatives (3)

The Worldwide Disclosure Facility (“WDF”)

• A platform to replace all the closed facilities, e.g. LDF, Crown Dependencies’ facilities – no immunity.
• Launched on 5 September 2016.
• Digital platform.
Additional measures

Strengthening tax avoidance sanctions and deterrents

• New measures aimed at ‘trustees, accountants, lawyers and others who are intrinsic in, and necessary to, the machinery or implementation of the avoidance’.
• Applies where avoidance has been defeated in court or settled.
• Extra-territoriality.
Questions
Your PwC contacts

Jon Preshaw
Director
PwC UK

Telephone: +44(0) 7921 108774
Email: jonathan.p.preshaw@uk.pw.com

Ben Roseff
Director
PwC UK

Mobile: +44 (0) 7715 211 869
Email: ben.roseff@uk.pw.com

Kevin Cowley
Partner
PwC Isle of Man

Phone: +44 (0) 1624 689689
Email: kevin.cowley@iom.pwc.com

This publication has been prepared for general guidance on matters of interest only, and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice. No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in this publication, and, to the extent permitted by law, PricewaterhouseCoopers LLC, its members, employees and agents do not accept or assume any liability, responsibility or duty of care for any consequences of you or anyone else acting, or refraining to act, in reliance on the information contained in this publication or for any decision based on it.

© 2016 PricewaterhouseCoopers LLC. All rights reserved. 'PwC' refers to PricewaterhouseCoopers LLC (a limited liability company in the Isle of Man), and may sometimes refer to the PwC network. Each member firm is a separate legal entity.