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CRIMINAL FINANCES ACT 2017 – WHAT YOU (AND YOUR BUSINESS) SHOULD OR SHOULD NOT BE DOING

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On 27th April 2017, the Criminal Finances Act 2017 ("the Act") was given Royal Assent. Part 3 of the Act, when it comes into force on 30th September 2017, will create two new offences under the heading "*corporate offences of failure to prevent facilitation of tax evasion*", which will apply in respect of corporate bodies and partnerships (wherever incorporated or formed) and will cover circumstances facilitating tax evasion in the UK and overseas.

How is the offence committed?

If a person, acting in "*the capacity of a person associated with*" the company (which includes employees, agents, or other people performing services for or on behalf of the company, and is acting in that capacity) commits a "*tax evasion facilitation offence*", then the company may be liable for an unlimited fine.

This is a strict liability offence. This means that it is not possible to blame your clients (or the provision of information from your clients), even though they are the ones committing the primary tax evasion offence. Nor is it possible to distance yourself from your employees (or other people "*associated with*" the company) who are deemed by the Act to have facilitated the tax evasion – your company will still have committed an offence under the Act.

What is a tax evasion facilitation offence?

This depends on whether the tax evasion takes place in the UK or abroad.

UK

1. being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of a tax by another person;

2. aiding , abetting, counselling or procuring the commission of a UK tax evasion offence (defined as (a) an offence of cheating the public revenue, or (b) an offence under the law

of any part of the UK consisting of being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax;

3. being involved in the commission of an offence consisting of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of tax.

Abroad

1. conduct which amounts to an offence under the law of a foreign country;

2. conduct which relates to the commission by another person of a foreign tax evasion offence under that law (defined as conduct which (a) amounts to an offence under the law of a foreign country, (b) relates to a breach of a duty relating to a tax imposed under the law of that country, and (c) would be regarded by the courts of any part of the United Kingdom as amounting to being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of that tax; and

3. conduct which would, if the foreign tax evasion offence were a UK tax evasion offence, amount to a UK tax evasion facilitation offence.

Remember, whilst the tax evasion may have been committed by your clients, and that tax evasion may have been facilitated by your employees (or other people "*associated with*" the company), it is nevertheless your company that will be liable to foot the bill.

Further, it has long been the rule in England and Wales that legal advice privilege will not attach to confidential communications that are made for the purpose of committing a crime or fraud (*R v Cox and Railton [1884] 14 QBD 153*). There is no reason to suspect that the position will be any different in relation to the new offences set out in the Act.

What about if the offence isn't committed by my branch of the company?

English law does not distinguish between different branches of a company, and so one branch may be liable for the actions of another, even though the two have no involvement with one another. By contrast, subsidiaries will usually be considered as separate entities.

However, even companies with subsidiaries ought to be wary. English law has traditionally been very reluctant to lift the corporate veil, and look at who is the ultimate beneficial owner of a company. However, recent regulations in relation to other topical matters (such as anti-money laundering and terrorist financing) have increasingly required an examination of the company structure to determine the ultimate beneficial owners of an entity. It is possible that this approach may filter through into general law and impact on the way subsidiaries are viewed. Whilst this has not yet happened, it is nevertheless possible that, in the future, you may find your corporate structure scrutinised in order to determine who is required to pay any fines.

What should I do about it?

In short, it is no longer possible to turn a blind eye to the tax arrangements of your clients, or the actions of employees (or other people “*associated with*” the company) when dealing with such clients.

In order to avoid liability a company must be able to show either (a) that it has in place such prevention procedures as it was reasonable in all the circumstances to expect the company to have in place, or (b) that it was not reasonable in all the circumstances to expect the company to have any prevention procedures in place.

The government is required to publish guidance as to the type of prevention procedures that ought to be put in place. Formal guidance has not yet been published. However, provisional guidance published in October 2016 states that such procedures will likely be based on six principles:

1. Risk assessment – example procedures include oversight of risk assessment by senior management, appropriate allocation of resources to the detection and monitoring of risk, periodic review of risks, and procedures to identify emerging risks.

2. Proportionality of risk-based prevention procedures – example procedures include reviewing and refining procedures for effectiveness, an overview of the strategy and a timeframe to implement prevention policies, a commitment to compliance over profit or bonuses, and monitoring and enforcing compliance with procedures.

3. Top level commitment – example procedures include communication and endorsement of the relevant body’s stance on preventing the criminal facilitation of tax evasion, and involvement in the development and review of preventative procedures.

4. Due diligence – the provisional guidance states that due diligence procedures should be proportionate to the identified risk, taking into account the level of control and supervision that the company is able to exercise over a particular person acting on its behalf, and the company’s proximity to that person.

5. Communication (including training) – the provisional guidance states that the nature of internal and external communication may vary depending on the nature of the risk being addressed, and the size, business, and operation of the company. It suggests that, for example, internal communication should make clear the company's zero tolerance policy for the facilitation of tax evasion.

6. Monitoring and review – example procedures include seeking feedback from staff members and looking to other financial crime prevention measures, formalised periodic review with documented findings, and working with other organisations, such as representative bodies or other organisations facing similar risks.

It should be stressed that the prevention policy that suffices for one company may not be appropriate or adequate for another. It is therefore important that companies obtain advice and assistance on the drafting of such policies, so as to ensure (so far as possible) that they are able to rely upon the defence set out in the Act.

If you would like Nicholas Woolf & Co to advise or assist you in that regard, please do not hesitate to call us at +44(0)20 7242 6018 or email us at info@nicholaswoolf.com.

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