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A fresh approach to accounting

CRIMINAL FINANCES ACT 2017

Under the Criminal Finances Act 2017 (CFA), companies and partnerships may be criminally liable for failing to prevent their employees from criminally facilitating tax evasion. A potential defence can be utilised, in cases where the business has put into place a system of reasonable prevention measures. Here, we take a look at the key aspects of the Act and the implications for your business.

Outlining the Act

Under the CFA, two criminal offences were introduced:

- **Domestic fraud offence**

The domestic fraud offence criminalises companies, partnerships and relevant bodies for failing to put into place reasonable prevention measures to stop their employees, agents or associated persons from facilitating tax evasion.

- **Overseas fraud offence**

This offence criminalises corporations trading within the UK who fail to implement reasonable procedures to prevent their employees, agents or representatives from facilitating tax evasion in another jurisdiction.

The rules apply to tax evasion committed both onshore and offshore, and are applicable to all taxes.

Three stages to the facilitation of tax evasion

Under the CFA, there are three stages that apply to both the domestic and the foreign tax evasion facilitation offences. Only the UK offence is considered here, additional requirements apply for the foreign offence.

Stage one

- The criminal evasion of tax (including national insurance contributions (NICs) is committed by a taxpayer.

Stage two

- The criminal facilitation of tax evasion is committed by an 'associated person' of the 'relevant body'.

Stage three

- The relevant body failed to prevent its employee from criminally facilitating tax evasion, or failed to implement reasonable measures to prevent the employee from committing the facilitation of tax evasion.

Under the CFA, only 'relevant bodies' and legal entities, such as incorporated bodies and partnerships, can commit the new offences. Natural persons, as opposed to legal persons, cannot commit the offences.

'Relevant body' refers to body corporates (including LLPs), and partnerships (whether incorporated or formed). Meanwhile, a person acts in the capacity of an 'associated person' if they are:

- an employee of a relevant body, acting in the capacity of an employee
- an agent of a relevant body, acting in the capacity of an agent
- any other person who performs or intends to perform services for or on behalf of a relevant body, who is acting in the capacity of an individual performing such services (for instance, a subcontractor).

Where stages one and two have been committed, the relevant body is deemed to have committed a corporate offence (subject to a reasonable defence being claimed).

Stage three, does not essentially alter what is considered to be a criminal act, but focuses on who is held accountable.

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Making use of a 'reasonable defence'

Under the CFA, the onus is on the relevant body in question to demonstrate that it has implemented adequate procedures within the business to protect against the criminal facilitation of tax evasion. If the organisation can prove that it implemented stringent procedures, prosecution will be 'unlikely'.

A relevant body may utilise a defence whereby they can prove that, when the tax evasion facilitation offence was committed, it had appropriate prevention procedures in place.

'Prevention procedures' here refers to procedures designed to prevent persons acting in the capacity of someone associated with a relevant body from committing UK tax evasion facilitation offences. The Act does not require relevant bodies to have 'excessively burdensome' procedures, but it does require more than 'mere lip service'.

High risk

The government advises organisations within 'high risk' sectors, such as banks and financial services companies, carry out thorough risk assessments to establish the likelihood of their associated persons committing the criminal act of facilitation of tax evasion. It is recommended that such organisations follow government advice on the matter.

What does my business need to do?

HMRC has published guidance on the procedures that relevant bodies (ie. your organisation) should have in place in order to help prevent their associated persons from committing the criminal offence of the facilitation of tax evasion. This can be accessed at www.gov.uk/government/publications/corporate-offences-for-failing-to-prevent-criminal-facilitation-of-tax-evasion

The HMRC guidance is designed to help you understand the types of processes available.

The six 'guiding principles'

The government has outlined six 'guiding principles' that can be used to help inform preventative processes. Each of the principles aims to advise organisations in respect of assessing the risk of their associated persons criminally facilitating tax evasion.

- **Risk assessment**

As a relevant body, you are advised to assess the nature and the extent to which you are exposed to the risk of their associated persons committing the facilitation of tax evasion. HMRC recommends that you 'sit at the desk' of your 'associated persons' and consider whether they have a motive, the opportunity and the means to criminally facilitate tax evasion.

You should ask:

- Is the work that 'associated persons' carry out subject to monitoring or scrutiny?
- How likely is the criminal facilitation of tax evasion by an 'associated person' to be detected?
- Are there any products or services that 'associated persons' use that could be open to abuse?
- How often do those within high risk roles receive fraud training, and how vigorously is this training evaluated?

- **Proportionality of risk-based prevention procedures**

Your reasonable procedures must take into account the nature, scale and complexity of its preventative activities. Organisations in sectors such as the banking industry or the accountancy sector may find that they are exposed to more significant risks than others.

- **Top level commitment**

Senior management need to be committed to preventing 'associated persons' from criminally facilitating tax evasion. A 'zero tolerance' attitude may be adopted, and managers should ensure that the consequences of the criminal facilitation of tax evasion are outlined to their associated persons.

Managers are urged to:

- Outline the consequences of failing to comply with the relevant body's facilitation of tax evasion policy
- Refrain from utilising the services of those who do not have the appropriate preventative measures in place
- Communicate the relevant body's main preventative procedures.

- **Due diligence**

In order to mitigate any potential risks, you must ensure you apply proportionate due diligence procedures in relation to persons who perform or intend to perform services on their behalf.

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Ask yourselves:

- How well do you know the persons performing tasks on behalf of your organisation? Do you need to carry out any additional checks on them?
- Does your organisation require annual certificates to show that you are complying with the CFA?
- If you plan to acquire or merge with another business, have you considered the CFA implications?

- **Communication**

The associated persons of your organisation must receive thorough and adequate training in regard to the criminal facilitation of tax evasion, and prevention policies must be well-communicated, understood and implemented through the workforce.

Your communication should seek to outline:

- The policies and procedures in place to prevent the criminal facilitation of tax evasion
- How to seek advice or report any concerns in regard to the criminal facilitation of tax evasion
- What is meant by tax evasion and associated fraud
- An employee's duty under the CFA.

- **Monitoring and review**

Detailed reviews must be carried out of your preventative measures, and changes must be made to these where necessary. Typically, the nature of the risks you face will evolve over time: as such, senior management must ensure that the organisation adapts in response.

Ways to review your procedures:

- Through feedback provided by internal staff members
- Through periodic reviews, accompanied by documented findings
- By working alongside other organisations facing similar risks.

Non-compliance: what are the penalties?

HMRC states: 'The legislation aims to tackle crimes committed by those who act for or on behalf of a relevant body.' Under the CFA, relevant bodies who fail to prevent their associated persons from committing the criminal act of facilitation of tax evasion are subject to unlimited fines and ancillary orders, such as serious crime prevention orders or confiscation orders.

How we can help

Ensuring that you have adequate preventative procedures in place to protect against the risk of your associated persons facilitating tax evasion is crucial. We can help you to implement such procedures - please contact us for more information.

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