

Advisory | White Collar Defense & Special Investigations



January 2019

Failure to Prevent Tax Evasion: Forgotten, but Not Gone

In this GT Advisory, we focus on the new offences introduced by the [Criminal Finances Act 2017](#) (the Act) which, although widely publicised in the months leading up to its commencement, have received little attention since from commentators and, seemingly, the enforcement authorities.

The Offences

The two new offences govern U.K. and non-U.K. tax and are targeted at criminalising a corporate entity or partnership's (broadly, a 'relevant body') failure to prevent the facilitation of tax evasion by persons acting for or on behalf of it, as an employee, agent, or a person performing services for or on behalf of the company.

The U.K. Offence

A relevant body commits the U.K. offence if a person acting 'in the capacity of a person associated with the relevant body' criminally facilitates a U.K. tax evasion offence committed by another person. A U.K. facilitation offence includes being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax by another person or aiding, abetting, counselling, or procuring the commission of a U.K. tax evasion offence.

To constitute a facilitation offence, the 'other person' must actually commit an offence facilitated by the conduct of the person associated with the relevant body.

A U.K. tax evasion offence includes the U.K. common law offence of cheating the public revenue, or an offence under any U.K. law consisting of being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax.

The Act is expressly extraterritorial to the extent that it is immaterial if any of the conduct which constitutes part of the facilitation or substantive offence takes place anywhere other than the U.K. The only requirement is that the conduct facilitates the criminal evasion of U.K. taxes.

Failure to Prevent Facilitation of Foreign Tax Evasion Offences

The foreign facilitation offence operates in a similar way to the U.K. offence.

This offence is committed by a relevant body if a person ‘acting in the capacity of a person who is associated’ with the relevant body criminally facilitates a foreign tax evasion offence committed by another person.

It can only be committed if:

1. The relevant body is incorporated or formed under U.K. law;
2. The relevant body carries on business or part of a business in the U.K.; or
3. Any conduct constituting part of the foreign facilitation offence takes place in the U.K.

A foreign facilitation offence includes conduct which amounts to an offence under the law of a foreign country and relates to the commission by another person of a foreign tax evasion offence under that law. There is a requirement of ‘dual criminality’ which means that the conduct would also amount to a U.K. tax evasion facilitation offence.

A foreign tax evasion offence is defined as conduct which amounts to an offence under the law of a foreign country and relates to a breach of duty relating to a tax imposed under the law of that country. Again, the ‘dual criminality’ requirement applies which means the conduct must, if carried out in the U.K., amount to being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax.

Investigations and Penalties

The U.K. offence will be investigated by Her Majesty’s Revenue and Customs (HMRC) and if prosecuted, presented by the Crown Prosecution Service (CPS). The foreign offence will be either investigated by the National Crime Agency (NCA) or the Serious Fraud Office (SFO).

If convicted of either offence, organisations will be liable to an unlimited financial penalty in addition to the possibility of facing confiscation proceedings.

The Statutory Defence

The legislation provides that it will be a complete defence to both new offences if the relevant body can prove that when the offence was committed it had in place ‘such prevention procedures as it was reasonable in all the circumstances to expect [the body] to have in place.’

Even if no procedures were in place, it will be a defence if the defendant relevant body is able to prove that it was not reasonable in all the circumstances to expect it to have any, though this may be hard to justify.

The ‘**Tackling tax evasion**’ government guidance includes six ‘guiding principles’ to inform facilitation-prevention procedures. These are adapted from those contained within the government’s guidance on Section 7 of the Bribery Act 2010, another corporate ‘failure to prevent’ offence which can be resisted if a defendant can show that it had ‘adequate procedures’ designed to prevent bribery.

The guiding principles and some key aspects of each are as follows:

1. **Risk Assessment:** A relevant body assesses the nature and extent of exposure to the risk of its employees facilitating tax evasion. The risk exposure will change over time. The government guidance suggests that risk assessments be overseen by senior management and reviewed on a periodic basis.
2. **Proportionality of risk-based prevention procedures:** Which procedures are in place will depend on the assessment of risk carried out under the first principle, and they need not be excessively burdensome.
3. **Top-level commitment:** This principle encourages the engagement of senior-level management via the preventative procedures. The guidance envisages the issuing of formal statements by senior managers to demonstrate this engagement as well as involvement in the development of such procedures, appropriate to the nature and size of the business.
4. **Due Diligence:** Although the guidance recognises that many organisations will already have due diligence procedures in place, it specifies that applying such procedures to the assessed risk of tax evasion will not necessarily be considered adequate.
5. **Communication (including training):** Prevention procedures should be communicated throughout the organisation in an appropriate and proportionate way in order to ensure that associated persons at all levels understand them. Training should take into account that some will be in higher risk positions than others.
6. **Monitoring and review:** Although mentioned in the other principles, this standalone principle suggests that the monitoring and review, as well as being formal and periodic, can be carried out by seeking internal feedback from staff members and external feedback from organisations such as representative bodies.

What Could Amount to Facilitation?

Corporates and partnerships will encounter a range of scenarios which may or may not raise suspicion of criminal tax avoidance. If there is suspicion, those dealing with such scenarios will need to be aware of the potential implications.

In the absence of cases tested by the courts, below are some illustrative examples of what could be considered facilitation of tax evasion in the context of both financial and non-financial services:

Financial Services:

1. An employee working in private wealth management of a U.K. bank advises a customer to place funds in an offshore account and not to declare it to HMRC.
2. An employee at a financial planning firm knowingly structures a client’s investments so as to generate an opportunity to evade tax.

3. A lawyer provides assistance in respect of a client's complex tax matters. As part of the lawyer's work, he recommends and subsequently assists the client to invest money into a fraudulent tax evasion scheme.

Non-Financial Services:

1. A manager in human resources at a medium-sized manufacturing company agrees that an employee can be treated as self-employed without any changes to his terms or working conditions, the employee having told the manager that it will save him a lot of money in taxes, as he does not intend to complete a tax return.
2. 'A Ltd', a U.K. regional construction company, is tendering for a contract to build a residential development. A Ltd approaches a third-party subcontractor to support part of the bid. The subcontractor tells A Ltd's representative that it will support their bid, and their terms are that they receive part payment in cash because they are struggling and want to avoid paying tax. The representative agrees and signs a contract on behalf of A Ltd, who wins the bid and duly pays the subcontractor partly in cash for ongoing work.
3. 'X Ltd', a U.K.-based renewable energies company, has just completed a deal for the company to provide energy services to a new industrial project in the United States. The company has an ongoing relationship with 'Y Inc.' in the United States for the supply and servicing of certain parts for the project. The accounts manager at X Ltd always settles invoices with Y, Inc. by paying fees into the personal offshore account of one of the two directors, who asked him to do so because it means he does not have to report the income.

Conclusion

Since these provisions came into force in September 2017, neither the SFO nor the CPS has prosecuted any organisations for either offence; therefore, these offences and the applicability of the statutory defence, including the interpretation of reasonable procedures, is yet to be tested by the courts.

HMRC, which will be responsible for investigating the U.K. offence, has identified tax evasion investigation as one of its key areas for growth. In its 2018 business plan, objective number one is 'maximise revenues due and bear down on avoidance and evasion'. In order to achieve this objective, HMRC confirmed that £800 million would be invested in additional work to tackle evasion; it will also increase the number of criminal investigations to '100 a year by the end of parliament' with a focus on wealthy individuals and corporates.

The SFO's 2017/18 annual report refers briefly to the offences as a development it helped to implement alongside HMRC and the Home Office. The NCA is silent on the issue, perhaps indicating that it will be the SFO, if anyone, who will take the lead in investigating the foreign offence.

Despite this apparent lack of interest on the part of U.K. enforcement authorities, relevant bodies as defined by the Act will need to ensure that their internal policies, procedures, and training properly address tax evasion risks in the U.K. and abroad, and that their risk assessments in respect of the same are regularly updated.

Authors

This GT Advisory was prepared by **Anne-Marie Ottaway**, **Barry Vitou**, and **Gareth Hall**. Questions about this information can be directed to:

- **Anne-Marie Ottaway** | +44 (0) 203.349.8700 | ottawayam@gtlaw.com
- **Barry Vitou** | +44 (0) 203.349.8700 | vitoub@gtlaw.com
- **Gareth Hall** | +44 (0) 203.349.8700 | hallg@gtlaw.com
- Or your **Greenberg Traurig attorney**

Albany. Amsterdam. Atlanta. Austin. Boca Raton. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.[~] Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. San Francisco. Seoul.[∞] Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.[^] Tokyo.[•] Warsaw.[~] Washington, D.C.. West Palm Beach. Westchester County.

This Greenberg Traurig Advisory is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Any legal advice depends on the specific circumstances of a matter and consultation with legal counsel is required. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. [~]Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ^{}Operates as a separate U.K. registered legal entity. ⁺Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [∞]Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. [^]Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. [•]Greenberg Traurig Tokyo Law Offices are operated by GT Tokyo Horitsu Jimusho, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. [~]Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2019 Greenberg Traurig, LLP. All rights reserved.*