Corporate offence of failure to prevent the criminal facilitation of tax evasion

Management of taxes

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How might your firm be affected? HMRC is asking for practical examples to help inform its guidance on this new offence.

HMRC has published a second consultation document containing draft legislation and guidance for a new corporate offence of failure to prevent the criminal facilitation of tax evasion.

The CIOT is intending to respond to the document and welcomes comments from members. Send them to mcurran@ciot.org.uk or directly to HMRC at consult.nosafehavens@hmrc.gsi.gov.uk. The deadline for responses to HMRC is 10 July.

This consultation is not seeking feedback on the policy, which was covered in the previous consultation last year, but seeks comments on the draft legislation and the draft guidance, considered together. In the previous round of consultation some stakeholders offered HMRC examples of how the offence would affect their organisation and its interactions with their obligations. HMRC said it found these particularly helpful and welcomed further input from stakeholders, in particular on how they approach due diligence in relation to the acts of those providing services on their behalf.

The new offence aims to overcome the difficulties in attributing criminal liability to corporations for the criminal acts of those who act on their behalf. The offence itself will have three stages:

Stage one: criminal tax evasion by a taxpayer (either a legal or natural person) under existing criminal law (for example, an offence of cheating the public revenue or fraudulently evading the liability to pay VAT);

Stage two: criminal facilitation of this offence by a person acting on behalf of the corporation, whether by taking steps with a view to: being knowingly concerned in or aiding, abetting, counselling or procuring evasion by the taxpayer;

Stage three: the corporation's failure to take reasonable steps to prevent those who acted on its behalf from committing the criminal act outlined at stage two.

A corporation will commit the offence if it fails to prevent an associated person criminally facilitating the evasion of a tax, whether the undeclared funds are in or outside the UK. A person acting in the capacity of one associated with the corporation is defined as 'someone acting on its behalf'. This means that the offence would be committed if an employee, agent, subsidiary or a contractor, during his/her work, facilitated tax evasion by a customer of the corporation.

It is the intention that the offence will apply in three situations:

- If a UK-based corporation fails to prevent those who act on its behalf from criminally facilitating a UK tax loss;
- If a non UK-based corporation fails to prevent those who act on its behalf from criminally facilitating a UK tax loss;
- If a UK-based corporation fails to prevent those who act on its behalf from criminally facilitating a tax loss overseas. This applies if the jurisdiction suffering the loss has laws in place equivalent to those in the UK – namely, if there is dual criminality.

The draft legislation separates the domestic and foreign elements into distinct offences.

It will be a defence for a corporation to prove that, when the offence was committed, it had in place prevention procedures that could reasonably be expected in the circumstances to be in place or that it was not reasonable to expect it to have any in place.

The draft guidance is on pages 28 to 44 of the consultation document, and there is also a case study on page 24 to help inform feedback. The purpose of the guidance

is to explain the policy behind the new offence and to help bodies of all sizes and in all sectors understand the sorts of procedures they can put in place to prevent persons associated with them criminally facilitating tax evasion. The guidance is intended to be of general application and is formulated around six guiding principles, which will each be followed by commentary and examples.

The six principles are:

- Proportionality of reasonable procedures
- Top-level commitment
- Risk assessment
- Due diligence
- Communication (including training)
- Monitoring and review

HMRC is keen for stakeholders to submit examples for the six principles, in particular it asks that stakeholders submit anonymised case studies to reflect the way their organisations make referrals, especially if the referral forms the basis of an ongoing relationship or the joint provision of services to a client. This will help to ensure that the examples provided in the guidance are relevant and reflect the manner in which corporations conduct their business.

Please send your comments/examples to mcurran@ciot.org.uk.