A corporate criminal offence of failure to prevent the criminal facilitation of tax evasion

Management of taxes

01 September 2016

CIOT has responded to HMRC's second consultation on the introduction of a corporate criminal offence of failure to prevent the criminal facilitation of tax evasion. We take the view that the offence must be applied proportionately and appropriately if it is to be effective.

In its response to HMRC's second consultation on proposals to introduce a new corporate criminal offence of failure to prevent the criminal facilitation of tax evasion, the CIOT's main concerns were that the new offence must be subject to appropriate defences being available, that clear and unambiguous guidance is provided by the Government so that corporations understand exactly what measures they must put in place to comply, and that the measure is not used where it simply 'adds to punishment'. In our view, the proposals represent a very significant change with extremely wide ranging implications for those affected by the measure.

It is still HMRC's intention to keep to its original implementation timetable so that the new legislation will be introduced to parliament in the autumn with royal assent expected by early 2017. Given the uncertainty that the EU referendum result is causing to business, we asked that HMRC consider delaying implementation.

The three stages of the new offence are:

1. Criminal tax evasion by a taxpayer (either an individual or an entity) under existing law. There has to be mens rea so, for now, it will not include the new strict liability offence in Finance Bill 2016.

2. Criminal facilitation of this offence by a person acting on behalf of the corporation as defined by the Accessories and Abettors Act 1861. The actions of the corporation's representative have to be deliberate. There are no changes being made to the existing law on criminal liability.
3. The corporation failed to take reasonable steps to prevent those who acted on its behalf committing the criminal act at stage 2. This part is a strict liability offence. It is a defence for the corporation to prove (on the balance of probabilities) that, when the UK tax evasion facilitation offence was committed: it had in place such prevention procedures as it was reasonable in all the circumstances to expect it to have in place; or that, in all the circumstances, it was not reasonable to expect it to have any prevention procedures in place.

We pointed out that it would be crucial for corporations affected to understand how they could rely on the defence of 'reasonable prevention procedures' in order to put in place a strategy to ensure compliance with their new obligations.

It would be helpful if corporations could build on current policies and procedures already in place under other legislative requirements to show that they have a defence. If not, the compliance costs could be significant.

Even where current policies are acceptable, there will still be costs involved in training staff and in certification and reporting processes. There is clearly a need to ensure that the measures can be implemented in a way that mitigates additional costs. We urged HMRC to take time to understand how the provisions could be implemented with the minimum disruption. In particular, this would be the case for businesses outside the current regulated sectors.

Guidance, although not legally binding, will be essential to help corporations identify how they can demonstrate that they have followed satisfactory due diligence procedures and have a reasonable care defence should one of their associates be discovered to have criminally facilitated tax evasion. We welcomed HMRC's willingness to discuss, develop and endorse sector-specific guidance. The CIOT is intending to work with HMRC and other professional and regulatory bodies on the production of such guidance for our members.

Guidance also has an important role in helping to define the practical implementation steps that will achieve the stated policy objective of encouraging an environment that improves the corporate monitoring and self-reporting of criminal

activity, as well as discouraging and impeding criminal behaviour by corporations and their associates.
In an appendix to our submission to HMRC, we provided some examples that we think provide a useful basis for discussing the scope of the new offence. We asked HMRC to explain in what circumstances, if any, an offence may arise in the examples and include them, or variations on this theme, in its guidance, and whether the department would believe it appropriate to prosecute in these cases.

The examples are of situations where criminal offences by a taxpayer and facilitator may have been committed, and where the corporation may not have put reasonable procedures in place to prevent the offences occurring.

Generally in these examples, however, there are already significant civil remedies that HMRC can use to penalise the offending parties. Guidance should show the interaction between existing civil remedies and those that would apply further to the new criminal offence, particularly for smaller organisations and cases.

Our preferred route would be for civil penalties to be used in most cases with the use of criminal prosecutions reserved for only the most serious. We do not wish to see the serious nature of a criminal prosecution downgraded by a series of lawsuits that simply add an extra fine and have little exemplary impact.

For the full text of the CIOT's submission, go to the CIOT website.