Facilitation of Tax Evasion – The Calm Before the Storm?

Two shiny new corporate offences were introduced in the Criminal Finances Act 2017 – failure to prevent the facilitation of UK tax evasion, and failure to prevent the facilitation of foreign tax evasion.

However, over seven years later, not a single prosecution has been brought to trial. One might be forgiven for assuming the offences have been left to languish.

Yet the offences should be a prosecutor's dream. Effectively strict liability, they do not require any knowledge or involvement by the directing mind of the relevant corporate or partnership (the 'relevant body'). All that is required is that an 'associated' person (broadly an employee, agent, or any other person performing services for the relevant body, acting in that capacity) deliberately and dishonestly facilitated tax evasion by a taxpayer. Nor is there any need for the taxpayer to have been convicted first (or at all). The sanction? An unlimited fine.

HMRC is quick to highlight that "*investigations are not the sole measure of success – the legislation was introduced to drive behavioural change and for organisations to put in place preventative procedures that reduced the opportunity for facilitation to occur in the first instance*." Albeit a laudable goal, it would be a marvel if the facilitation of tax evasion had truly been eradicated.

In fact, under the surface, there is an undercurrent of activity by HMRC. Every six months, it releases an update on its figures, which show some fluctuation. There are currently 11 live investigations, with a further 28 live 'opportunities' under review, across different business sectors (including software providers, labour provision, accountancy and legal services, and transport), and sitting across all HMRC customer groups. Startlingly, HMRC has reviewed and rejected an additional 114 opportunities – it has covered some serious ground.

Further, the introduction of a similar 'failure to prevent' fraud offence (under the Economic Crime and Corporate Transparency Act 2023) shows faith in the model. Now would be the perfect time for HMRC to make a splash by bringing its first prosecution under the 2017 Act.

Corporates and partnerships should be preparing to weather the storm. Not only will the first prosecution carry heightened reputational consequences, but even as it searches for its perfect target, HMRC uncovers other offending on the way – "*in some cases, following investigation we have been satisfied with explanations provided and have not established deliberate facilitation - but those investigations have found other tax and regulatory offences that are being pursued*".

What can corporates and partnerships do? They should have two priorities:

1. **Shore up their defences**. There is a key defence to the offences – the implementation of reasonable prevention procedures. Such measures must be risk-based and proportionate – i.e. carefully tailored to the relevant body. This means there is no standard 'tick list' for what constitutes reasonable procedures – they must be drafted carefully. Their implementation must also be faithfully evidenced so that this can be demonstrated if it comes to a trial. Some comfort can be drawn from HMRC's Guidance, which recognises that "*any regime that is risk-based and proportionate cannot also be a zero failure regime*".

2. **Be ready to self-report**. If facilitation has already occurred, it may not be too late. Although there is no guarantee that a prosecution will be averted, availing yourself of HMRC's self-reporting regime may (i) count towards your reasonable prevention procedures defence, (ii) be taken into account by prosecutors when considering whether to prosecute, and (iii) result in a reduced fine. You may wish to perfect your whistleblowing procedures to ensure you are first to know about any offending, giving yourself the choice to self-report before HMRC comes knocking.