

Tackling offshore tax evasion: A new criminal offence for offshore evaders

Response to consultation from Kingsley Napley LLP

This response is submitted by Kingsley Napley LLP. We are the leading criminal defence solicitors in the UK. We have specialist experience in representing companies and individuals being investigated by HMRC using their criminal investigation and prosecution powers or through the civil regime. We work closely with other specialist professionals (both accountants and other lawyers) in seeking to resolve matters with HMRC through civil or Tribunal proceedings and we defend HMRC criminal prosecutions.

General remarks

We do not support the introduction of a strict liability offence for tackling off shore tax evasion.

We understand that respondents to last year's consultation were almost universally opposed to the introduction of a strict liability offence. It is a matter of grave regret that such concerns have gone unheeded and we find ourselves a year on dealing with a near-identical proposal. We adopt and endorse the widely-expressed opposition to the proposed strict liability offence, in particular that of the **Fraud Lawyers Association**.

Tax evasion by definition requires a deliberate act to deprive the Revenue of monies to which it is entitled. It is not possible to evade, hide or conceal something carelessly or recklessly - specific intent is necessary to carry out all of these acts. As a consequence, it is not clear what "mischief" or behaviour HMRC is trying to tackle that would not otherwise be caught by existing provisions. No examples have been provided of the type of offending covered by the new proposals which would not amount to tax evasion under current legislation.

The basis of a prosecution for tax evasion must be found on proving dishonesty. Anything less would mean that individuals are potentially liable in criminal law for an honest mistake (regardless of any defence of reasonable care or excuse). This is particularly the case where the proposed offences carry a custodial sentence, where the starting point is that expressed in **Archbold 2015 17-2:**

"To make a man liable for imprisonment for an offence which he does not know that he is committing and is unable to prevent is repugnant to the ordinary man's conception of justice and brings the law into contempt."

In its original consultation document HMRC justifies its stance by citing examples of other strict liability offences which attract custodial sentences, such as driving whilst disqualified and various firearms offences (Box 1: Other Strict Liability Offences). However, the public policy that justifies the departure from the norm in these cases (i.e. risk of serious physical harm to the public) is not present in respect of tax evasion. Similarly, the tax and customs offences which are strict liability,

such as section 167 Customs and Excise Management Act (CEMA) can be differentiated on the basis that they do not attract a custodial sentence and cannot be committed by mistake.

The consultation document states that “*the proposed offence is designed to be simple to administer*”. We do not consider that as proposed this is going to be the case. Far from it, we conclude that proposing a strict liability offence with the series of thresholds, caveats and defences creates confusion. Such labyrinthine legislation will undoubtedly lead to substantial litigation. It will also undermine the consultation’s stated ambition, “*to ensure there will not be greater obstacles than at present to obtaining convictions in certain cases*”.

Above all it is unclear why such legislation is necessary. HMRC’s own figures suggest that tax evasion investigations, prosecutions and convictions have increased significantly year on year from 2010 – 2015. For example there were 420 prosecutions in the year 2010/2011 trebling to 1289 in 2014/15. More than 90 Countries have committed to the Common Reporting Standards (CRS) which will allow automatic exchange of account information by 2017, further assisting HMRC’s ability to gather information and investigate offences. The introduction of the CRS has been hailed in the consultation as “an unprecedented step change in HMRC’s ability to tackle offshore tax evasion”. In such circumstances it is difficult to understand why further legislation is needed or justified.

Notwithstanding the above, we offer the following response to the specific questions posed on the understanding that if HMRC are to cite our views on these issues it should be made clear that we object to the proposed legislation as a whole.

Q1. Do you agree that there should be a statutory defence of reasonable excuse for those parts of the offence arising from a failure to notify chargeability to tax and failure to file a return; and of reasonable care for that part of the offence arising from an inaccurate return?

We do not agree that the offence should be introduced. However if it is to be introduced as proposed then it is critical to have statutory defences.

It is not clear how reasonable excuse and reasonable care would be defined or whether HMRC will await judicial determination in due course? Greater clarity is required. The consultation response refers to “inappropriate claims to reasonable care and excuse”:

1. How could this be demonstrated?
2. Would seeking professional advice be deemed as reasonable excuse?

Given that the defences have been sourced from the civil model, might it not be more appropriate to focus resources on effective enforcement under the civil regime and existing criminal measures rather than create a new offence with significant challenges?

Q2. Are there any other legislative safeguards that should be included in the offence?

We do not agree that the offence should be introduced.

We support the suggestions made by the FLA with respect to this question, namely:

Given the potential for unfair outcomes and given further the breadth of prosecutorial discretion, the commencement of proceedings should be subject to the express (not delegated) consent of the Director of Public Prosecutions (i.e. by him/her in person).

There should be a minimum level of at least £75,000 of unpaid tax before a prosecution can commence.

Q3. When HMRC cannot accurately apportion an item of income or a gain between the UK and overseas, or between different overseas jurisdictions, how should that sum be taken into account when deciding whether tax understated exceeds the threshold amount?

Given the complexity of what is being proposed and the implications for the individual in any strict liability offence, lack of clarity on how to apportion an item of income or gain could lead to injustice. If HMRC cannot accurately apportion the relevant amount then it should not be included in terms of the determining the threshold. Indeed, to do so would contradict the stated intention of the original consultation document at para 2.16:

“The requirement to demonstrate the tax non-compliance – the acuts reus – already sets a high bar for the prosecuting authority. There is no intention to remove or reduce this requirement, nor to change the standard or the burden of proof. It will still be for the prosecuting authority to demonstrate to the criminal standard that the taxpayer ought to have declared taxable offshore income or gains, yet failed to do so.”

It is imperative that this includes the accurate calculation of what is in fact should have been declared in the UK to the criminal standard.

Q4. Do you agree that overseas income and gains that are deemed to be that of the taxpayer under various anti-avoidance provisions should be taken into account in the normal way?

No comment

Q5. Do you have any views, comments or evidence which may help inform our understanding of likely impacts?

We understand HMRC's policy objective in pursuing tax evaders. We consider that this would be better served via civil sanctions and effective enforcement under existing provisions. Resources should not be spent on developing an unfair and unworkable system that defeats its very objective. This is particularly the case when there is clear evidence of improved performance in tackling tax evasion over the past 5 years without introducing such draconian legislation.

For more information please contact:

Julia Bateman

Professional Support Lawyer, Criminal Litigation, Kingsley Napley LLP

Knights Quarter, 14 St John's Lane, London, EC1M 4AJ

jbate...@kingsleynapley.co.uk