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CRIMES & MISDEMEANOURS
The harsh new landscape for UK taxpayers

The UK government has been waging a war against tax evasion and avoidance for the last few years and during the last 12 months in particular the stakes have risen, with harsh new criminal and civil sanctions targeted not just at taxpayers, but also their advisors.

Tax avoidance and evasion – why this is now your problem too…..

Tax evasion has always been a criminal offence in the UK, with offenders mainly prosecuted under the ancient common law offence of 'cheating the public revenue'. However, prosecutions were difficult to secure as the authorities had to show a guilty intent on the part of a taxpayer, as opposed to mere negligence, laziness or forgetfulness. It was even trickier to prosecute companies as there needed to be a guilty 'directing mind' at board level, which is notoriously difficult to prove.

However, by way of the Finance Act 2016, the UK now has a strict liability criminal offence that will have far-reaching implications not just for individual taxpayers, but also their bankers, advisors and other professionals.

Individual taxpayers now face strict liability for tax evasion, which means that the authorities do not need to prove a guilty intent, only that the correct amount of tax has not been paid. This raises the prospect of a whole new generation of people criminalised for forgetting to submit a tax return, or for making a genuine computational mistake. The only good news is that if the deficiency in tax is part of a tax avoidance arrangement that has been the subject of professional advice then the taxpayer will have a defence against prosecution.

In addition, institutions (i.e. companies and partnerships) can be liable to prosecution under the new strict liability criminal offence of 'failure to prevent tax evasion' (FTP) under rules introduced in the Criminal Finances Act 2017. Such an institution will be caught if an employee, agent *or associate* criminally facilitates tax evasion on the part of another person. In such a circumstance, the institution will be automatically guilty unless it can prove that it had adequate prevention and monitoring procedures in place. The FTP offence is extra-territorial and will therefore catch any company or partnership anywhere in the world, as long as UK tax has been evaded. HMRC has made it clear that

tax advisors, banks, trustees and scheme promoters worldwide are in their sights. It is therefore crucial that all relevant bodies implement the required education, prevention and monitoring policies for its staff and management. The FTP rules are modelled on the Bribery Act and there is extensive guidance available on the kind of procedures that will need to be put in place to avoid liability.

The Finance Act 2017 has introduced a unique new civil penalty for *'enablers of tax avoidance'.* What is so unique about this penalty is that it is payable not by the taxpayer, but instead anyone who has 'enabled' the taxpayer in tax avoidance arrangements which have been 'defeated' by HMRC. This could catch any person or company that has advised, facilitated or in any way assisted a taxpayer in a tax avoidance arrangement. The scope is breathtakingly wide in its application and is designed to catch all those in the tax avoidance 'supply chain', including tax advisors, bankers, financial advisers, insurance companies, trustees and anyone else who provides a relevant service. The penalties will be limited to the value of the fees billed by the enabler to the taxpayer.

The combination of these new criminal and civil offences mean that institutions will have to urgently conduct risk assessments of their current business processes and put in place adequate education, prevention and monitoring measures. A failure to do so will render that institution potentially liable for severe criminal and civil penalties as well as potentially devastating reputational damage.

Penalties and more penalties….

If the above were not enough, HMRC has introduced new higher financial penalties for taxpayers who avoid taxation. Under the old rules the penalty for taxpayers who understated their tax was anything between 0% and 100%, with the latter reserved for the most egregious cases. In practice, even when taxpayers were 'caught' by HMRC, provided they cooperated with them it was generally possible to limit the penalty to about 30-40% of the tax lost.

The latest innovation is the 'requirement to correct' (RTC) rules, which have been cleverly aligned with the Common Reporting Standard procedures. The RTC rules will only affect tax liabilities arising from offshore income or gains or in respect of the transfer or holding of funds offshore, for all tax years prior to 6th April 2017. If there has been any understatement of tax, whether deliberate or innocent, then the taxpayer has until 30th September 2018 to inform HMRC or face extremely harsh penalties. It is no coincidence that this date is aligned with the main wave of disclosures due under CRS.

After this date the basic penalty will be 200% of the tax lost, plus a 10% asset based penalty where the conduct has been deliberate and the tax lost exceeds £25,000. The basic penalty may be increased to 300% where assets are moved deliberately to avoid detection by HMRC. This last penalty is clearly designed for individuals who try and circumvent the CRS reporting rules.

It is important to note that this is all stick and no carrot – there is no attractive disclosure opportunity on offer; taxpayers are expected to own up and accept the current regime of penalties. They will probably do so simply out of fear of higher penalties after 30th September 2018.

These new rules are indicative of both a harsher attitude to tax avoidance generally and the increased confidence of HMRC in its access to financial information – with the first wave of CRS data due this September our tax authority feels that, finally, it is in the driving seat.

Conclusions

There is no doubt that CRS has changed the game for HMRC and tax authorities worldwide. With prospect of taxpayers' financial information being disclosed automatically HMRC has put the UK's taxpayers on notice – either pay up now or face the consequences.

However, as we have seen, the pressure is not just on taxpayers but also all those who enable taxpayers to avoid tax or fail to prevent the evasion of tax, wherever they may be in the world. In this respect, the new laws are truly extra-territorial and should be of great concern to advisors everywhere.

James Quarmby, Partner, Stephenson Harwood LLP

The writer is head of private wealth at the international law firm Stephenson Harwood and he advises individuals and companies on all aspects of revenue law.