Tax
Alert

Weil

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Failure to Prevent The Facilitation of Tax Evasion Rules Now in Force

Tomorrow (30 September 2017) the new UK criminal offence of "Failing to Prevent" comes into force. See our April client briefing for more details on the offence (accessible here).

The legislation makes it an offence for an entity (including a company or partnership) to fail to prevent those who act for, or on behalf of, it (an "**associated person**") from committing the (already criminal) offence of facilitating tax evasion (whether in the UK or overseas) (the "**FtP Offence**"). Especially noteworthy are the facts that the FtP Offence can be committed both by UK entities and non-UK entities – that is, it has extra-territorial effect – and that no knowledge of the offence by the organisation's managers or intent by them to enable the facilitation is required in order for an organisation to have committed the FtP Offence.

The only defence (the "**Defence**") available to an entity where an associated person has facilitated the evasion of tax is for the entity to show that either:

- reasonable procedures were in place to prevent the facilitation by the associated person;
- it was reasonable not to establish additional procedures at the time the offence was committed.

Given the breadth of the FtP Offence, its criminal nature and the unlimited financial penalties sanction, it is important that entities consider whether they have such reasonable procedures in place and what additional procedures they might need to ensure that they are in a position to avail themselves of the Defence if necessary.

What to do now

The key points to consider now are:

Risk assessment

To identify, assess and determine how to mitigate the risk of associated persons criminally facilitating tax evasion. Broadly, the risk assessment should consider the likelihood (including opportunity) of an associated person facilitating tax evasion, the possible impact of such facilitation should it take place and lay the foundations for an action plan (policies and procedures) to mitigate such risks.

Due diligence

Linked to the risk assessment, each entity will need to consider the due diligence procedures it has in place in respect of associated persons and whether they adequately mitigate identified risks. Generally the due diligence exercise should consider: (i) the terms of engagement letters with associated persons and the information obtained from them as part of the engagement process; (ii) whether the associated person has policies and procedures in place to address tax evasion and facilitation risks; and (iii) systems and controls in place for the appointment of, and ongoing review of the engagement with, associated persons in relation to the risk they may be involved in the facilitation of tax evasion.

Where there are failures, a contemporaneous written record should be made identifying and explaining the failure and the steps taken to address it going forward (and, where applicable, a disclosure made to any appropriate reporting body). Policies and procedures (including training for personnel) on the prevention of the facilitation of tax evasion also need to be put in place

How we can help

The Weil tax team has been working with a number of clients across a variety of industry sectors preparing them for the introduction of the FtP Offence. We have worked on risk assessment processes, identifying steps to be taken to mitigate risks and drafting and implementing procedures and policies (including training programmes).

If you have questions concerning the FtP Offence or would like more information please speak to your regular contact at Weil.

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