



British
Private Equity &
Venture Capital
Association

Individual issues and the facilitation offence

BVCA

Issues for individuals



Recap of the corporate offence

- A body corporate or a partnership (referred to as a "relevant body"), whether established for business or non-business purposes, may be prosecuted for failure to prevent the facilitation of tax evasion if:
 - a person evades tax;
 - an associate of the relevant body criminally facilitates that evasion while acting in the capacity of an associate of the relevant body; and
 - the relevant body is unable to show they had in place "reasonable prevention procedures" (or that it wasn't reasonable for prevention procedures to be in place).



Individual responsibility

- HMRC emphasise that they see individuals at the heart of the offence:
 - The evader of tax
 - The associated person that facilitates tax evasion
- From HMRC's perspective the corporate is taking responsibility for the actions of individuals
- Although it is a corporate offence, individual directors, who will be responsible for ensuring reasonable prevention procedures are in place, will inevitably be the focus of attention



Criminal Evasion and facilitation

- Key evasion offences include:
 - fraudulent evasion of income tax / VAT / excise duties
 - providing false documents or information to HMRC
 - cheating the public revenue
- If in doubt, “cheating the public revenue” provides a catch-all offence:
 - any form of fraudulent conduct which results in depriving the HMRC of tax Covers both acts and omissions
 - includes not just failing to pay tax but making false statements
- A facilitation offence occurs when a person aids, abets, counsels or procures, fraudulent evasion of tax.



When will a person be dishonest?

- The above offences all require “dishonesty”, which is a two limbed test:
 - Whether, according to the ordinary standards of reasonable and honest people, what was done was dishonest
 - Whether the defendant himself must have realised that what he was doing was, by those standards (and not by his own standards), dishonest.
- The court will assume that a business person has a certain level of knowledge and certain standard. The court will consider the full range of behaviour, for example:
 - Deliberately paying late and missing deadlines
 - Lack of transparency in dealing with HMRC
 - Obstructive behaviour



Examples of dishonest behaviour

- Is wilful blindness and recklessness enough?
 - A businessman inherited a business that used a system that identified some supplies as giving rise to VAT but not others, even though they also clearly gave rise to VAT.
 - The owner continued to run the system
 - In Court, he argued that he was reckless and blind to an arrangement that had been put in place by his predecessor
 - The Court confirmed that recklessness was not enough
 - However, the Court noted that he was an intelligent businessman who knew what the correct position was and it inferred dishonesty from his wilful sloppiness



Associated persons

A person (P) acts in the capacity of a person associated with a relevant body (B) if P is—

*(a) an **employee** of B who is acting in the capacity of an employee,*

*(b) an **agent** of B (other than an employee) who is acting in the capacity of an agent, or*

*(c) **any other person who performs services for or on behalf of B** who is acting in the capacity of a person performing such services*



Who are associated persons?

- The concept is primarily directed at agent or contractor-type relationships
 - HMRC have not been clear on this but we would not ordinarily expect portfolio companies to be associated persons
 - As noted above, HMRC's emphasis is on individuals who are acting for and on behalf of a corporate
- Whether a person acts for or on behalf of a Corporate is defined by their conduct, not by the nature of the relationship
- They must be acting for that relevant corporate and not on a "frolic of their own". Given that a person may be associated with more than one corporate, it is necessary to identify the corporate they are acting for



Identifying associated persons

- HMRC refer to notions of: proximity, control, benefit
- In particular, if it is possible to exercise a degree of control over an individual then that will strongly suggest they are associated
- HMRC have noted that concerns have been raised with them regarding individual staff/consultants over whom a corporate has no realistic control. That is especially the case in foreign jurisdictions.
- HMRC consider that Corporates are often failing to distinguish between those individuals over whom a corporate cannot exercise control and those individuals over whom a corporate is unwilling to exercise control



Examples of associated persons

- HMRC identify the “middle manager” as a key risk
- Examples in the guidance as potentially amounting to facilitation (if conducted with the necessary intention to assist the evader) include:
 - Delivery and maintenance of infrastructure - for example, trust and company formation and setting up and maintaining bank accounts.
 - Financial assistance – helping an evader move money around.
 - Acting as a broker or conduit – arranging access to others in the supply chain
 - Providing planning advice
- Referrals are a good example of the wide notion of an associated person:
 - A UK company refers a customer to an offshore, third party who can provide banking arrangements. The third party falsifies documents in order to allow the customer to evade tax
 - Is the UK company liable?



Advisers and intermediaries

- HMRC refer to the “supply chain of advice and intermediation” - those persons who establish infrastructure, carry out administrative actions and provide advice
- Already a target of other rules, they are seen as a key tax risk
- To what extent are you reliant on advisors/intermediaries, in particular, in other jurisdictions?

Role of directors



- Top level commitment is a key principle
- What is it and why is it important?
 - “Those at the most senior levels of the organisation are best placed to foster a culture where actions intended to facilitate tax evasion are considered unacceptable. This principle is intended to encourage the involvement of senior management in the creation and implementation of preventative procedures. It is also intended to encourage senior management involvement in the decision making process in relation to the assessment of risk, where this is appropriate.”
- This is a theme, not just from other regulatory provisions but from HMRC as well. For example, in formulating tax strategy, senior level management is seen as crucial.



Responsibility of directors

- The directors must now be aware of the offence and whilst it does not otherwise formally change the duties of a director, as a practical matter, it places a greater burden on the directors
- HMRC talk about circumstances in which directors have chosen not to exercise control over a third party and instead relied on the assumed good governance of the third party
- What about a director from the fund who deliberately does not involve himself or herself in the affairs of the company?
 - At what point is a hands-off approach seen as turning a blind eye?



Liability of a director

- It is a corporate offence and not an individual offence. There is no extension of the offence to directors in circumstances where the offence involved the “consent or connivance” of a director (which is not unusual for offences of this sort)
- There was considerable discussion in Parliament about the consequences for directors should the offence apply
- Trend is towards greater personal responsibility
 - For example, the senior managers regime in relation to regulated entities
 - Importance of a person being “fit and proper”
- It is worth keeping in mind the duties of a director and the extent to which liability under this offence will be taken to reflect a breach of those duties



Disqualification of a director

- Disqualification can be sought by the secretary of state under the Company Director Disqualification Act 1986
 - Disqualification can be justified under a number of grounds including where a director's conduct has 'fallen below the standards of probity and competence appropriate for persons fit to be directors'.
- The Liberal Democrats proposed an amendment stating that disqualification would be sought in the event that a corporate was liable:
 - "It is a civil procedure to disqualify a director...it has a huge impact on corporate governance in making sure that the procedures are there. It may even be on a piece of paper on the boardroom table. I have personally heard, "Oh, this is something we can get disqualified for if we don't get it right". That is exactly how more boards should be thinking."
 - In the end it was considered unnecessary but largely as a result of existing rules that would be pursued in any case



Examples of Steps to be taken by a director

- Who on the board is responsible for monitoring tax risk?
- What are the reporting lines?
- Is a consistent message that tax evasion is unacceptable being communicated?
- Is there communication and enforcement of procedures?
- How does the board obtain and review internal and external advice?
- How does the board audit procedures and ensure that any recommendations are put into action?
- Who is responsible for the interaction of (and sharing of knowledge between) tax and business?
- What is the director's personal situation as regards tax planning?



Responsibility of directors in a PE context

- In relation to portfolio companies, on what board(s) are you sitting?
 - For example, at a Topco level or at a lower level?
 - Does it matter?
 - Does your approach and level of involvement need to change?
- In relation to the fund, what should you be considering:
 - Investment structures, remuneration structures etc.
 - Supervision of / Guidance for those sitting on portfolio company boards
- What would you like to see from HMRC and from the BVCA?

Q&A





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