

Are you aware that your company can now be criminally liable for tax evasion by an employee, agent or associate?



To avoid fines for this new offence, make sure you have in place the reasonable prevention procedures suggested by HMRC. Our article outlines these procedures to set you off on the right path, so you can avoid unwittingly breaking the law.

Whilst it is already a criminal offence under English law, in March 2015 the UK Government announced its intention to take further steps towards achieving its aim of closing down tax evasion.

On 30 September 2017 the Criminal Finances Act 2017 (CFA) came into force. It is now a criminal offence if an employee, agent or other person performing services for and on behalf of a company or partnership (including any agent, distributor, contractor, sub-contractor or other associate) commits any UK or foreign tax evasion facilitation offence. As the CFA will apply to factors and discounters, it's important that you are aware of your obligations under the CFA.

## What is tax evasion

The CFA defines a UK tax evasion offence in broad terms to mean any activity designed with the intent of either cheating the public revenue, or being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of tax. Put simply, tax evasion is the use of illegal means to evade paying taxes: examples include failing to file a tax return when required to do so by law, not declaring a company's full income for tax purposes, or hiding taxable assets. Tax avoidance, on the other hand, is not illegal (even if morally questionable) if the taxpayer is



merely using the rules of the tax system to gain a legitimate tax advantage.

Punishment for tax evasion under the CFA is in the form of limitless fines.

## Strict liability

As with the Bribery Act 2010, tax evasion under the CFA is an offence of strict liability. A company commits the offence if it has failed to prevent tax evasion and is unable to demonstrate that it had in place such prevention procedures as it was reasonable in all the circumstances to expect the company to have in place, or that it was not reasonable in all the circumstances to have any prevention procedures in place.

## Guiding principles

HMRC have issued guidance on what might amount to “reasonable prevention procedures” and set out the following six guiding principles:

### (1) Risk Assessment

Every company should consider and adopt a carefully documented risk assessment taking into account those transactional points that might be regarded as tax evasion. Particular attention should be given to matters which are dealt with by only one staff member.

### (2) Top-level Commitment

Management should be seen to foster a culture where tax evasion is unacceptable. Clear instructions should be given to staff stressing the need to be alert to the risks and prioritise prevention procedures.

Employers may wish to consider amending their employment contracts to make clear that engaging in any form of tax evasion is unacceptable to the Company and may lead to dismissal, and also to highlight that whistleblowing reports can be made confidentially to the leadership team.

### (3) Proportionality of Procedures

The guidance from HMRC suggests it is better to have policies and procedures designed to tackle specific areas of risk as identified in your risk assessment; this will be deemed proportionate to the risk and remove the need for major changes. This is far more likely to be found to be “reasonable” than simply inserting a reference to tax evasion in existing anti-money laundering or Bribery Act procedures.

### (4) Training and Communication

Communicating the policies and training your staff on the importance of preventing tax evasion and detecting financial crime generally is an important part of avoiding liability under the CFA.

Criminal tax evasion should be a feature of your training sessions, and you should provide guidance on your intranet (if you have one) and in your staff handbook. Consider a regular workshop where staff can bring any concerns to a member of the senior leadership team and ensure that you regularly assess whether the training is effective so that it can be adapted as necessary.

### (5) Monitoring and Review

HMRC suggest that you should have a procedure in place for monitoring the success of your new policies and

procedures for detecting any attempted tax evasion.

## (6) Due Diligence

In your dealings with third parties such as your clients and suppliers, HMRC recommends that you add consideration of tax evasion issues to your due diligence. In particular, you should devise questions to ask any new client, supplier, employee or associate, particularly if they are likely to be working with high risk clients or products. The aim is to be alert to unexplained wealth or secrecy surrounding assets or accounts.

## New powers of investigation

The CFA has introduced extended investigatory powers for government agencies in relation to financial crime in the shape of Unexplained Wealth Orders and Disclosure Orders. If suspected of possessing information relevant to an investigation into fraud or money-laundering, you may be required to disclose information. Additionally, Government agencies now have the power to seize assets. Having in place good procedures to detect tax evasion and financial crime generally can only help you if faced with such requests and may help preserve your company's reputation if any financial crime has been committed by an employee or associate.

## Reporting an offence or suspicious activity

Note that companies are encouraged under the CFA to "self-report" both their own failings in committing or failing to prevent tax evasion, as well as any suspicions of another body they think may be evading tax, and such action will be taken into account in decisions on liability and penalties. This is done by way of filing a Suspicious Activity Report with HMRC. The Government's guidance suggests you seek legal advice before making such a report.

## Conclusion

The CFA is now in force and companies can best protect themselves from unwittingly committing an offence under the Act by having in place policies and procedures in line with the guidance published by HMRC and which are designed to prevent the commission of any UK or foreign tax evasion facilitation offence within the meaning of the CFA.



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