

Association of Accounting Technicians response to “Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion”

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1. Introduction

- 1.1. The Association of Accounting Technicians (AAT) is pleased to have the opportunity to respond to the consultation paper on “Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion” (condoc), released on 16 July 2015.
- 1.2. AAT is submitting this response on behalf of our membership and from the wider public benefit of achieving sound and effective administration of taxes.
- 1.3. AAT has added comment in order to add value or highlight aspects that need to be considered further.
- 1.4. AAT has focussed on the operational elements of the proposals and has provided opinion on the practicalities in implementing the measures outlined.

2. Executive summary

- 2.1. AAT notes that the Government announced in its 2015 Budget a “package of measures to tackle offshore tax evasion to ensure that those who do not come forward face rigorous sanctions and will confirm that there is no place for facilitators, or enablers, of offshore evasion” (2.5, condoc).
- 2.2. The scope of this consultation is to find an appropriate and proportionate means of ensuring corporations can be held accountable under the criminal law for failing to prevent their agents from criminally facilitating tax evasion.
- 2.3. HMRC invites views on how best to achieve this and the defences required to ensure that corporations are not held criminally liable where they have taken reasonable steps to try to prevent their agents from criminally facilitating tax evasion.
- 2.4. The consultation document is structured to cover the following areas:
 - 2.4.1. Chapter 2 sets out the background to the consultation and the reasons for introducing a new offence to apply to corporations.
 - 2.4.2. Chapter 3 sets out the proposed scope of the new offence, the taxes to which it will apply and the criminal conduct that corporations can be held criminally responsible for failing to prevent.
 - 2.4.3. Chapter 4 discusses the measures necessary to ensure the new offence is applied proportionately, including a defence of having taken reasonable care to prevent the criminal facilitation of tax evasion by an agent of the corporation. Corporations include companies and partnerships as well as not for profit concerns that are not engaged in a business, profession or trade. For the purpose of this consultation, “agent” is used to mean a person who acts on behalf of the corporation and “facilitation” and “criminal facilitation” are used to mean an act to facilitate tax evasion that is already considered criminal under existing law, for example an act that would fall within Section 8 of the Accessories and Abettors Act 1861 or Section 45 of the Serious Crime Act 2007.
- 2.5. AAT agrees in paragraphs 3.1 and 3.10 (below) that the new corporate criminal offence should cover failure by an organisation to prevent its agents from criminal facilitation of

evasion of all taxes where the corporation cannot show they took reasonable steps to prevent this but where the corporation can show that they took such reasonable steps then this should constitute a defence.

3. AAT response to the consultation paper on “Tackling offshore tax evasion: a new corporate criminal offence of failure to prevent the facilitation of evasion”

Q1. We (HMRC) believe that that a corporation should be held accountable where it fails to prevent its agents from facilitating tax evasion, regardless of the type of tax involved. Do you agree that the new corporate criminal offence should cover failure to prevent its agents from criminal facilitation of evasion of all taxes?

- 3.1. AAT agrees that the new corporate criminal offence should cover failure by a corporation to prevent its agents from criminal facilitation of evasion of all taxes.
- 3.2. AAT also agrees that a corporation should be held accountable where it fails to prevent its agents from facilitating tax evasion, regardless of the type of tax involved.
- 3.3. However, as there is no specific offence applying to corporations where agents facilitate tax evasion and AAT agrees that this void should be remedied.
- 3.4. AAT notes that 2.13 (con doc) outlines the legal constraint of the “directing mind and will test”, under which employees who can be shown to be the directing mind and will of the company will have their acts attributed to the corporation. That would relate to managing or controlling directors. However, as 2.15 (con doc) recognises the offending individual may be operating without the knowledge of the senior members of the company.
- 3.5. AAT, therefore, agrees with the Government’s plans (1.1, con doc) “to introduce a new criminal offence which is committed when a corporation (including the wider range of commercial organisations mentioned in paragraph 3.13 (below)) fails to prevent their agents from criminally facilitating tax evasion and the corporation cannot show they took reasonable steps to prevent this.”
- 3.6. AAT also recognises the comparison with the Bribery Act 2010 with a similar difficulty in holding commercial organisations to account for the criminal acts or omissions of their agents and that the introduction of s.7 of the Bribery Act 2010 has proved to be successful in bribery by criminalising the commercial organisation for failing to prevent bribery on its behalf and incentivising companies to put in place adequate procedures and promote corporate good governance. (2.18, con doc)
- 3.7. AAT agrees that the best model for the new failure to prevent the facilitation of tax evasion offence is the Bribery Act, section 7, and that it will help to ensure consistency, as exemplified in paragraph 3.31 below.

Q2. If a new corporate failure to prevent offence is created, should the offence be limited to corporate failure to prevent criminal facilitation in the offences of cheating the public revenue and the fraudulent evasion of income tax outlined above?

- 3.8. AAT does not consider that the proposed new corporate failure should be limited to corporate failure to prevent criminal facilitation in the offences of cheating the public revenue and the fraudulent evasion of income tax only.
- 3.9. AAT agrees that the offence should relate to corporate failure to prevent criminal facilitation in the offences of cheating the public revenue and 3.2 (con doc) reminds us that the common law offence of cheating the public revenue applies to the fraudulent evasion of all taxes and not only income tax.

Q3. Alternatively, should the new offence also be committed where a corporation fails to prevent its agents from criminally facilitating other tax offences? Which additional tax offences do you believe should be included in any corporate failure to prevent offence?

- 3.10. AAT considers that the new offence should be committed when a corporation fails to prevent its agents from criminally facilitating the tax offences of not only income tax but also capital gains tax, inheritance tax and VAT.
- 3.11. AAT considers that the proposed new criminal offence is consistent with HMRC policy as set out in 2012 'No Safe Havens' to "focus attention on those who facilitate tax evasion, including corporations who fail to prevent their agents from criminally facilitating tax evasion" (2.9, condoc).

Q4. We do not envisage that under the new offence it would have to be shown that the agent who is facilitating the evasion of taxes was acting for the benefit of the corporation, for example, to obtain or retain business for the corporation, as under s.7(1) of the Bribery Act 2010, do you agree with this approach?

- 3.12. AAT agrees that under the proposed new offence it would not have to be shown that the agent who is facilitating the evasion of taxes was acting for the benefit of the corporation to obtain or retain business for the corporation, as under s.7(1) of the Bribery Act 2010.

Q5. Do you agree that the offence should cover all of the above entities? Do you have any comments on the entities which you believe the offence should apply or not apply to?

- 3.13. AAT agrees that the offence should cover all the entities envisaged by the question which are commercial organisations, not for profit companies, professions, trades and partnerships.
- 3.14. One might question whether a registered charity should be excluded, but AAT considers that the proposed legislation should require the directors of all the above organisations to take reasonable steps to prevent their agents from criminally facilitating tax evasion.

Q6. Do you agree that the offence should apply to both corporations with a presence in the UK and non-UK based corporations whose agents criminally facilitate the evasion of UK taxes?

- 3.15. AAT agrees that the offence should apply to both corporations with a presence in the UK and non-UK based corporations whose agents criminally facilitate the evasion of UK taxes.
- 3.16. AAT considers that the new offence should apply to encompass corporations based and operating in other jurisdictions who fail to prevent their agents from facilitating the evasion of UK taxes.

Q7. Do you agree that the offence should apply to UK based commercial organisations whose agents criminally facilitate the evasion of taxes in other jurisdictions, provided tax evasion is a recognised crime in those jurisdictions?

- 3.17. AAT does agree that the offence should apply to UK based commercial organisations whose agents criminally facilitate the evasion of taxes in other jurisdictions, provided tax evasion is a recognised crime in those jurisdictions and perhaps with reciprocal legal arrangements.

Q8. Do you believe that a defence of having taken reasonable steps to prevent the facilitation of tax evasion by an agent is appropriate? Are there any other defences you feel should be considered for the new offence?

- 3.18. AAT believes that where a corporation can show that they took reasonable steps to prevent their agents from criminally facilitating tax evasion then this should constitute a defence.
- 3.19. AAT agrees with the proposal to include a due diligence defence to ensure that corporations who have taken reasonable steps to put in place adequate compliance procedures to prevent the criminal facilitation of tax evasion by their agents should not face prosecution.
- 3.20. AAT agrees with HMRC caution recognised in 4.2 (condoc) of possible concern with the prospect of self-incrimination under existing reporting obligations, for example under s.330 Proceeds of Crime Act 2002.
- 3.21. AAT believes that the defence of having taken reasonable steps should be synonymous with having taken reasonable care.
- 3.22. AAT considers that the legislation might also incorporate the defence of reasonable excuse where an isolated offence occurs but is out of character with an organisation's culture of compliance and could not have been prevented by reasonable due diligence and supervisory procedures.

Q9. We welcome views on the nature of guidance that corporations would find helpful to enable them to identify the best way for them to prevent criminal facilitation of tax evasion by their agents.

- 3.23. AAT recommends that any firm which provides services or infrastructure which could be used for the facilitation of tax evasion should include relevant provisions in contractual terms with its entire staff, supported with basic and widely communicated internal rules, procedures and explanations of the proposed legislation on the new criminal offence.
- 3.24. AAT considers that it is important for such firms to operate adequate internal controls and communication, supervision and monitoring by line management to identify wrongful use of services. Junior staff may not always recognise the consequences or eventual use of a financial instrument in which they may be involved in constructing.
- 3.25. AAT suggests that corporations which provide facilities which could be used to facilitate tax evasion should offer guidance and workshops to employees and agents to assist them in identifying examples of structures which could be used in the facilitation of tax evasion.

Q10. We also welcome any relevant observations about experiences with existing guidance, either domestic or overseas, that may help inform guidance for the new offence.

- 3.26. AAT has experience of being a supervisory authority to monitor compliance with the Money Laundering Regulations 2007 (MLR) and an awareness of the Proceeds of Crime Act 2002.
- 3.27. AAT provides detailed guidance to members who are required to register under the terms of MLR and provides for MLR inspections at Practice Assurance Visits.
- 3.28. AAT, therefore, cites MLR as existing legislation which currently requires organisations which provide taxation, accounting or financial services to have and to enforce robust policies and procedures.
- 3.29. AAT has given guidance to all Members in Practice on the Bribery Act 2010 (BA) from before it came into force on 1 July 2011.
- 3.30. AAT endorses 4.5 (condoc) that "where similar due diligence defences exist under BA section 7(2) or MLR, guidance is produced to enable commercial organisations and

prosecutors to better understand the obligations that corporations need to meet and will already have put in place policies and procedures which would satisfy this defence of taking reasonable steps to prevent the facilitation of tax evasion by their agents.”

- 3.31. AAT notes that all the seven examples, cited in Chapter 3 (conduc), of failures by organisations to prevent facilitation of evasion by agents involve corporations or firms which are banks, trust companies or legal providers which should currently be regulated by MLR and BA requirements.

Q11. Do you have any views, comments or evidence which may help inform our understanding of likely impacts?

- 3.32. AAT has nothing to add to the assessments of impacts outlined in Chapter 5 (conduc).

4. Conclusion

- 4.1. In 3.4 (above), AAT explains why it can be extremely difficult to hold corporations to account under existing law for the criminal actions of their agents. AAT agrees in paragraphs 3.1 and 3.10 (above) that the new corporate criminal offence should cover failure by an organisation to prevent its agents from criminal facilitation of evasion of all taxes including income tax, capital gains tax, inheritance tax and VAT where the corporation cannot show they took reasonable steps to prevent this.”
- 4.2. In 3.6 and 3.7 (above) AAT explains that the proposed failure to prevent the facilitation of tax evasion offences is to be modelled on s.7 of the Bribery Act 2010 which criminalises commercial organisation for failing to prevent bribery on its behalf.
- 4.3. In 3.23 and 3.24 (above) AAT outlined the importance of adequate internal controls and communication, supervision and monitoring by line management and that any firm which provides services or infrastructure which could be used for the facilitation of tax evasion should include suitable provisions in contractual terms with all its staff explaining procedures and explanations of the proposed legislation on the new criminal offence.
- 4.4. AAT’s view in 3.15 and 3.17 (above) is that the new offence should encompass corporations based and operating in other jurisdictions who fail to prevent their agents from facilitating the evasion of UK taxes and the offence should apply to UK based commercial organisations whose agents criminally facilitate the evasion of taxes in other jurisdictions.
- 4.5. AAT considers that an appropriate defence is required and in paragraph 3.18 (above) explains that where a corporation can show that they took reasonable steps to prevent its agents from criminally facilitating tax evasion then this should constitute a defence.

5. About AAT

- 5.1. AAT is a professional accountancy body with over 49,500 full and fellow members and 82,400¹ student and affiliate members worldwide. Of the full and fellow members, there are over 4,200 Members in Practice who provide accountancy and taxation services to individuals, not-for-profit organisations and the full range of business types.
- 5.2. AAT is a registered charity whose objectives are to advance public education and promote the study of the practice, theory and techniques of accountancy and the prevention of crime and promotion of the sound administration of the law.

¹ Figures correct as at 30 Sept 2015

6. Further information

If you have any questions or would like to discuss any of the points in more detail then please contact AAT at:

email: consultation@aat.org.uk and aat@palmerco.co.uk

telephone: 020 7397 3088

Aleem Islan
Association of Accounting Technicians
140 Aldersgate Street
London
EC1A 4HY