"Tackling offshore tax evasion: A new criminal offence"

Response to the HMRC Consultation from the Criminal Bar Association

The Criminal Bar Association ("CBA")

1. The CBA represents the views and interests of practicing members of the criminal Bar in England and Wales.

2. The CBA's role is to promote and maintain the highest professional standards in the practice of law; to provide professional education and training and assist with continuing professional development; to assist with consultation undertaken in connection with the criminal law or the legal profession; and to promote and represent the professional interests of its members.

3. The CBA is the largest specialist Bar association, with over 4,000 subscribing members; and represents all practitioners in the field of criminal law at the Bar. Most practitioners are in self-employed, private practice, working from sets of Chambers based in major towns and cities throughout the country. The international reputation enjoyed by our Criminal Justice System owes a great deal to the professionalism, commitment and ethical standards of our practitioners. The technical knowledge, skill and quality of advocacy all guarantee the delivery of justice in our courts, ensuring that all persons receive a fair trial and that the adversarial system, which is at the heart of criminal justice in this jurisdiction, is

maintained.

Introduction

4. The Consultation Document assumes that Respondents agree that the introduction of a strict liability offence for offshore tax evasion is itself appropriate. The CBA strongly disagrees with that proposition. We consider it essential to address this issue at the outset. Without prejudice to this general position, we then answer the questions set out in the Consultation**.**

5. The CBA has had the benefit of seeing the draft Response of the Fraud Lawyers Association, an organisation that has many members who are also members of the CBA. We are grateful to the authors of the FLA Response and adopt and support the detailed arguments that are set out therein.

Should the Government introduce a strict liability offence to deal with offshore tax evasion?

6. No.

7. We consider that tax evasion is an offence that requires a *mens rea*. Ordinarily this should be dishonesty. There are already a number of offences that could be used to prosecute such behaviour. This proposal is an unnecessary change which is fraught with unfairness and inconsistency. The objectives may be laudable but they can be achieved by far better means than creating this offence.

8. HMRC's published policy has usually reserved criminal investigation for large scale frauds involving one or more of a number of identified aggravating features. It is on this basis that HMRC's policy of selective prosecution has historically been held rational and thereby lawful (R v IRC (ex. p Mead) [1993] 1 All E.R. 772).

9. Absent such aggravating features, even large scale tax frauds (i.e. those worth in excess of £75,000) are generally dealt with by way of the civil procedures available

under Code of Practice 9. There can therefore be no justification for prosecuting individuals who, for example, may have been careless rather than dishonest, where the sums involved may be far smaller.

10. The CBA does not see any proper reason for HMRC to depart from this policy approach.

11. We do not believe that it is suitable to try such allegations in the Magistrates Court. The incompetent and the careless should be dealt with through the civil regime. Where the allegations are sufficiently serious to warrant prosecution then allegations of this sort should be tried in the Crown Court.

12. We respectfully adopt the positive suggestions made by the FLA in its response in alternative to the proposed offence.

    - Reviewing the investigatory powers available to HMRC to see if they can be supplemented in any way (e.g. by acquiring similar powers to those enjoyed by the CPS under s.62 of SOCPA 2005 (the right to conduct compulsory interviews[1])).
    - Increasing the available civil penalties for an incompetent or negligent failure to declare offshore gains.
    - Intensifying political and diplomatic efforts to expand the pool of countries presently signed up to the Common Reporting Standard ('CRS').
    - Intensifying HMRC's present PR campaign to inform the public more widely of the impact of the CRS and to deter those who might otherwise be tempted to evade their tax.

13. Such measures would assist HMRC in reducing the incidence of off-shore tax evasion without the creation of an unfair and inappropriate strict liability offence.

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[1] Should such a power be introduced, it must of course be accompanied by the safeguards presently built into s.2 CJA 1987 and s.62 SOCPA 2005, such as the immunity of legally privileged information and restrictions on the use of the product of the interview.

Questions Posed in Consultation and Answers

If you intend to cite any of these answers as having been provided by the CBA we expect you to make plain that we object to the concept of introducing this offence

Scope of the offence

Do you agree that the applicability of the offence should be limited to income tax and capital gains tax?

Ans: Yes.

Do you agree that the offence should be restricted to taxable income and gains which arise offshore?

Ans: Yes

In your opinion, which option (to apply the offence only to investment income or gains, or to apply the offence to all offshore income and gains) would best deliver the policy intention?

Ans: The offence should apply only to investment income or gains.

Do you think that the offence should apply to income and gains which are reported under the Common Reporting Standard?

Ans: No. The increased powers available to HMRC in relation to the CRS scheme mean that there is insufficient justification for prosecuting cases which arise thereunder.

Should all income and gains in CRS jurisdictions be exempted from the offence, or should the offence apply to any income and gains which are not automatically reported to HMRC?

Ans: All income and gains in CRS jurisdictions should be exempted.

Are there any further issues or impacts which should be taken into account when introducing the offence into Scottish and Northern Irish law?

Ans: We defer to any relevant opinions expressed by lawyers in those jurisdictions.

Proportionality and sanctions

Do you agree that a *de minimis* threshold is appropriate?

Ans: Yes. We suggest that the entry point for prosecution under the new offence should be no less than the entry point for civil disposal under COP9.

Should the *de minimis* be set by reference to the potential lost revenue arising from the failure/inaccuracy, or some other measure? If so, should the potential lost revenue be calculated in the same way as it is for the purposes of determining civil penalties?

Ans: See above

Should the threshold be incorporated in statute or guidance?

Ans: In statute

Are there any further options (for setting the threshold)?

Ans: See above

Which approach to setting the threshold do you favour?

Ans: See above

The Government's view is that the threshold should apply for each tax year, rather than in respect of a cumulative amount of potential lost revenue, as a new offence would be committed for each tax period – *e.g.* each time an incorrect return is filed. Do you agree?

Ans: The difficulty with this approach is that persistent low level offenders would be immune from prosecution.

Do you agree with the principle that the available criminal sanction for offshore non-compliance should not be seen as more lenient than the available civil sanction?

Ans: Yes

Should an unlimited financial penalty be available to the courts?

Ans: Yes, if linked to the amount of the tax evaded - see paragraph 4.29 of the Consultation Document.

Is the harm which could be caused by a failure to declare offshore income and gains sufficient that a custodial sentence could be justified in the most serious cases?

Ans: No. Custodial sentences should only be imposed for dishonest instances of evasion. We believe that such offending should continue to be prosecuted only under the powers which are presently available to HMRC and in the Crown Court.

If a custodial element is appropriate, should the maximum sentence be six months?

Ans: See above

Safeguards and defences

Should it be a defence for (i) a person to demonstrate that they had taken reasonable care in conducting their tax affairs, or (ii) a person to demonstrate that they had sought and followed appropriate professional advice? What would be the impact on the likelihood of successful prosecutions if statutory defences are included?

Ans: Statutory defences of this nature must be included if the strict liability scheme is to be imposed. They are routinely included in other forms of legislation which give rise to strict liability and there would be no justification for excluding them from the tax regime.

We stress that we do not consider that the inclusion of these defences would justify the imposition of strict liability offending in the first place.

We observe, for example, that the use of the word "appropriate" has the potential to import complex judgments as to the quality of professional advice which are wholly inappropriate to a summary jurisdiction case.

Should any other statutory defences be introduced?

Ans: See above.

Are further safeguards appropriate? What should these be?

Ans: No cases should be brought without the consent of the Director General of HMRC or the equivalent individual within the CPS. Any delegation of the power to consent should be exercised very sparingly.