BOURNER BULLOCK
Chartered Accountants

JPA INTERNATIONAL

ICAEW CHARTERED ACCOUNTANTS

CHARTERED TAX ADVISERS

Sovereign House
212-224 Shaftesbury Avenue
London
WC2H 8HQ
Tel: +44 (0) 20 7240 5821
Fax: +44 (0) 20 7240 5827

Web: www.bournerbullock.co.uk
Email: bb@bournerbullock.co.uk

New criminal offence for companies and partnerships

The Criminal Finances Act was passed by Parliament before the General Election and comes into force on 30 September 2017. Part of the Act means that companies and partnerships can be criminally liable where they fail to prevent those who act for, or on behalf of, the business from criminally facilitating tax evasion. There is however a potential defence against this offence by the business putting into place a system of reasonable prevention measures.

The penalties for the offence include unlimited financial penalties and ancillary orders such as confiscation orders.

An overview

There are three stages that apply to both the domestic and foreign tax evasion facilitation offences. There are additional requirements for the foreign offence but we only cover the UK tax evasion offence here.

- **Stage one:** the criminal tax evasion by a taxpayer (either an individual or a legal entity) under existing law
- **Stage two:** the criminal facilitation of the tax evasion by an 'associated person' of the 'relevant body' who is acting in that capacity
- **Stage three:** the 'relevant body' failed to prevent its representative from committing the criminal facilitation act.

Stages one and two do not create any new offences. These are already criminal offences. Only a 'relevant body' can commit the new stage three offence, so it applies to incorporated bodies (typically companies) and partnerships, not individuals. The new offence is a strict liability offence which means that if stages one and two are committed, the relevant body will have committed the new offence (subject to claiming a defence).

Who is an 'associated person' for stage two?

A person is 'associated' with a relevant body if that person is:

- an employee
- an agent
- any other person who performs services for or on behalf of the relevant body. So for example, a sub-contractor can be an associated person.

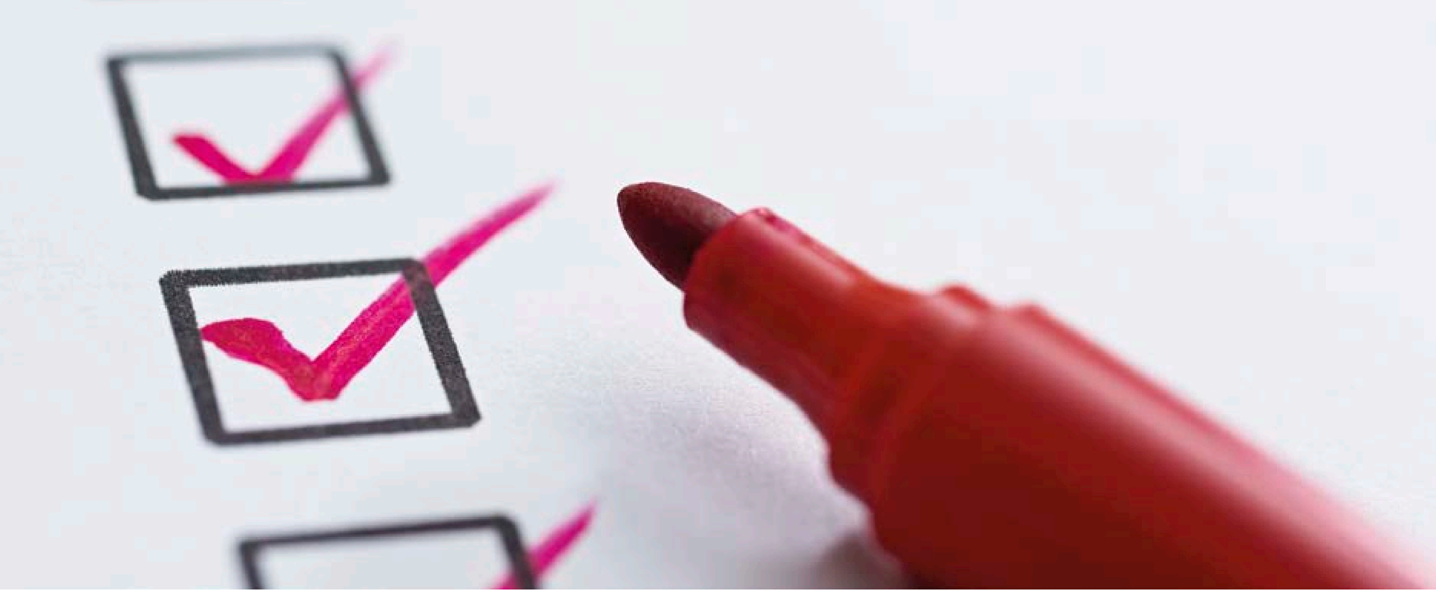
However the person must be facilitating tax evasion by acting in the capacity of an associated person. Examples which illustrate scenarios in which people are or who are not acting for and on behalf of the relevant body are:

Example 1

An employee transfers income producing assets to his wife with the deliberate intention that his wife will not declare the subsequent income. He has committed a tax evasion offence but not in his capacity as an employee of a relevant body.

Example 2

An employee falsifies information relating to a person providing services to the company so that the person is treated as a self-employed subcontractor rather than an employee. The employee has committed a tax evasion offence in his capacity as an employee.



Defence against the stage three offence

The defence against the stage three offence applies where the relevant body has put in place 'reasonable prevention procedures' to prevent its associated persons from committing tax evasion facilitation offences (stage two), or where it is unreasonable to expect such procedures.

The procedures to put in place are similar in approach to the procedures that can protect organisations from committing a criminal offence under Bribery Act 2010 – namely a failure to prevent bribery by a person associated with the organisation.

Under the Criminal Finances Act, the government must prepare and publish guidance about procedures that relevant bodies can put in place. The published guidance (currently in draft) on the new regime includes a section setting out six guiding principles for prevention measures by relevant bodies. The guidance can be found at **https://goo.gl/tYYus2**

To quote from the guidance:

> *These principles are not prescriptive, they are intended to be flexible and outcome focussed, allowing for the huge variety of circumstances that relevant bodies find themselves in.*
>
> *Procedures to prevent facilitation of tax evasion should be proportionate to risk.*

Risk assessment

The initial stage is risk assessment. Organisations may operate in high to low risk professions or industries. Those involved in financial services, for example, are potentially in a high risk environment. The government suggest that relevant bodies need to 'sit at the desk' of their employees and those who provide services for them or on their behalf and ask whether they have a motive, the opportunity and the means to criminally facilitate tax evasion offences, and if so how this risk might be managed.

Reasonable prevention procedures for lower risk SMEs

The legislation applies to all companies and partnerships irrespective of size. However the published guidance states that the guidance is not a 'one-size-fits-all' document. The guidance should be considered and applied in a risk-based and proportionate way. So all businesses should undertake and document a risk assessment.

If the assessment concludes the business is low risk, the guidance includes suggested reasonable prevention procedures for lower risk SMEs. Among the suggested procedures are such matters as:

- demonstrating a commitment to prevention of tax evasion facilitation by issuing a prominent message from the board of directors against all forms of tax evasion
- providing regular training for staff on financial crime detection and prevention
- having terms in contracts (with employees and contractors) requiring them not to engage in facilitating tax evasion and to report any concerns immediately.

How we can help

The new criminal offence for companies and partnerships throws more compliance issues on businesses. Key to coping with the requirements for your business is an initial risk assessment followed by a system of reasonable prevention procedures.

Written policies and procedures are strongly advised in order to demonstrate the work that has been and continues to be done.

We are able to help you perform a risk assessment and help install appropriate procedures. If you would like to discuss the implications for your business in more detail please contact us.