

New Rules on Failure to Prevent Tax Avoidance

New rules come in to effect on 30th September 2017 that is likely to impact recruitment companies and their relationships with providers.

In summary; the new offence aims to hold corporate bodies liable where it can be shown that they have been involved in the facilitation of tax evasion. This will include any employee recommending providers where there is a reasonable expectation that the correct levels of tax are not being paid.

The onus is on the corporate entity to demonstrate that it has reasonable procedures in place to prevent the offence. This is likely to bring increased pressure on the use of Preferred Supplier Listings with companies that can demonstrate compliance as well as ensuring recruitment consultants operate within the new company guidelines.

As you will see from the overview below a consultant receiving a cash incentive payment for the introduction to a provider is likely to breach the rules in 2 ways:

1. The receipt of a payment from a provider to a consultant, if not disclosed on the consultant's tax return, meets the test of tax evasion. As the individual is an employee the corporate body can be held liable for any unpaid taxes unless it can be shown that reasonable steps are in place. This is likely to mean that any recruiters seeking 'commission' from providers will need to move this to a more formal arrangement, likely to be carried out through a company to company relationship. Recruitment companies must take steps to stop consultants receiving 'brown envelope' payments, the largest of these tend to come from what we would consider non-compliant providers that would fall within the scope of these new rules.
2. Recommending a provider where there is a clear expectation that the worker is benefiting financially as a result of reduced tax charges. We have seen a number of recruiters starting to select providers based upon the returns they can offer the workers. Those offering the highest returns for the workers get the most business. What is clear is that ALL providers operate within the same rules and therefore should be returning a similar amount for each worker. Where this is not the case and the returns are greater than expected it will be difficult to mount a defence against these new rules. Recruiters need to formalise their policies on the provider introductions, preferred supplier listings and commission rebates to stand any chance of mounting a defence. HMRC enforcement has been active in the sector for months and has considerable intelligence on compliant and non-compliant providers and the companies the non compliant providers have relationships with. If you are one of these you must change your processes prior to the end of September. If not, you will need to ensure that all employees are adhering to your policies as the action of an employee can bring the liability to the corporate.

Failure to prevent tax evasion: how will the new law affect recruitment businesses?

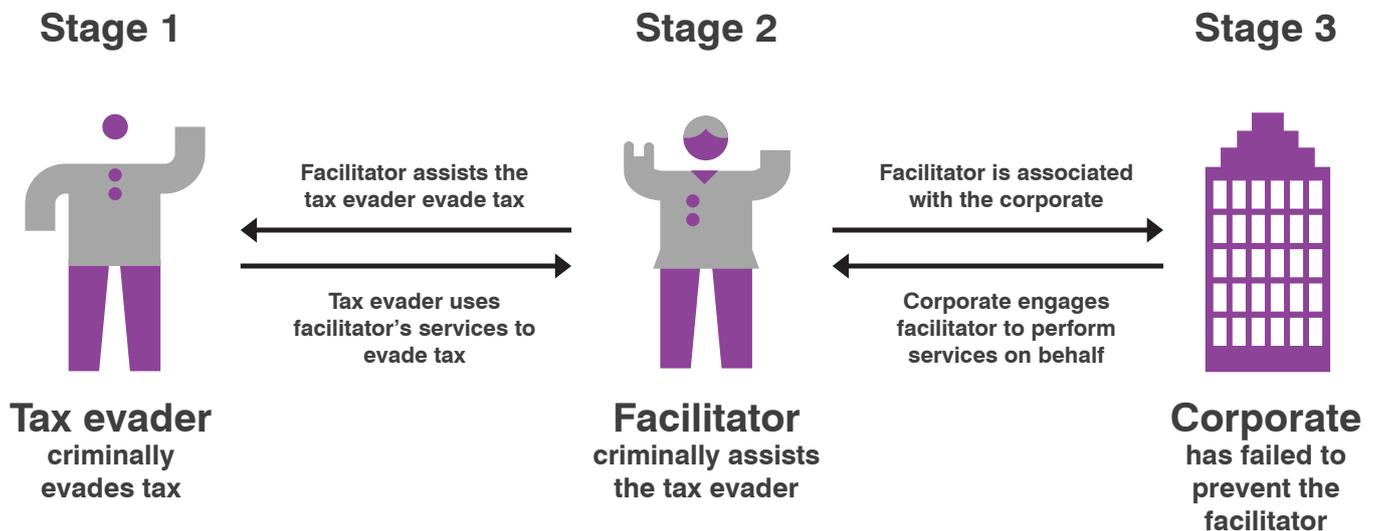
- The new corporate offence is a Bribery Act style "failure to prevent" offence, with an unlimited fine and criminal record for corporations if convicted.
- Reasonable procedures to prevent the facilitation of tax evasion must be in place in order to establish a defence.
- All corporations irrespective of sector and size should take action now before the offence comes into force, on 30 September 2017.
- The staffing supply chain is under scrutiny by authorities in relation to things like offshore payment schemes, and some aggressive onshore schemes (such as the Anderson scheme reported on this month) and some aspects of false self-employment.
- Any recruitment/staffing business looking to sell will, as part the due diligence process, need to demonstrate that they have carried out a risk assessment and provided training to their staff about the offence.

The aim of the new offence is to make it much easier to convict corporates for the facilitation of tax evasion by their employees or associated persons. Like the Bribery Act 2010, it is a move to a US-style strict liability approach. Also like the Bribery Act, if a defence is to be established, the onus is on the corporate to demonstrate that it had reasonable procedures in place to prevent the prohibited conduct.

Overview of the new offence

A corporation will be guilty of the new offence if all three steps below are established:

1. a tax evasion offence is committed by a tax payer (a tax evader) (e.g. a contractor or local payroll company);
2. the commissioning of that offence is criminally facilitated by a third party (the facilitator) (which might be a recruitment consultant who has made a recommendation); and
3. the facilitator is associated with the corporation (the recruitment consultant's employer).



In fact, the corporate can be convicted even if it did not benefit from the offence.

It will, therefore, become increasingly important to recruitment businesses to carry out effective supply chain checks and to monitor referrals made to third party paying companies by their recruitment consultants. In any event, the receipt by a recruitment consultant of a "kick-back" payment (whether in monetary or other form) which goes undeclared for tax and NI purposes will, almost certainly constitute criminal tax evasion, and may be seen as aggravating any offence relating to whatever referral the kick back was for. Their employers will be liable in each case.

Who is an associated person?

Corporations will only commit the new offence if the facilitation offence was carried out by an associated person.

The definition of an associated person, though, is deliberately broad. It includes employees, agents and anyone who performs services for and on behalf of the corporate (which could include distributors, subcontractors, consultants, joint venture partners, subsidiaries and other group companies). In other words, it could conceivably apply to people to whom a staffing company has outsourced compliance or payroll activities. For large corporations with extensive global networks this could amount to hundreds of entities.

If you have any questions about the new legislation and the impacts that this could have on your business please don't hesitate to contact Steve McDermott at Black Diamond Accountancy on steve@blackdiamondaccountancy.com or 07854 881220



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