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Dear Timothy

TACKLING OFFSHORE TAX EVASION:
A NEW CRIMINAL OFFENCE FOR OFFSHORE EVADERS
STRENGTHENING CIVIL DETERRENTS FOR OFFSHORE EVASION
CIVIL SANCTIONS FOR ENABLERS OF OFFSHORE EVASION

The Investment Association[1] welcomes the opportunity to respond to the consultations on tackling offshore tax evasion.

A new criminal offence for offshore evaders and strengthening civil deterrents for offshore evasion

As expressed in our response to the first consultation on a new criminal offence for offshore tax evasion, we were concerned that a strict liability offence could apply to individuals who are simply unaware of having offshore income on which they need to pay tax.

In recent years, individual investors have been increasingly investing via platforms, whilst continuing to use other forms of financial intermediation. In addition, model portfolios are becoming more popular as opposed to the separate selection of funds and other investments. Such model portfolios are suggested to investors by investment professionals who select portfolios of investments depending, for example, on desired levels of risk. A model portfolio is a starting point and an investor may then adapt the portfolio as desired. Model portfolios may include offshore funds alongside UK funds.

The ability to invest in offshore funds has been facilitated by the success of the UCITS regime, which allows funds to be sold freely to the retail market across EU member states. Building on

[1] The Investment Association is the trade body that represents UK investment managers, whose members collectively manage over £5.5 trillion on behalf of clients. The money is in a wide variety of investment vehicles including authorised investment funds, pension funds and stocks & shares ISAs.

this, the European Commission continues to work towards a true single market for capital across the member states through its recently published Capital Markets Union action plan.

These features of the retail distribution of funds and savings products in the UK demonstrate how individuals are now more easily able to invest in a diverse range of funds and investment products that can be domiciled outside the UK.

Investors in UK funds are provided with a tax voucher showing the amount of income that has been received and any tax that has been deducted from that income. Currently, basic rate taxpayers have no further tax to pay on income received from funds, so the holding of an interest in a UK fund does not in itself give rise to a tax filing obligation for basic-rate taxpayers. However, an investor in an offshore fund might not receive similar information about the tax obligations that might arise from holding an investment. Some offshore funds do not distribute all income; an investor may need to search for details of excess reported income on the fund manager's website or in a newspaper in order to comply with the reportable income regime in SI 2009/3001.

For the reasons outlined above, an investor might reasonably, but wrongly, assume that they have been provided with details of all income received on their investments. This may lead to an investor inadvertently failing to report income on offshore investments.

We believe that an individual in such a situation should meet the criteria for having a reasonable excuse or having taken reasonable care in relation to the proposed criminal offence for offshore evaders. However we are concerned about the lack of definition of these terms and we believe that it should be made explicit that someone who is unaware that they have income in relation to which a tax filing requirement arises should have a reasonable excuse or could be considered to have taken reasonable care.

We note that the relevant consultation document seems to support this view. In relation to reasonable care, paragraph 4.12 says: “the civil penalties for inaccurate returns and documents do not apply reasonable excuse as a safeguard. Instead there is no penalty if the taxpayer takes reasonable care to get the return right”. In relation to reasonable excuse, paragraph 4.13 says “any taxpayer who had a reasonable belief that he did not need to do something (or had already done it) might be considered to have a reasonable excuse for a failure”.

Equally, we consider that a defence of having a reasonable excuse or having taken reasonable care should apply in relation to the suggested extension of civil deterrents for offshore evaders.

In relation to the suggested naming of offshore evaders, we do not agree that only full, unprompted disclosures should be out of scope. In the type of situation mentioned above, an investor would be unable to make an unprompted disclosure as they would be unaware of having failed to meet tax reporting requirements. Defences of reasonable excuse and reasonable care should be available.

Civil sanctions for enablers of offshore evasion

The suggested definition of “enabler” is wide, and means any person who, knowingly or unknowingly, provides services which assist a UK taxpayer to evade UK tax. As such a fund manager or intermediary (such as a platform or IFA) could potentially be an enabler by providing the opportunity to invest in offshore funds.

The consultation document gives the example of non-reporting (not fulfilling reporting, regulatory or legal obligations) as being a way in which someone might enable tax evasion. As

highlighted, there are different reporting requirements in relation to income from UK funds and income from offshore funds. The proposal is that only enablers who have acted deliberately should be liable to a penalty. In other words, the enabler would have knowledge of, and the intent to enable, the evasion.

Corporate criminal offence of failure to prevent the facilitation of evasion

Investment managers frequently work in a cross-border environment. This is the case, for example, where funds are distributed to investors in other jurisdictions. It is common, therefore, for investment managers to appoint agents to distribute funds in other countries.

The facts for fund managers that distribute funds overseas are, in many cases, similar to those in example 1. However the commentary discusses contractual terms and training for *staff*. In many cases fund managers appoint independent agents for offshore distribution.

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?

We do not agree with this and consider that it should be necessary to show that the agent who is facilitating the evasion of taxes was acting for the benefit of the corporation. It seems inappropriate for the offence to be more widely drawn than a bribery offence.

We also note that, for the purpose of the consultation, “agent” is used to mean a person who acts on behalf of a corporation (paragraph 1.4). Before a corporation can commit an offence, it should be necessary to show that someone facilitating an evasion of taxes was, in fact, an agent and acting for or on behalf of the corporation.

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?

Yes, we think it is reasonable to apply the offence in these cases. However the facts that are relevant to determining whether a corporation has taken reasonable steps to prevent facilitation of tax evasion by its agents will vary depending on whether the agent is an employee, or is an independent agent. If the agent is independent we believe it will be relevant to consider only the contractual terms of the corporation’s agreement with the agent, along with any reasonable due diligence and monitoring of that agreement. Although a corporation might require certain undertakings from and commitments of an independent agent, ultimately a corporation does not have detailed oversight of everything an independent agent may do.

We also believe that in cases where tax evasion occurs in other jurisdictions, in order for the offence to apply it should be shown that the UK based organisation had an awareness of tax evasion having been facilitated. In practice, a UK organisation may not know that evasion of tax has taken place in another jurisdiction if they do not have detailed knowledge of the tax requirements in that other country.

Thank you again for the opportunity to comment on this consultation. I am available at your convenience to discuss anything in this letter at jorge.morley-smith@theinvestmentassociation.org or on +44 (0)20 7831 0898.

Yours sincerely

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