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By email:
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Dear Ms Haslett

Tackling tax evasion: legislation and guidance for a corporate offence of failure to prevent the criminal facilitation of tax evasion

The Investment Association welcomes the opportunity to comment on HMRC's consultation on legislation and guidance for a corporate offence of failure to prevent the criminal facilitation of tax evasion.

Specifically, we welcome the government's agreement to consider and incorporate approved sector-specific guidance drafted by business representatives. Please note that The Investment Association plans to participate in producing sector-specific guidance alongside other trade associations representing the financial sector.

We have the following comments in relation to the specific questions asked.

QA1. Do you believe that the draft legislation, when read with the draft guidance, adequately articulates the offence and defence? The Government would welcome alternative or additional wording for inclusion in the guidance that stakeholders believe adds clarity to the offence and defence.

In terms of the defence, a wide range of persons may be associated with a particular corporation and the prevention procedures the corporation puts in place should presumably reflect this. For example, reasonable prevention procedures in relation to possible facilitation by an employee could be quite different from reasonable prevention procedures in relation to an agent or a contractor. It would be helpful if this could be drawn out in the guidance. This point applies equally to facilitation of UK tax evasion and to facilitation of foreign tax evasion.

It would also be helpful if the guidance could stipulate that reasonable prevention procedures might fall along a spectrum depending on the particular organisation concerned. For example, for an organisation that does not face individual high net worth clients (or their investment vehicles) directly, a module within annual compliance training for all staff should be sufficient. However, if an investment manager has a team of staff that deals with such clients, then perhaps that team should receive specific training, including examples tailored to the organisation, whilst the rest of the employees receive standardised annual

compliance training. If an organisation solely deals with high net worth individuals, then all staff might need tailored training.

We suggest that the wording be tightened in the section of the guidance entitled “UK Tax Evasion Facilitation Offence (by an associated person”. In particular, the references to “The above offences” at the start of the section and to “these offences” in the third sentence lack clarity. Also, this section of guidance says that “The above offences can be committed by a person other than the person who owes the tax” (emphasis added). In contrast, clause 2(4) and clause 3(5)(b) both specify that a facilitation offence is always committed by someone other than the person who commits the tax evasion offence.

Question QB1. Do consultees consider that this clause, when read with its associated guidance, will enable them to identify when a person acts for or on behalf of a corporation? The Government welcomes suggested case studies from stakeholders for inclusion in the guidance to illustrate when a person can be said to be associated with a corporation for the purposes of the offence.

The wording of the clause seems clear. In relation to the guidance, it would be helpful to include case studies illustrating the assessment of a person as associated or not. For example, an external adviser who is merely introduced to a client or customer should not be an associated person. On the other hand, an external adviser otherwise takes direction from a corporation presumably would be. We note that the case study in paragraph 3.6 of the consultation document is along these lines.

Question QE1. Do you agree that the domestic tax fraud and overseas tax fraud elements of the corporate offence are better presented as two separate offences?

We agree that it is preferable to articulate two separate offences. However, the wording of clauses 3(3) and 3(4) seems clearer than the wording of clauses 2(2) and 2(3). As such we suggest that “it had in place” be changed to “B had in place” in clause 2(2)(a) and “the body” be replaced by “B” in clause 2(3). Also, the sentence beginning “In Paragraph (b)(i) “establishment” has the meaning...” should be a continuation of clause 3(2)(b) rather than a continuation of clause 3(2)(b)(ii).

Question QE2: The Government welcomes stakeholder views on the new clauses, whether they sufficiently articulate the requirement for dual criminality at both the taxpayer and facilitator level, when read alongside the associated guidance. The Government welcomes suggested language or case studies for inclusion in the guidance.

In relation to the taxpayer, for ease of understanding, we suggest that the words “(carried out with the necessary knowledge or intent)” be deleted from clause 3(5)(a), as superfluous. The requirement for the necessary knowledge or intent seems to be adequately incorporated by means of the phrase “being knowingly concerned in, or in taking steps with a view to” in clause 3(5)(a)(ii), as it is for the definition of UK tax evasion offence in clause 2(4)(a).

Also as regards dual criminality at taxpayer level, clause 3(5)(a)(ii) might be clearer if reworded as follows:

> “would amount to an offence under the law of the United Kingdom of being knowingly concerned in, or in taking steps with a view to, the fraudulent evasion of ~~that~~ tax (if ~~assuming~~ that tax was due ~~there was an offence of that kind~~ in the United Kingdom ~~in relation to that tax~~);

In relation to dual criminality at facilitator level, it would be clearer to combine sub-subclause 3(5)(b) and subclause 3(6) into one subclause or sub-subclause (as for dual criminality at taxpayer level) and to simplify the language. For example the following could be adopted:

> "foreign tax evasion facilitation offence" means:
>
> (i) an offence under the law of the foreign country concerned which is committed by facilitating the commission by another person of a foreign tax evasion offence, and
>
> (ii) which would amount to a UK tax evasion facilitation offence if the foreign tax evasion offence were a UK tax evasion offence (see section 2(4) to (6)).

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

Yours sincerely

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Director