

# MACFARLANES

## CORPORATE TAX RESPONSIBILITY

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### INTRODUCTION

In its document *"Improving Large Business Tax Compliance"* – HMRC proposed various ways to *"drive further behavioural change in the large business population"*.

The following represent key rules expected to be in place in 2016/2017. These rules promote the "good" behaviour of large companies, focusing on internal processes (clear board oversight and governance) and external communication, demonstrating a transparent commitment to tax compliance.

### FAILURE TO PREVENT THE FACILITATION OF TAX EVASION

This offence was given further impetus following the Panama Papers leak when it was (re)announced by David Cameron and then presented in the Queen's speech.

The rules (which are modeled on s7 of the UK Bribery Act) will apply to corporates (potentially in the UK and overseas) where (i) UK or overseas tax evasion has taken place; (ii) a person has committed an offence by facilitating that evasion; and (iii) the person is "associated" with the company.

A person is "associated" if (and when) they perform services "for or on behalf of" the company. They can act in any capacity and need not, for example, be an employee.

The offence therefore requires a "facilitation" offence to have taken place, but the corporate does not need have benefited from it. Nor does any offence need to be proven – it is enough for HMRC to show that there has been conduct capable of giving rise to the relevant offence. This is significant because there may well be no prosecution as HMRC often agrees not to pursue convictions if full disclosure is made. HMRC's various disclosure facilities are offered on that basis.

A company will have a defence if it can show that it had "reasonable procedures" in place to prevent those persons associated with the organisation from facilitating tax evasion.

The notion of "reasonableness" (in contrast to the notion of "adequate procedures" in the Bribery Act) is intended to provide comfort that companies will be judged by reference to standards that are appropriate to their circumstances.

HMRC will also publish guidance and case studies to assist organisations in formulating reasonable procedures.

Ultimately, it is a corporate's responsibility to reflect upon its business, the tax risks that are involved and consider what new or amended processes need to be put in place.

Consultation is on-going and it is most likely that the offence will be effective from 2017.

### TAX STRATEGY

The Finance Act 2016 is expected to include provisions requiring companies to publish (on the internet and free of charge) their "tax strategy".

Many companies do already publish their tax policy (to some degree). Failure to do so for all relevant companies will now carry a penalty of £7,500 for the relevant year (and potentially for each month thereafter).

Under these rules, UK groups (and sub-groups) must publish a tax strategy where the group has a turnover of more than £200m or a group balance sheet total of more than £2bn (or where a group is subject to the country-by-country reporting rules).

The strategy must set out (in respect of UK tax):

- ◆ the group's approach to risk management and governance;
- ◆ the attitude of the group towards tax planning;
- ◆ the level of risk the group is prepared to accept; and
- ◆ the group's approach in dealing with HMRC.

The strategy may include other information and deal with the above by reference to individual group members.

In July 2015, HMRC published a report – "Exploring Large Business Tax Strategy Behaviour" comparing how different companies approached their tax policy. The report distinguished companies that saw tax as a straight-forward cost and those for whom tax was "part of identity".

The objective in requiring publication of a tax strategy is not, therefore, just to promote transparency, but to ensure that there is board level oversight of tax planning so that “good” behaviour becomes part of a company’s DNA.

#### **FRAMEWORK FOR CO-OPERATIVE COMPLIANCE**

“Co-operative compliance” is a concept seen in the OECD and describes a “common set of principles and ways in which large businesses and HMRC can work together”.

Some of these principles are listed below:

“Both parties to engage in open and early dialogue to discuss tax planning”

“...business to be open and transparent with regards to decision making, governance and tax planning...keeping HMRC informed of who has responsibility, how decisions are reached, how the business is structured...”

“...business to avoid structuring transactions in a way... inconsistent with the underlying economic consequences... For example, the business should reasonably believe that transactions are structured in a way...which is not contrary to the intentions of Parliament.”

We do not yet have a publication date (originally, the Framework was to be introduced from April 2016) but when it is introduced, it may be a useful means by which HMRC and companies can engage. It is important, however, that it is a source of co-operation, and not another non-statutory rule. Further guidance is needed – for example, how governance is shown and the consequences of not complying.

#### **SPECIAL MEASURES**

One such consequence may be the “special measures” regime which is to be enacted in the Finance Act 2016. A company can be put into “special measures” if it engages in “persistent uncooperative behaviour” that has contributed to two or more disagreements with HMRC. Special measures can result in penalty consequences but, probably more significantly, there is a risk of being publicly “named” by HMRC.

HMRC states that this regime will apply to a small number of companies who engage in aggressive tax planning or refuse to co-operate with HMRC. Whilst this may be the case, on the face of it, the rules are not as limited as may be expected.

Uncooperative behaviour includes using so-called “tax avoidance schemes”. This is largely judged by reference to whether a company has entered into arrangements disclosed under the rules on the Disclosure of Tax Avoidance Schemes (DOTAS). Given HMRC’s widening of these rules, however, there is a question as to whether all such arrangements are genuinely “aggressive”.

In addition, uncooperative behaviour can include any behaviour that hinders or delays HMRC. Whilst some of the factors for determining such behaviour may be reasonable (such as providing inaccurate documentation), other factors are less clear.

For example, the rules refer to holding “speculative” interpretations of the law as uncooperative, but this is a vague concept that is, in effect, determined by HMRC. Requiring HMRC to use statutory powers to obtain information is also a marker of uncooperative behaviour. HMRC accepts that there may be good reasons for doing so, but should a requirement for HMRC to exercise its powers in the manner intended by Parliament ever be treated as uncooperative?

Ultimately, there is no comprehensive list of factors that determines uncooperative behaviour – to a large extent, it is a matter of judgment by HMRC.

Given that there is no genuine right of appeal, there is a concern that the “special measures” regime gives HMRC a wide power to impose sanctions on a company.

#### **OTHER CONSEQUENCES**

The special measures regime may be a particular example of administrative sanctions for “bad” behaviour, but such sanctions are increasingly common. For example, bidders for government procurement contracts (over £5m) must self-certify that they have not been engaged in tax avoidance.

In an increasing number of tax areas, a person who has engaged in (legal and effective) tax avoidance may also not be regarded as “fit and proper” person.

For the most part, such rules have focused on those engaged in tax avoidance (for example, arrangements disclosed under the DOTAS rules). In the future, these rules could be applied more widely to ensure that companies continue to exhibit “good” behaviour.

#### **CONCLUSION**

The rules proposed by HMRC may be seen as characteristic of a regulator (rather than a pure tax authority).

The sweep of the proposals noted above is potentially very wide encompassing UK and overseas activities and the actions not just of employees but anyone ostensibly acting in the company’s name.

It is, therefore, important for companies to ensure that appropriate internal processes are established, clear reporting lines are maintained and codes of practice and strategy are published and followed.

To a large extent, however, these issues have already been faced by companies in the wider context of corporate responsibility. If a company genuinely engages with tax risk in the same manner and maintains a productive relationship with HMRC, ways can be found to ensure that it is seen as a “good” tax citizen without impacting on the business – indeed, such tax citizenship becomes integral to its business “identity”.

#### **CONTACT DETAILS**

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