

Corporate

# Tackling offshore tax evasion: A new criminal offence

Response to Consultations  
*(published: 19 August 2014)*

## **Introduction**

1. The Institute of Financial Accountants (IFA) and the Federation of Tax Advisers (FTA) welcome the opportunity to comment on the consultation documents in respect of 'Tackling offshore tax evasion: A new criminal offence' published by HM Revenue & Customs (HMRC) on 19 August 2014.
2. We should be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
3. Information about the IFA and the FTA is given below.

## **Who we are**

4. The IFA is an internationally recognised professional accountancy membership body whose members work for small and medium-sized enterprises (SMEs) or who run or work in small and medium-sized accounting practices (SMPs) that advise SMEs.
5. At the IFA, we put small and medium enterprises (SMEs) first, recognizing their role as vital wealth-creators, as employers to more than half of the UK's private sector workforce and as the power behind vibrant urban and rural communities. We hold the interests of small and medium practices (SMPs) in the accounting profession in equal regard.
6. The FTA is the Tax Faculty of the IFA and is the modern membership body for agents who provide tax compliance and planning expertise to SMEs and entrepreneurs. It is the tax representative for IFA and FTA members.
7. We are proud of our unique relationship with our members, who predominantly come from a SME/SMP background. As a professional accountancy body, we aim to provide the very best support and guidance to our members who operate within this arena, frequently tailoring policies and recommendations to meet the unique challenges and trading relationships associated with smaller business.
8. Founded in 1916, the IFA supports over 10,000 members and students in more than 80 countries with a programme of professional qualifications and education. As well as resources, events, training and seminars. IFA members uphold high standards of conduct, confidentiality and ethics and undertake annual continuing professional development (CPD) activities.
9. The IFA is a full member of the International Federation of Accountants (IFAC), the global body for the accountancy profession. As such, the IFA takes its place alongside the UK and Ireland's six chartered accountancy bodies, as well as 135 national and regional accountancy organisations representing 125 countries and jurisdictions.
10. The IFA is formally recognised as an awarding organisation by Ofqual, the public body responsible for monitoring standards, exams and qualifications (other than degrees) in England, underlining the quality of the IFA's work and the integrity of its qualifications; and is authorised by HM Treasury for Anti Money Laundering supervision.

## **General Comments**

11. Thank you for the opportunity to respond to the consultation.
12. Our overriding comment in relation to the consultation is that we consider that it fails to address the fundamental question, which is whether a strict liability offence is an appropriate and proportionate deterrent for offshore tax evasion.

### **Specific comments on the consultations**

13. In addition to our general comments, our comments on specific questions set out in the consultation document are set out below.
14. It is our opinion that in all cases where tax evasion is being contended by HMRC, that HMRC should have to prove that there was intent by the individual to cheat the public purse. Additionally we consider that the state of mind of the defendant is paramount when establishing the rationale for an omission from a return.
15. It is for this reason that we consider a strict liability offence an inappropriate way of dealing with offshore evasion.
16. Therefore, whilst we have attempted to address the questions posed by the consultation document, it has to be acknowledged that we do not agree with the implementation or development of a strict liability offence.

### **Tackling Offshore Evasion: A new criminal offence**

#### **Scope of the offence**

##### **Question at 3.7**

**Do you agree that the applicability of the offence should be limited to income tax and capital gains tax?**

##### **Response:**

17. We do not consider that such an offence should be introduced and consider existing legislation to be more than sufficient to encourage compliance and deter all forms of evasion including offshore evasion.
18. We believe it is essential that HMRC educate the public as to their tax responsibilities, promote awareness of their powers through advertising where individuals seek to evade tax and continually seek to simplify the tax system to avoid innocent individuals being caught by complex rules.

##### **Question at 3.11**

**Do you agree that the offence should be restricted to taxable income and gains which arise offshore?**

##### **Response:**

19. Any statutory offence must be administered in a fair, transparent and consistent manner from one taxpayer to another under similar circumstances.
20. We consider that the distinction between onshore and offshore evasion is unfair and inconsistent. Any tax offence should clearly demonstrate that the individual had intended to defraud the public purse, be that onshore or offshore.

### **Question at 3.19**

**In your opinion, which option (to apply the offence only to investment income and gains, or to apply the offence to all offshore income and gains) would best deliver the policy intention?**

**Response:**

21. Any offence which could potentially result in a custodial sentence must be clear and not open to ambiguity and interpretation. It must be obvious from the legislation exactly what constitutes a breach of the law and the consequences of incurring such a breach.

### **Question at 3.25**

**Do you think that the offence should apply to income and gains which are reported under the Common Reporting Standard (CRS)?**

**Response:**

22. Although we do not agree with a strict liability offence, should one be imposed, we do not consider that the offence should apply to income and gains which are reported under the Common Reporting Standard (CRS).

### **Question at 3.30**

**Should all income and gains in CRS jurisdictions be exempted from the offence, or should the offence apply to any income and gains which are not automatically reported to HMRC?**

**Response:**

23. Although we do not agree with a strict liability offence, should one be imposed, we consider that all income and gains in CRS jurisdictions should be exempt from the offence.

### **Question at 3.32**

**Are there any further issues or impacts which should be taken into account when introducing the offence into Scottish and Northern Irish law?**

**Response:**

24. We do not agree with a strict liability offence across the United Kingdom. However, should such an offence be introduced, we are unable to comment on the impact of introducing the offence into Scottish and Northern Irish law.

## Proportionality and sanctions

### Question at 4.4

**Do you agree that the *de minimis* threshold is appropriate?**

#### Response:

25. It is recognised that only a small percentage of the population are engaged in offshore tax evasion and that the majority of the population are law abiding and pay their taxes in accordance with legislation.
26. Therefore, whilst a *de minimis* threshold would be a simplistic and quantifiable way of ensuring that small innocent cases are not inadvertently caught by the proposed legislation, there will be cases where the amounts are significant (possible CGT on the sale of a foreign property) where the individual equally is innocent of any deliberate intent to defraud HMRC. For example, where a property is bought and sold for the same amount but a foreign exchange gain arose on the sale it is possible the individual may have paid tax in the country the property is situated but had not appreciated that the gain still needed to be disclosed in the UK.
27. In these circumstances it should be obvious that a custodial sentence is an inappropriate way forward but if the omission is over the *de minimis* threshold he/she is reliant on an inspector recognising and appreciating this fact and cannot rely on legislation as a recourse.
28. A *de minimis* threshold, though useful, is not alone enough to ensure that the innocent individuals are not caught by the legislation.

### Question at 4.6

**Should the *de minimis* be set by reference to the potential lost revenue arising from the failure/inaccuracy, or some other measure? If so, should the potential lost revenue be calculated in the same way as it is for the purposes of determining civil penalties?**

#### Response:

29. However the *de minimis* is calculated it is imperative that extra safeguards are in place to ensure that innocent and careless cases are not taken forward for prosecution.
30. In the interest of transparency, legislation should clearly set out how the *de minimis* is calculated.

### Question at 4.10

**Should the threshold be incorporated in statute or guidance?**

#### Response:

31. Should a *de minimis* threshold be introduced it is essential that this is written and incorporated into statute.
32. At a time when ESC's are being placed on statute and historic HMRC guidance has come under increased criticism (IR20/HMRC6) it is imperative that thresholds and safeguards are written into legislation and clearly set out taxpayer's rights.

**Question at 4.18**

**Are there any further options (for setting the threshold)?**

**Response:**

33. We are not aware of any other option which would give the flexibility required to ensure that taxpayers are treated based on their individual circumstances and not a numeric formulae.

**Question at 4.19**

**Which approach to setting the threshold do you favour?**

**Response:**

34. Neither approach is favoured as both are too simplistic when dealing with what can often be complex cases involving unique facts and circumstances.

**Question at 4.20**

**The Government's view is that the threshold should apply for each tax year, rather than in respect of a cumulative amount of potential lost revenue, as a new offence would be committed for each tax period – e.g. each time an incorrect return is filed. Do you agree?**

**Response:**

35. It is our view that should thresholds be introduced, these are applied for each tax year taking account of the facts and circumstances surrounding the omission.
36. There should be flexibility to ensure that an individual is not caught just because they breach a numerical limit.

**Question at 4.23**

**Do you agree with the principal that the available criminal sanction for offshore non-compliance should not be seen as more lenient than the available civil sanction?**

**Response:**

37. We consider that tax law should be appropriate, proportionate and consistent. Development of a strict liability for offshore evasion is not justified on the basis that the income/gains were offshore and it is therefore harder to prove the intent to defraud the public purse.
38. The introduction of this offence would not demonstrate consistency between onshore and offshore tax evasion.

#### **Question at 4.30**

**Should an unlimited financial penalty be available to the courts?**

**Response:**

39. We do not consider that unlimited financial penalties should be available to the courts especially as HMRC would not have to demonstrate under the strict liability offence that the individual had intended to defraud the public purse.
40. An unlimited financial penalty would not be proportionate or fair.

#### **Question at 4.37**

**Is the harm which could be caused by a failure to declare offshore income and gains sufficient that a custodial sentence could be justified in the most serious cases?**

**Response:**

41. We do not consider that offshore and onshore failures to declare income and gains should be differentiated.
42. We consider that the system currently available via the CPS is sufficient when dealing with tax fraud and that a separate offence for offshore failures adds an unnecessary level of complexity.

#### **Question at 4.39**

**If a custodial element is appropriate, should the maximum sentence be six months?**

**Response:**

43. We do not consider that there should be a new strict liability offence for offshore evasion and therefore do not agree with any sentence.

### **Safeguards and defences**

#### **Question at 5.8**

**Should it be a defence for (i) a person to demonstrate that they had taken reasonable care in conducting their tax affairs, or (ii) a person to demonstrate that they had sought and followed appropriate professional advice? What would be the impact of the likelihood of successful prosecutions if statutory defences are included?**

**Response:**

44. We consider that both these defences are appropriate and not mutually exclusive. Therefore both should be written into legislation.

**Question at 5.9**

**Should any other statutory defences be introduced?**

**Response:**

45. We continue to assert that no legislation should be introduced without the express requirement for HMRC to demonstrate intent to defraud the public purse.

**Question at 5.16**

**Are further safeguards appropriate? What should these be?**

**Response:**

46. As we consider that the offence should not be introduced, no further safeguards are deemed necessary.

**Assessment of impacts**

**Question at 6**

**Do you have any views, comments or evidence which may help inform our understanding of likely impacts?**

**Response:**

47. We have no comments or evidence to assist with your understanding of the likely impacts.

**Question at 6**

**Do you have any views, comments or evidence which may help inform our understanding of likely equalities impacts?**

**Response:**

48. We have no comments or evidence to assist with your understanding of the likely equalities impacts.

Should you wish to discuss our responses further, please contact [AdamL@ifa.org.uk](mailto:AdamL@ifa.org.uk) in the first instance.