

The right way to report a company's failure to prevent the facilitation of tax evasion

30 Apr 2019 Nicola Sharp.

Nicola Sharp outlines what HM Revenue and Customs expects from those who believe they have committed the corporate offence that was introduced by the Criminal Finances Act.

The corporate offence of failure to prevent the facilitation of tax evasion came into force on 30 September 2017. Under Part 3 of the Criminal Finances Act 2017, it is a criminal offence if a company, partnership or other 'legal person' fails to take reasonable steps to prevent its employees or associated persons from facilitating tax evasion.

It is important that companies not only know about the offence but also how they should go about self-reporting if they feel they have committed it. The HMRC has now issued guidance on how to submit a report on behalf of a company or partnership if such a failure to prevent has occurred.

The Offence of Failure to Prevent

The offence covers UK tax evasion and relates to all organisations, regardless of whether they operate on commercial lines or where they are based. It also covers the facilitation of tax evasion in other countries providing there is a UK connection: either involving a UK legal person, foreign legal persons with a place of business in the UK or foreign legal persons whose facilitation of tax evasion took place in the UK.

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For the facilitation of tax evasion to be a criminal act, a person must have deliberately and dishonestly helped another person to evade tax. This does not include the accidental, ignorant or negligent facilitation of tax evasion.

A company or partnership that fails to prevent the facilitation of tax evasion commits the corporate criminal offence.

But such an organisation will have a defence if it can demonstrate it had put in place reasonable procedures to prevent the criminal facilitation of tax evasion or that it was not reasonable to expect it to have such procedures.

The Need to Self-Report Correctly

Self-reporting such a failure can be used as part of the company or partnership's reasonable procedures defence if it is charged with an offence. It can also be taken into account by prosecutors when making a decision about whether to prosecute and can be reflected in any penalties that are imposed

It is important, therefore, to ensure that self-reporting is conducted correctly.

In its guidance, HMRC states that those making the report should only give basic details about the organisation's prevention procedures to prevent the criminal facilitation of tax evasion. The report should not include the organisation's full prevention procedures. These may be sought by HMRC after the report has been submitted.

HMRC makes it clear that anyone making such a report must have the authority to do so from the company or partnership that the report is about – and the report should only relate to that organisation's failure to prevent the criminal facilitation of tax evasion. A person, it is emphasised, should not make a report about a company or partnership's wrongdoing if they are not authorised to do so and such reports should not be used to report foreign offences; which should be reported to the Serious Fraud Office (SFO).

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The person submitting such a report should only give the information that they already have and should not take it upon themselves to find out more than they already know.

The guidance also states that the person submitting a report should not encourage anyone to either commit or continue committing a crime to get more information or continue committing a crime themselves in order to gain more information

If a person has been authorised to send a self-report on behalf of a company or partnership, HMRC recommends the sender does not tell others that they are sending a report. But the person should inform the HMRC if any of the information in the report has been provided by someone else.

The Contents of a Report

The report must give details about the criminal facilitation that the company or partnership failed to prevent and any tax evasion that may have taken place as a result.

While the HMRC guidance outlines in detail the dos and don'ts of such a report, it does stress that such self-reporting is voluntary. A company or partnership has a right to remain silent and can also decide for itself how much information should go in the report.

But when self-reporting, however, HMRC expects you to supply the company's name, address, Companies House registration number (if it has one) and its Unique Taxpayer Reference (if applicable). If the organisation is not UK-based, HMRC requires its registration number in the country where it was formed, the submission references of any previous self-reports made to HMRC and details of reports made to any other agencies relating to this incident (such as a Suspicious Activity Report).

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HMRC will also require any report to detail how the tax evasion was facilitated. This should include who in the company facilitated it, what capacity they were acting in, what tax was evaded, how this was discovered, an estimated date for when it ended (if it has), an estimate (if possible) for how much tax was evaded and an overview of existing prevention procedures.

While the person who sends the report will not be guilty of failing to prevent the facilitation – even though they are self-reporting on behalf of the company or partnership - it should be noted at all times that they may be guilty of a criminal offence if they give either false information or information that they do not honestly believe to be true.

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