Criminal Finances Act – the implications for professional sports clubs in the UK and abroad

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Abstract

From 30 September 2017, the Criminal Finances Act 2017 will impose criminal sanctions on companies and partnerships who fail to prevent tax evasion by any employee or agent/intermediary. Whilst the new Act applies to all corporate bodies, the creation of a corporate criminal offence will be of particular concern to the sports sector, as companies and partnerships can now be held accountable for their employees and agent/intermediary's actions. Whilst there are steps that can be taken to show reasonable attempts at preventing tax evasion, the Act extends to worldwide tax evasion if there is a sufficient UK element, making this even more onerous on those involved, particularly where individuals concerned have economic interests in more than one country.

Sports Clubs need to fully understand the potential criminal liability that could attach to them, and the specific steps they need to take in order to be able to defend themselves against the strict liability that arises under this Act. The Act does not require clubs to be involved in or even aware of tax evasion, nor do they need to benefit from it. Strict liability will attach if the organisation cannot show that they took reasonable steps to prevent the tax evasion. A key element to the new legislation appears to be the demonstration of a clear commitment to preventing tax evasion, from the very top of the organisations concerned.

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The Criminal Finances Act 2017 (the '**Act**') extends the existing criminal sanctions for tax evasion, allowing liability to attach to a corporate body where evasion has occurred. The Act does not change what is criminal; instead it focusses on who can be held accountable for those criminal acts. The Act is specifically drafted to create corporate responsibility – the liability at individual level, however, still remains. The offence at corporate level focuses on the failure to prevent evasion, through lack of appropriate procedures and risk assessment. The Act therefore requires organisations to focus on strong and robust governance.

They are required to have procedures in place designed to prevent tax evasion before it occurs. The Act does not only apply to UK tax evasion, but also applies to the facilitation of foreign tax evasion.

Whilst both of these offences have three main requirements, the foreign offence does also require:

- both the taxpayer and the 'facilitator' (i.e. the Club itself) to be criminally liable; and
- The entity to have a 'UK nexus'.

The dual criminality point essentially requires the overseas jurisdiction to have equivalent tax evasion offences and for the behavior to be a crime had it taken place in the UK. A 'UK nexus' will include where any conduct which forms part of the offence takes place in the UK, as well as entities incorporated under UK law or carrying on business in the UK.

Whilst HMRC guidance suggests that proceedings for this foreign tax evasion offence would only be brought if considered in the public interest, this element of the Act must be adequately addressed by risk assessment and procedures.

The main requirements of both the UK and foreign offences are:

1. Criminal tax evasion by the taxpayer, be that an individual or an entity. Criminal prosecution of the taxpayer for the evasion is not a prerequisite for pursuing the related corporate entity for the failure to prevent the evasion, although if not pursuing prosecution, HMRC would have to prove that it occurred;
2. Criminal facilitation of the taxpayer's offence by a person (the 'associated person') acting on behalf of the corporate entity. The facilitation must involve deliberate and dishonest behaviour – accidental or negligent facilitation would not be an offence, but clearly it would have to be proved that there was no element of deliberate or dishonest behaviour; and
3. The entity failed to prevent its representative facilitating the evasion.

The offence is strict liability – meaning that actual negligence or intention to harm does not need to be proved – so the only defence is to show that appropriate, proportionate procedures and risk assessments have been put in place with ongoing training and monitoring.

Key facts you need to know

- Corporations have an obligation to put procedures in place to prevent someone 'associated' with them from committing tax offences. An 'associated person' means an employee, agent or other person who performs services for or on behalf of the relevant body. In the context of clubs, this extends to players, intermediaries, and professional advisors. Clubs face these obligations as they fall within the bracket of a 'relevant body' under statute (s.44(1)). These obligations will be particularly onerous for clubs when it comes to securing players from outside the UK, given that the new legislation is not limited to UK tax. The new obligations will add another layer to the regulatory process of securing players by ensuring that they and their advisors comply with the tax regime of that particular country as well as the UK.

- Clubs must be aware that they may be liable for an action in 'tipping off' if they notify anyone that they suspect them of tax evasion.

- The Court has a new power to require individuals to provide an explanation of the source of wealth by issuing an Unexplained Wealth Order (UWO) to individuals who have wealth in excess of £50,000 which appears to be disproportionate to their income. Making a false or misleading statement when responding to a UWO is a criminal offence.

- These are criminal offences, with unlimited potential fines.

What you need to do

As with money laundering, protection from prosecution lies in introducing effective preventative procedures which meet the requirements of the Act. Organisations will be expected to identify and prioritise risks, and show they are implementing procedures to prevent tax evasion. There is

acknowledgement in HMRC's guidance that some procedures will take time to put in place so clear documentary evidence of intention and timescales should assist if an offence is committed before specific preventative procedures are implemented.

The regime is principle based so there is no set of statutory rules which, if followed, will provide protection. HMRC has issued guidance on what principles need to be reflected in the procedures but are very clear that this is not an exhaustive list, but should be used to help entities design bespoke prevention procedures specific to that particular organisation.

The examples provided by HMRC are as follows:

- **Risk assessment** – ensuring that in relation to any particular relationship you have sufficient knowledge to understand the risk that tax evasion presents. HMRC guidance particularly identifies complex tax planning structures as high risk transactions.
- **Proportionality** – ensuring that the procedures are proportionate to the risk, taking into account the nature and complexity of the business being conducted and the contractual relationships. 'Prevention procedures' refers to both formal policies and the practical steps taken to implement these policies.
- **Top level commitment** - there must be a culture of people at all levels of the business engaging in preventing tax evasion led from the top. This commitment should be communicated in a manner appropriate to the organisation, be that internally or externally, and exhibited through senior management having responsibility for and engagement with preventative measures.
- **Due diligence** – before doing business or engaging employees, due diligence must be undertaken, including in relation to any financial or legal advisers.
- **Communication and training** – it is not enough to have procedures in place. Regular training on the obligations under the Act and effective communication of the firm's procedures, so that it is clear what is expected of everyone at every level, is essential. Internal communications should make clear the zero tolerance policy in relation to the facilitating of tax evasion. Consideration should also be given to providing internal channels for individuals who wish to raise questions or concerns about services being provided.
- **Monitoring and review** - the Club must continue to review the procedures in place to ensure that they are adequate. If a club does suspect tax evasion has taken place it is under an obligation to report such instances to the relevant authorities to avoid being deemed to be facilitating tax evasion. Failure to do so may potentially see clubs being considered by the authorities as assisting players in offences found under Part VII of the Proceeds of Crime Act 2002 such as concealing property (s.327) and making arrangements to facilitate tax evasion (s.328).

Next Steps

Businesses need to carry out reviews, devise the appropriate procedures that are proportional, and communicate and train the whole team so that the risk of falling foul of the legislation with the financial, personal and reputational damage that will accompany prosecution is minimised. Procedures must be robust and enforced as the reasonableness of those procedures will be judged against actual or suspected tax evasion by employees or associates. This process should start immediately, as it is the review and risk assessment process that may help to provide protection once the offences come into force, whilst procedures are being developed and put in place.

The Sports industry and football players and managers in particular are already exposed to media attention in relation to both tax avoidance in the UK and tax evasion accusations/convictions in EU countries. HMRC are conducting enquires in to players and managers. Against this background,

businesses operating in the sports sector are likely to be assessed as high risk and it is critical that clubs prepare themselves now for 30th September by introducing procedures that are effective and proportionate to that risk.