

CONSULTATION

TACKLING TAX EVASION: LEGISLATION AND GUIDANCE FOR A CORPORATE OFFENCE OF FAILURE TO PREVENT THE CRIMINAL FACILITATION OF TAX EVASION

ABOUT AIA

The Association of International Accountants (AIA) is a global body for professional accountants. We create world class accountants through offering high-standard, relevant and innovative qualifications, and providing first-class, tailored and pertinent services for our members around the world.

Founded in 1928, AIA has promoted the concept of 'international accounting' to create a global network of accountants in over 80 countries worldwide.

In the UK, AIA is a Recognised Qualifying Body (RQB) for statutory auditors, and as such we are regulated by the Financial Reporting Council (FRC). AIA works in the public interest, ensuring that our members are appropriately regulated for the work that they carry out. AIA is a Prescribed Body under the Companies (Auditing and Accounting) Act 2003 in the Republic of Ireland and we also have supervisory status for our members under the UK Money Laundering Regulations 2007. We have recognition to operate in the Regulated Qualifications Framework (RQF) and is regulated by the The Office of Qualifications and Examinations Regulation (Ofqual) which regulates qualifications, examinations and assessments in England and vocational qualifications in Northern Ireland. AIA is also an Accredited Organisation under the Commonwealth.

AIA members are fully professionally qualified to undertake accountancy employment in the public and private sectors.

AIA RESPONSE

SUMMARY

AIA is pleased to respond to this consultation document and to note that the proposals to amend the original draft clauses published in December 2015 represents a substantial improvement.

The following comments are made in this summary and are also covered in the responses to the specific questions below.

The concept of an informed and reasonable person (for example taking a view on whether an individual is acting in a corporate or personal capacity) might help to clarify the effect of the legislation. Such a concept might also be helpful in determining the extent to which procedures introduced by a Corporation might be considered reasonably sufficient to be a legitimate defence under Clause (2)(b) of the draft clauses.

Although it is clearly the intention to include Limited Liability Partnerships within the scope, it is curious that the draft clauses exclude LLPS, though Limited Partnerships are specifically included. It has therefore been recommended that as a simply 'tidying-up' exercise that LLPS should be specifically included in the legislation in preference to being inferred.

In relation to overseas tax evasion, care is needed. For example, if certain types of tax evasion are not a criminal offence in the jurisdiction suffering loss, the UK Government should not seek to impose criminal sanctions in the UK. Additionally, (and comment has been made in the response to Question E2), there should be no question of a criminal offence arising from the evasion of taxes which, under UK law, it would be illegal to impose.

QUESTION A1

DO YOU BELIEVE THAT THE DRAFT LEGISLATION, WHEN READ WITH THE DRAFT GUIDANCE, ADEQUATELY ARTICULATES THE OFFENCE AND DEFENCE?

AIA agrees.

QUESTION B1

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?

AIA agrees.

QUESTION B2

DO YOU BELIEVE THAT THE DRAFT CLAUSES, WHEN READ WITH THE ASSOCIATED GUIDANCE, CLEARLY EXCLUDE INSTANCES WHERE THE CORPORATION'S REPRESENTATIVE IS ACTING IN A PRIVATE CAPACITY, RATHER THAN PROVIDING SERVICES FOR OR ON BEHALF OF THE CORPORATION?

AIA considers that a distinction needs to be drawn to address cases where a representative is acting in a private capacity. The draft clauses whilst they may be adequate might be enhanced if there is scope for a provision similar to that proposed in the current IHT DOTAS consultation – i.e. by reference to a reasonably informed person assumed to have appropriate practical experience. The reason for this suggestion is to enable the input of expertise from individuals who have worked for organisations where enhanced risks may be present, to identify when an individual is acting in a private capacity or as an employee or agent of a corporation.

We are concerned that the statement that an employee of B is presumed, unless the contrary is shown, to be a person who performs services for or on behalf of B might lead to arrangements where an employer relationship might be deliberately avoided and be counter-productive.

QUESTION C1

DO YOU HAVE ANY COMMENTS ON THE DRAFT CLAUSE ABOVE, WHEN READ WITH THE ASSOCIATED GUIDANCE?

Although clause 2.9 of the consultation document clearly indicates that the response document confirmed that the Government intended that the new offence should apply to all legal persons e.g. companies, partnerships, LLPs, regardless of whether they operate commercially or for other reasons, it is curious that the meaning of a ‘relevant body and associated person’ does not include Limited Liability Partnerships and for the avoidance of doubt AIA believes that the draft legislation should be extended to include LLPs as (for example) a sub-clause under 3(c).

QUESTION D1

DO YOU BELIEVE THAT THE LEGISLATION, WHEN READ WITH ITS ASSOCIATED GUIDANCE, MAKES IT SUFFICIENTLY CLEAR IN RESPECT OF WHAT CRIMINAL ACTS A CORPORATION CAN BE LIABLE FOR FAILING TO PREVENT ITS REPRESENTATIVES FROM CRIMINALLY FACILITATING?

AIA agrees.

QUESTION E1

DO YOU AGREE THAT THE DOMESTIC TAX FRAUD AND OVERSEAS TAX FRAUD ELEMENTS OF THE CORPORATE OFFENCE ARE BETTER PRESENTED AS TWO SEPARATE OFFENCES?

AIA agrees that domestic and overseas tax fraud should be presented as separate offences. Furthermore because different territories may classify certain types of tax evasion as criminal, but other types as not, and also because some overseas taxes might, if imposed in the UK be illegal under UK law, it is entirely sensible to separate domestic and overseas taxes to enable the revised legislation to target these categories of taxes as appropriate.

QUESTION E2

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. AND WHETHER THEY SUFFICIENTLY ARTICULATE THE REQUIREMENT FOR DUAL CRIMINALITY AT BOTH THE TAXPAYER AND FACILITATOR LEVEL.

Our response is in two parts:

1 For clarity and consistency Clause 95)(a)(i) might be amended to read ‘it is a criminal offence under the law of a foreign country...’ Our understanding is that Switzerland differentiates between tax evasion and tax fraud and whilst AIA condones neither of these practices, it is inconsistent to have legislation in the UK that may impose a criminal charge in the UK for an activity that may not constitute a criminal offence in the jurisdiction that suffers the tax loss.

Similarly Clause (6)(a) might be amended by insertion of the word ‘criminal’.

2 Equally, and related to 2.27 of the consultation document, it would be appropriate to include legislation to confirm that an offence cannot be committed in relation to the evasion of any foreign tax or other impost which, if it were imposed in the UK, would be unlawful under UK law. This would ensure that no offence in the UK could arise for example from facilitating the evasion of overseas taxes based upon religion, political opinion or extortion or confiscation. The suggestion of practical examples is welcome, but nevertheless AIA considers that the revised legislation should ensure that there is no question of a risk of UK criminal proceedings in these circumstances.

QUESTION F1

DO YOU BELIEVE THE AMENDED DRAFT LEGISLATION BRINGS WITHIN SCOPE ONLY THOSE CORPORATIONS WITH A SUFFICIENT PRESENCE IN THE UK, OR THOSE CORPORATIONS WHOSE REPRESENTATIVES ARE COMMITTING THE RELEVANT CRIMINAL ACT(S) FROM WITHIN THE UK?

AIA considers that the amended draft adequately extends the scope to relevant criminal acts from within the UK, in relation to foreign tax evasion offences.

FURTHER INFORMATION

The above replies represent our comments upon this consultation. We hope that our comments will be helpful and seen as constructive. AIA will be pleased to learn of feedback, and to assist further in this discussion process if requested.

If you require any further information, please contact:

AIA Policy & Public Affairs Department
The Association of International Accountants
Staithes 3
The Watermark
Metro Riverside
Newcastle upon Tyne
NE11 9SN
United Kingdom
T: +44 (0)191 493 0269
E: consultations@aiaworldwide.com