

Finance Bill 2016: Criminal offences and civil sanctions

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Private Client analysis: Catherine Richardson, associate at Cadwalader, Wickersham & Taft LLP, and Adam Blakemore, a partner at the firm, provide an update on the criminal offences and civil sanctions aspects of Finance Bill 2016 (formally known as Finance (No 2) Bill).

Were the new offences and civil sanctions for tax evasion included in Finance Bill 2016 and, if so, when do these provisions have effect from?

As foreshadowed in the draft Finance (No 2) Bill 2016 announcements on 9 December 2015 (draft Finance Bill 2016), the government has included several measures relating to tax evasion in Finance Bill 2016, which was published on 24 March 2016. Specifically, measures have been included which will bring into effect new offences and civil sanctions in relation to offshore tax evasion. These measures include:

- increased civil sanctions for offshore tax evaders
- new civil sanctions for 'enablers' of offshore tax evasion, and
- new criminal offences for offshore tax evaders

The increased civil sanctions for offshore tax evaders and the new civil sanctions for 'enablers' of offshore tax evasion will come into force on such day as the Treasury may appoint by regulations made by statutory instrument. The new criminal offences for offshore tax evasion will take effect from royal assent, which is expected to be before Parliament's summer recess in July.

Finance Bill 2016 also includes legislation dealing with a new asset-based penalty for 'offshore inaccuracies and failures' (discussed below).

Have any changes been made to the legislation since the draft provisions published in December 2015? If so, what changes have been made (and why)?

The provisions included in Finance Bill 2016 broadly track the legislation as included in draft Finance Bill 2016. However, at Budget 2016 the government made further announcements in relation to two particular areas, which are proposed to be legislated in a future Finance Bill or other legislation.

Firstly, the government will consider defining 'reasonable care' as it is used in avoidance penalty cases (including in relation to the new criminal offence and the new civil sanctions for 'enablers' of offshore tax evasion). This is intended to clarify that tax avoiders cannot rely on 'generic, third party' legal advice received via the promoter or other enabler of the scheme.

Secondly, the government announced plans to consider further ways to address the issue of those who 'enable' tax avoidance schemes. The Finance Bill 2016 proposals already deal with 'enablers' of offshore evasion but the government has made it clear that these provisions could be broader so as to clearly bring promoters within the scope of these rules. The intention behind this announcement is to ensure that avoidance scheme promoters and other intermediaries who 'enable' the sale of tax avoidance schemes, and the use of such schemes, face greater direct consequences when one of those schemes fails.

What is the scope of the new asset based penalty?

As announced by the government in Budget 2015, draft Finance Bill 2016 includes draft legislation for a new asset-based penalty for 'offshore inaccuracies and failures'. Specifically, this penalty will be applicable to deliberate inaccuracies in an individual's tax return, or a deliberate failure to notify, in relation to an offshore asset and a loss of income tax, capital gains tax or inheritance tax. In such circumstances, HMRC will be able to charge a penalty of the lower of 10% of the value of the asset underlying the tax evasion, or ten times the lost tax. This is subject to a minimum threshold of lost revenue in the relevant tax year of £25,000.

Reductions in the amount of the penalty will be available where, broadly, the taxpayer makes a disclosure of the inaccuracy or failure relating to the standard offshore penalty, provides HMRC with a reasonable valuation of the asset and provides HMRC with information or access to records for the purposes of valuing the asset. The extent of the reduction is yet to be announced.

This measure will come into effect at a later date to be announced by HMRC.

What is the scope of the consultation on the new corporate criminal offence for failure to prevent the criminal facilitation of tax evasion and what changes are proposed from the original draft legislation?

The government announced its intention at the March 2015 Budget to introduce a new corporate criminal offence for failure to prevent the criminal facilitation of tax evasion.

Following an initial public consultation, draft legislation was published on 9 December 2015. This new offence was to be subject to further public consultation during 2016 with legislation to be introduced prior to the commencement of the exchange of information under the common reporting standard. Following the recent disclosure of the Panama Papers and the extensive media reporting of the tax-related aspects of those documents, the prime minister announced on 11 April 2016 that the time scale for these measures would be brought forward with the relevant legislation to be implemented in 2016.

Accordingly, the government published the further consultation document on 17 April 2016, which included revised legislation and draft guidance. The focus of this consultation is on the draft legislation and guidance rather than the policy of introducing the new offence.

The revised draft legislation proposes amendments to clarify (yet potentially broaden) the scope of those for whom a corporation can be liable, the definition of a 'corporation' for the purposes of determining which persons could be liable for tax liabilities and penalties as well as providing distinct offences for UK tax fraud and overseas tax fraud. The revised draft legislation also seeks to provide greater clarity as to the meaning of 'reasonable procedures' which would otherwise constitute a defence to the offence.

The proposed amendments to this new criminal offence coupled with the government's accelerated timeframe for implementation reflect the impact of the disclosure of the Panama Papers as well as the government's commitment to dealing with both real and perceived offshore tax evasion.

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