Tackling tax evasion

Business Legal Services

The Criminal Finances Act 2017 (CFA) introduced new cross-jurisdictional offences (within the UK or abroad) for failure of a corporate to prevent the facilitation of tax evasion by persons associated with them.

This article examines the new offences, in the footballing context, and highlights the need for football clubs to be proactive if they are to avoid the potential for significant penalties.

Contextual clarity: evasion v avoidance

Despite a legal distinction between the two concepts, the line between tax evasion and avoidance is often confused, and, in any event, is increasingly blurring. Tax evasion is the illegal evasion of taxes, whereas tax avoidance is the legal use of tax laws to reduce one's tax burden. Nevertheless, although not illegal per se, if in the process of a tax avoidance scheme any false or dishonest representations are made, or the purpose of a scheme is to abuse the tax system, then it may be deemed evasion, and therefore illegal. The new offences are therefore entirely relevant in both situations.

Legal background

Companies – which all UK football clubs are – have legal personality; this means they can be prosecuted. However, despite tax evasion historically constituting a criminal offence, the inherently human requirement of intention or recklessness to prosecute the offence, meant it was exceptionally difficult to find a company 'guilty.' Essentially, a corporate could only be convicted of tax evasion if those representing the 'directing mind and will of the company' had been complicit in the offence. Proving this was understandably difficult due to its subjectivity. The structure of football clubs also often meant identifying the person(s) who fit this description was difficult.

Rumblings of a landscape shift began with the introduction of the Bribery Act 2010. This contained the new corporate offence of failing to prevent bribery by persons associated with them. This applies whether the bribery was committed nationally or internationally. It is also a strict liability offence meaning the only defence is to prove that adequate procedures were in place to prevent it. It is this offence that the new tax evasion offences are modelled on.

The offences

Section 45 of the CFA makes it a criminal offence for corporates and partnerships to fail to prevent an associated person from facilitating UK tax evasion. Section 46 covers equivalent offences for facilitating tax evasion which is illegal under foreign law. The individual offender no longer has to be identified as the 'directing mind.' An associated person is widely defined to include an employee, agent or any other person performing services for or on behalf of the company or partnership. This could include contractors, suppliers, agents or intermediaries – lack of a contract does not preclude someone being an associated person.

The jurisdiction in which the corporate or partnership is formed is also irrelevant. Section 46, failure to prevent an equivalent offence under foreign law, applies to UK bodies, foreign bodies who conduct business in the UK, and even foreign bodies where the mere act of facilitation has occurred in the UK.

They are also strict liability offences, meaning that, where tax evasion is found to have occurred, a corporate or partnership will be guilty, unless it can be proven that **reasonable prevention procedures were in place**, or that it was not reasonable for measures to be in place. The latter is highly unlikely in a football club context.

As with the UK Bribery Act it is therefore key that football clubs undertake a proper facilitation of tax evasion risk assessment across its business, considering relevant jurisdictions, and put in place reasonable prevention procedures designed to minimise the risk of its associated

persons facilitating tax evasion. This requires positive action on the part of football clubs.

Alternatively, it will be a defence if demonstrated that the associated person was not acting for or on behalf of the organisation. However, mere ignorance will not be a defence. It is also immaterial whether any benefit was derived from the evasion.

Penalties and Implications

If an associated person is found to have committed an offence under these provisions the corporate could be liable to an unlimited fine and/or other ancillary orders, including confiscation of assets.

Aside from the significant financial implications of a fine, the negative publicity could also lead to other financial concerns, including renounced sponsorship deals. Moreover, being involved in tax evasion, whether proven or merely suspected, could cause severe reputational damage to a club. For any individuals involved, it could have life-long career implications. In addition, it could have significant regulatory implications with The FA and UEFA.

The scope and potential consequences of the offences are therefore vast, and not to be underestimated. HMRC have indicated they will be 'relentless' in their pursuit of tax evaders. Last April's raids on Newcastle and West Ham, spanning England and France, show HMRC's appetite to tackle the problem. Although no prosecutions came from these raids, in light of the new offences, and growing public anger at tax evaders, HMRC are likely to be more diligent than ever.

Risk areas in football

HMRC's chief executive, Jon Thompson, has identified that the most significant tax evasion risk in football is in image rights deals.

Although image rights deals give rise to certain legal tax reliefs, if HMRC see minimal or no commercial benefit arising from the deal, they are likely to become suspicious. Former Hull City player Geovanni is currently embroiled in a tax investigation as it is alleged that he sold image rights to a British Virgin Islands company for the sole reason of avoiding income tax, in an arrangement described by a first instance court as a 'sham.'

Recent figures suggest 181 footballers at 51 Premier League and Football League clubs, and 21 agents, are currently under investigation in relation to such deals.

Additionally, footballers, as employees, are 'associated persons.' As such, when payments are changing hands between clubs and the players, these offences need to be considered. They are equally relevant in relation to any payments made to agents, intermediaries or introducers, which are commonplace transactions in the football world. The tax implications of such payments both in the UK and abroad needs to be carefully considered, particularly if made offshore.

In relation to agents/intermediaries it is commonplace for agents to be paid a commission as a benefit in kind through the player, which in the UK is taxable as a deduction from the gross basic salary. Complications and tax implications can occur if the relationship changes between player and agent or if the player moves on. In addition, FA rules allow for dual or triple representation by agents in a single transaction – issues of the share or split of benefits in kind should be carefully considered.

Another risk factor is the use by players and football club staff of tax avoidance schemes.

Football clubs should take the time during their risk assessments to understand the tax affairs of each and every player, and their agents, to understand where fees are being paid to (jurisdiction) and where tax may be payable.

The new era

Across Europe, and in particular in Spain, there has been a well-documented crackdown on tax evasion. Lionel Messi and Alexis Sanchez have both been convicted in Spain. They received substantial fines, as well as suspended prison sentences. Cristiano Ronaldo and Jose Mourinho are also seeking to settle claims. It would be prudent to assume this is likely to be indicative of HMRC's approach moving forward. Foreign investigations are also likely to tip off UK investigators.

HMRC has issued draft guidance to accompany the new legislation centering around six principles:

1. Risk assessment
2. Proportionality of risk-based prevention procedures
3. Top level commitment
4. Due diligence
5. Communication (including training)
6. Monitoring and review.

Clubs must take steps to ensure that all contracts and roles of intermediaries, agents, players and staff are properly defined so that payments are made after appropriate risk assessments and due diligence.

The idea is that adherence with this guidance should provide a corporate with a sufficient defence. However, as the potential implications are so great, it is prudent to seek specialist support.

The conclusion is therefore simple: get onside or face the risk of potential prosecution. Ensuring adequate preventative measures are in place is the best way to avoid falling foul of the new legislation. Although it may seem onerous, specialist legal advice and support can help reduce the initial burdens and maximise the rigidity of club policies and contracts moving forward. Being proactive is the only way – failure to do so may result in severe and potentially irreversible financial and reputational damage.

At Irwin Mitchell, we have a sports sector team with national coverage and cross-disciplinary expertise. We can help you understand the new legislation and the potential impacts for you and your business, and provide bespoke compliance advice. We can also discuss the provision of training.

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