

Criminal Finances Act 2017 – Beware!



Preface

This Act will have far-reaching consequences across all finance areas

Contributor

Adam Davis QC



The latest attack on Criminal Finances received Royal Assent on April 27, 2017 having passed through the various stages of Parliament. It has far-reaching consequences across all finance and will impact professional advisors and high net worth individuals in many different ways.

The background to this legislation can be found in the October 2015 “UK national risk assessment for money laundering and terrorist financing”, which identified a

number of areas where the regimes could be strengthened. The Government response to that assessment was the “Action plan for anti-money laundering and counter-terrorist finance”, which was published in April 2016. It represented one of the most significant changes to the anti-money laundering and terrorist finance regime in more than a decade. The Criminal Finance Bill gives effect to key elements of that action plan.

The explanatory notes to the Bill indicate the objectives of the bill to be as follows:

“The Criminal Finances Bill seeks to make the legislative changes necessary to give law enforcement agencies, and partners, capabilities and powers to recover the proceeds of crime, tackle money laundering and corruption, and counter terrorist financing. The measures in the Bill aim to improve cooperation between public and private sectors enhance the UK law enforcement response; improve our capability to recover the proceeds of crime, including international corruption; and combat

the financing of terrorism.”

The Bill is in four parts.

- **Part 1** deals with the proceeds of crime, money laundering, civil recovery, enforcement powers and related offences and creates a range of new powers for law enforcement agencies to request information and seize monies stored in bank accounts and mobile stores of value.
- **Part 2** seeks to ensure that relevant money laundering and asset recovery powers will be extended to apply to investigations under the Terrorism Act 2000 (TACT), as well as the Proceeds of Crime Act 2002 (POCA).
- **Part 3** creates two new corporate offences of failure to prevent facilitation of tax evasion.
- **Part 4** includes minor and consequential amendments to POCA and other enactments.

This article looks at two of the most significant aspects of the bill, Pt.1 which amends the Proceeds of Crime Act 2002, specifically creating the concept of unexplained wealth orders (UWO) and Pt.3 which creates the two new offences of corporate failure to prevent the criminal facilitation of tax evasion.

A) Part 1: Unexplained Wealth Order

Sections 362A – 362H are added into POCA, which make provision for the court to make an UWO.

A UWO is defined (s.362A(3)) as an order requiring an individual to set out the nature and extent of their interest in the property in question, and to explain how they obtained that property in cases where that person's known income does not explain ownership of that property. It therefore allows an enforcement authority to require an individual to explain the origin of assets that appear to be disproportionate to their income. Applications for UWOs may be made to the High Court by an enforcement authority. An enforcement authority is defined in s.362A(7), and includes the NCA, the SFO, the CPS, the Public Prosecution Service for Northern Ireland, HMRC and the Financial Conduct Authority.

The High Court may make an order provided it is satisfied that each of the requirements for making or the order is fulfilled (see s.362B). A key requirement is that the value of the property subject to an order is greater than £50,000, it was originally £100,000 but the House of Lords amended the figure after an intervention by Scottish peers. The court must be satisfied that the respondent is a politically exposed person (PEP) or that there are reasonable grounds to suspect that the respondent or a person connected to them is (or has been) involved in serious crime as defined in the act. It is not necessary to prove to the criminal standard that the respondent, or other persons, are involved in such offences. This suspicion need not be restricted to the respondent alone. An order may be made in respect of a person who is (or has been) involved in serious crime if that person is associated with the respondent.

If you cannot prove the origin of the money used in the acquiring of an asset then beware and we will have to watch this space for how these orders are obtained in practice.

B) Part 3: Corporate Offences of Failure to Prevent Facilitation of Tax Evasion

These offences are perhaps the most significant aspect of the legislation for lawyers in private practice. Only relevant bodies (any corporation or partnership) can commit the new offences. They cannot be committed by an individual.

Section 42(1) creates the offence of corporate failure to prevent the facilitation of tax evasion in relation to UK taxes. The offence is committed by a relevant body where a person acting in the capacity of an associated person (employee, agent, contractor, sub-contractor, or consultant) commits a

“
If you cannot prove the origin of the money used in the acquiring of an asset then beware and we will have to watch this space for how these orders are obtained in practice.
”

tax evasion facilitation offence, that is, criminally facilitates another's offence of tax evasion.

However, the associated person does not commit a tax evasion facilitation offence when he or she inadvertently, or even negligently, facilitates another's tax evasion. The facilitation by the associated person must be criminal under the existing law. Section 43 applies to foreign tax offences and applies to relevant bodies incorporated or a partnership formed under UK law. A tax evasion offence is defined in subs.(4), as an offence amounting to a cheat of the public revenue or any offence consisting of being knowingly concerned in or taking steps with a view to the fraudulent evasion of tax. Where the taxpayer is non-compliant or engaged in avoidance (even aggressive avoidance) falling short of fraud the new offence will not be committed.

This offence is clearly aimed at those providing advice in this area and although there are outlined offences, a number of city law firms will need to put into place procedures designed to prevent this from occurring as s.42(2) provides that it will be a defence for a relevant body if they:

- (i) had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or
- (ii) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.

Section 44 provides that Guidance will be published to assist relevant bodies to devise reasonable prevention procedures. The guidance will be provided by the Chancellor of the Exchequer and once that is published Firms will have to adapt accordingly. This involves a whole new area of training to be put in place to ensure that they are not caught by these new provisions and the implications will cause concern for many. ■