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UK reporting obligations and UK Taxation of offshore structures

Gibraltar | November 2017

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CHANGES TO UK TAX

- Election of 2015
- July 2015 announcement
- Many incarnations and drafts
- Finance Bill (No2) 2017 published 8 September
- Finance Bill 2018 published 13 September

REFORMS TO TAX FOR NON-DOMS

Headline changes:

- Non-doms resident in UK in 15/20 tax years deemed domiciled for all taxes
- Individuals born in UK with UK domicile of origin
- New rules for offshore trusts
- Inheritance tax on UK residential property
- Rebasing relief for personal assets
- Untangling relief for personal assets

TAXATION OF OFFSHORE TRUSTS

Depends on:

- source of income
- domicile of settlor
- whether trust is “protected” or not

TAXATION OF OFFSHORE TRUSTS

	INCOME	GAINS	IHT
UK domiciled and resident settlor	Taxed on settlor	Taxed on settlor	Either within settlor's estate or 10 year charge regime
Non-UK domiciled but UK resident settlor	UK source income taxed on settlor	Taxed on beneficiaries	Where non-UK assets outside scope of IHT
Deemed domiciled settlor – with "protection"	UK source income taxed on settlor	Taxed on beneficiaries	Where non-UK assets outside scope of IHT
Deemed domiciled settlor - no "protection"	Taxed on settlor	Taxed on settlor	Where non-UK assets outside scope of IHT (if created when Non-dom)

LOSS OF PROTECTION

Loss of beneficial status for deemed dom settlor if:

- they become domiciled under general law
- settlor born in UK with UK domicile of origin
- settlor adds property
- a settlement ‘connected’ with the settlor adds property

So, what is ‘adding property’?

TAINTING

- **Uncommercial loans from the settlor (one year grace period)**
- **Fixed term loans**
  - No taint where pre April 2017 loan
  - Needs to be repaid on/before repayment date
- **Increasing the value of a trust asset**
- **Loans to settlor – interest rate needs to be official rate or less**

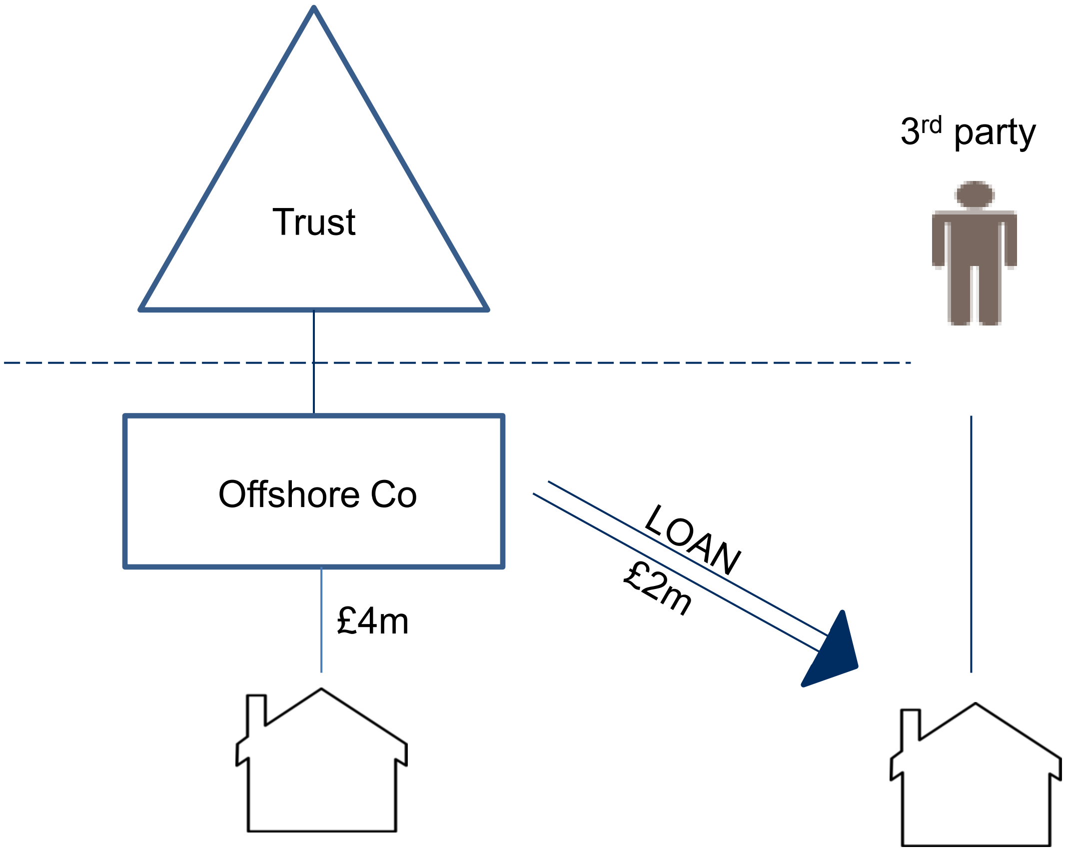
TAINTING

- **Do not:**
  - capitalise interest
  - fail to pay interest on due date/annually
  - vary the loan so that it becomes uncommercial
  - fail to abide by terms and conditions
- **Life tenant fails to draw income entitlement**

EXCLUSIONS FROM TAINTING

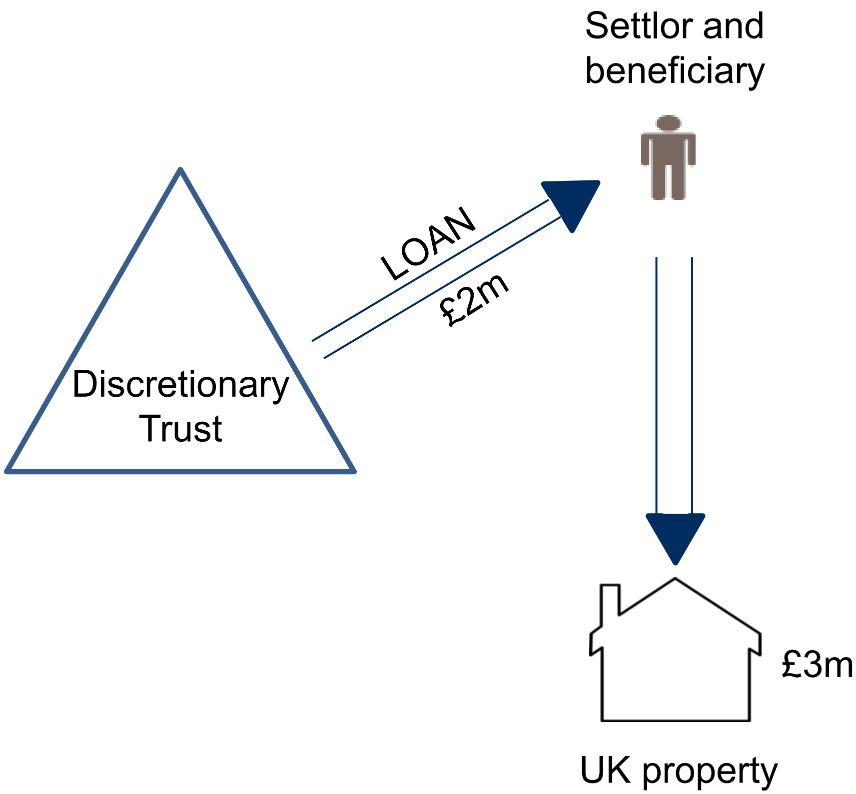
- Settlor entering into arm’s length transaction
- Property or income added pursuant to a pre 6 April 2017commitment
- Property added to pay expenses in excess of income
- Property provided (other than by loan) without gratuitous intention
- Failure by settlor to exercise power of revocation
- Failure to require a payment of dividend from underlying company

UK RESIDENTIAL PROPERTY



- UK residential property owned though companies and loans for the purchase of UK residential property now within scope of IHT:
  - 10 year charge; and/or
  - within estate of settlor
- Obligation to report on trustees where trust involved, on individual where property owned via a corporate

TRIPLE TAXATION ?



- Value of loan from trust:
  - caught by 10 year charge
  - taxed on settlor's death
- Value of property within settlor's estate
- No deduction for loan
- On £3m property the IHT bill is £2m AND £120k every 10 years

EMPLOYMENT BENEFIT TRUST ("EBT") CHANGES

- Draft legislation is included in Finance Bill No2 2017
- A charge to PAYE and NIC will apply to EBT loans outstanding on 5 April 2019
- The charge does not apply to EBT loans taken out before 6 April 1999
- Trustees/ Beneficiaries have an obligation to disclose the existence of the loan to the employer company or, where the employer has ceased to exist, to HMRC

EBT CHANGES

- This legislation will catch those arrangements not currently under HMRC enquiry/ subject to HMRC protective assessments
- Trustees/ beneficiaries should consider how they wish to approach the change ASAP
- HMRC are due to publish settlement terms by the end of this year
- Waiving/ repaying the loans are possibilities, but PAYE/NIC and IHT charges have to be considered
- <u>Head in the sand is not an option</u>. With the introduction of the Requirement to Correct legislation failure to meet the requirements of the new EBT legislation will have additional consequences

IHT TRIP WIRES

Problem assets within excluded property trusts:

- UK assets held at trust level
- Loans to UK resident beneficiaries
- UK residential property
- Loans for acquisition of UK residential property
- Trust established by UK domiciled settlors
- Trusts converted from life interest to discretionary

UK TAX REPORTING ISSUES FOR TRUSTEES

- **Income tax:**
  - UK source income at trust level
  - UK withholding / tax on interest on loans to UK residents
  - Non-resident landlord returns
- **Capital gains tax:**
  - Disposal of UK residential property
  - Form 50 FS

UK TAX REPORTING ISSUES FOR TRUSTEES

Annual tax on Enveloped Dwellings (“ATED”)

- Reporting on disposal of >£500,000 residential property held by companies
- Annual ATED return
- ATED Stamp Duty Land Tax (“SDLT”)

SDLT

- Liability arises on acquisitions of UK real estate

UK TAX REPORTING ISSUES FOR TRUSTEES

Inheritance Tax (“IHT”)

- On creation, exit and 10 year anniversary where settlor is UK domiciled individual
- On creation, exit and 10 year anniversary in relation to UK assets where settlor is non-dom
- On creation, exit and 10 year anniversary of non-dom settlor where UK assets owned directly or UK residential property/loans for acquisition of UK residential property
- Loans to UK resident beneficiaries at 10 year charge date or when loan “forgiven”

UK REGISTER OF TRUSTS

Applies to non-resident trusts where in respect of a given tax year:

- the trust receives UK source income
- has a UK asset where Trustees have incurred liability to:

  a) Income tax
  b) IHT
  c) SDLT or SDRT

UK REGISTER OF TRUSTS

Deadlines for registration:

Taxable event	Scenario	Deadline for registration
IT, CGT	Trusts which: (a) only became liable for IT or CGT for the first time during the 2016/17 UK tax year; and (b) have not previously registered with HMRC using Form 41G	5 January 2018
IT, CGT, IHT, SDLT, and SDRT	Trusts which: (a) were liable for relevant UK taxes in the 2016/17 tax year; and (b) have already registered with HMRC using Form 41G	31 January 2018 (unless the trust was wound up before 31 January 2018, in which case it does not need to be registered on the Trust Registration Service)
IT, CGT	Trusts which become registrable for reasons of UK income tax or CGT during 2017/18 (or subsequent tax years)	5 October 2018 (or 5 October in the relevant tax year)
IHT, SDLT and SDRT	Trusts which become registrable for reasons of IHT, SDLT or SDRT during 2017/18 or subsequent tax years	31 January 2019 or 31 January after the end of the tax year in which the chargeable event occurs (rather than the payment deadline)

UK REGISTER OF TRUSTS

Information to be provided:

- on all settlors
- trustees
- beneficiaries
- protectors
- potential beneficiaries

Need to provide, name, date of birth, NI or UTR, passport number, country of issue and expiry date.

UK REGISTER OF TRUSTS

Provide general information on the trust:

- name
- date created
- statement of accounts describing assets
- country of tax residence
- place of administration
- contact address
- details of agent

Will be penalties for non-compliance

But don't register unless you need to!

FUTURE REQUIREMENTS TO REPORT

Consultation on beneficial ownership register of overseas companies

- Likely to have to register the beneficial owners of corporates undertaking any new property purchases
- One year grace period for properties already held

Equivalent measures in other countries

UK Register will be at Companies House

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REQUIREMENT TO CORRECT

- Introduced in Finance Bill 2017
- Requires correction of errors/irregularities in tax affairs related to offshore matters/offshore transfers
- Punitive sanctions for failure to correct (FTC)
- Deadline for correction 30 September 2018

WHEN DOES FTC APPLY?

- Tax non-compliance is:
    - Failure to notify chargeability to tax
    - Failure to make and deliver a return
    - Delivery of an inaccurate document

(even where there was no deliberate intention to evade tax)

TAX NON-COMPLIANCE

- The tax non-compliance must relate to:
  - Offshore matters
  - Offshore transfers
- Definitions of these are:
  - Offshore matter: tax at stake relates to income arising outside the UK, activities carried on wholly or mainly outside the UK
  - Offshore transfer: not an offshore matter but “applicable condition” is met

HOW CAN THE FAILURE BE CORRECTED?

- Delivering to HMRC the document that should previously have been provided
- Using a facility provided by HMRC to make a disclosure
- Telling an HMRC officer in the course of an enquiry or via another method agreed with HMRC

PENALTIES 1

- Finance Bill sets out the level of FTC penalties as follows:
  - 200% of the potential lost revenue (PLR)
  - 50% of the penalty above for “jurisdiction hopping”
  - 10% asset-based penalty
- Only one asset-based penalty
- Reduction in 200% to reflect quality of disclosure (but not below 100%)

PENALTIES 2

- Expectation from HMRC that taxpayers will “rat” on enablers
- Nil disclosures may be required to present facts relating to technical grey areas
- Penalties as high when initial transgression is inadvertent as for deliberate evasion
- FTC penalties cannot be suspended

DEFENCES

- "Reasonable excuse" for not having made corrections by deadline
- May still suffer "ordinary" penalties for initial non-compliance
- No specific guidance as to what constitutes reasonable excuse

NOT A REASONABLE EXCUSE

- These include:
  - Insufficiency of funds
  - Where reasonable excuse ceases and failure not remedied quickly
  - Reliance on another person who failed to act (unless taxpayer took reasonable care)
  - Reliance on advice which is “disqualified”

DISQUALIFIED ADVICE

Advice is disqualified if:

- Given to the taxpayer by an interested person
- Given to the taxpayer as a result of arrangements made between an interested person/the person who gave the advice
- Given by an individual without the appropriate expertise for giving the advice
- It failed to take account of the taxpayer’s individual circumstances
- It was addressed to/given to a person other than the taxpayer

OTHER SANCTIONS

Publication of information about a taxpayer including:

- Name and address
- Nature of any business
- Amount of penalty and PLR
- Periods offshore non-compliance occurred

In circumstances where:

- PLR exceeded £25,000
- Taxpayer incurs 5 or more FTC penalties

RISKS FOR ADVISERS AND FIDUCIARIES

- Sanctions as enablers

- Corporate criminal offence: failure to prevent the facilitation of tax evasion

CORPORATE CRIMINAL OFFENCE: WHAT IS IT?

- The failure by businesses to prevent the facilitation of tax evasion by employees or “associated persons”.

(An associated person is one who is performing services for or on behalf of the entity when the tax evasion facilitation takes place; e.g. contractors, agents, outsourcers, introducers, customers)

WHO DOES IT AFFECT?

The new failure to prevent the facilitation of tax evasion offence affects:

- Companies
- Partnerships
- LLPs
- Charities

WHERE DOES IT APPLY?

- All businesses both in the UK and elsewhere in respect of the facilitation of UK tax evasion

- Businesses with a UK connection in respect of the facilitation of non-UK tax evasion (NB: there must be dual criminality)

WHY HAS IT BEEN INTRODUCED?

- Attribute criminal liability to business entities
- Bring about cultural change
- Deny opportunities to escape sanctions on basis that senior management were unaware

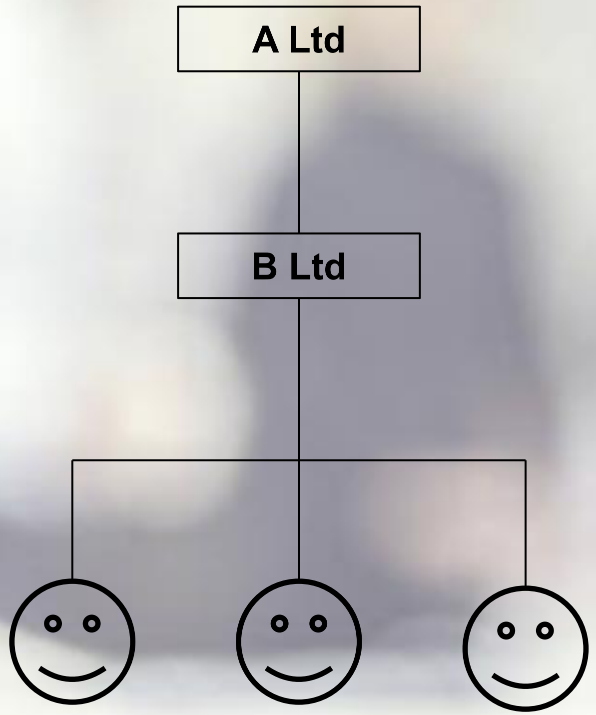
SCOPE OF THE OFFENCES

Three key stages must exist for the legislation to apply:

- Stage 1: Criminal tax evasion by taxpayer
- Stage 2: Criminal facilitation of the offence by an associated person of the business (must be deliberate and dishonest)
- Stage 3: Failure by the organisation to prevent the associated person from committing the offence at Stage 2

EXAMPLES OF OFFENCES 1

Domestic offence

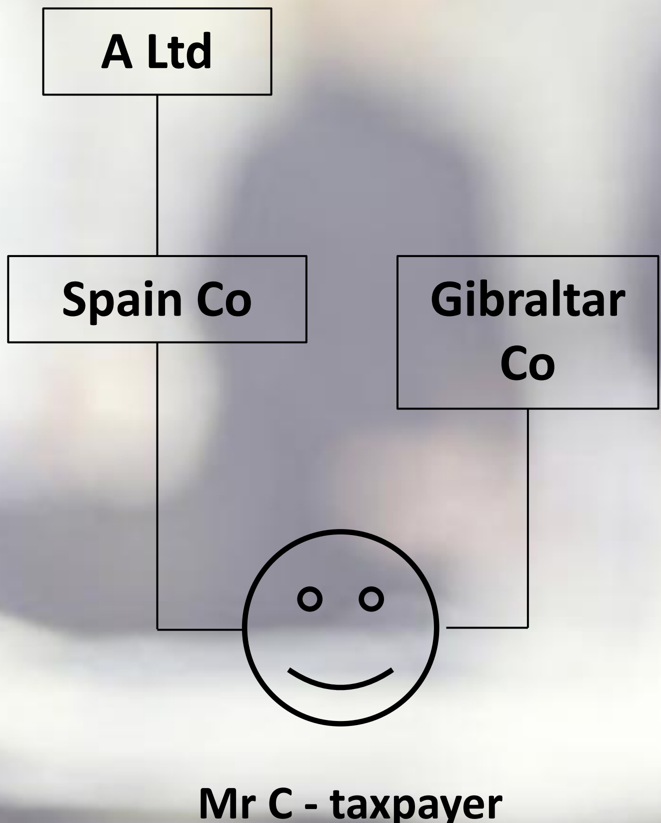


Employees of B Ltd

- A Ltd engages with contractor B Ltd for provision of UK services
- Contractor B is an "associated person" of A Ltd
- Employees of B Ltd fail to declare all of their income for UK tax purposes (Tax evasion - Stage 1)
- B Ltd does not put the payments through the payroll although the payroll manager is aware that the employees are not declaring their income (Facilitation - Stage 2)
- To avoid being treated as having failed to prevent the facilitation of tax evasion (Stage 3), A Ltd will have to show it had reasonable procedures for prevention in place; e.g. risk assessments, specific contract terms, adequate due diligence procedures and ongoing monitoring/review

EXAMPLES OF OFFENCES 2

Foreign offence



- A Ltd contracts with Spain Co as a third party supplier to provide services on behalf of A Ltd
- Spain Co is an “associated person” of A Ltd
- Spain Co engages with Mr C as a contractor
- Mr C asks to be and is paid for services via a company in Gibraltar and does not declare his income in Spain – Stage 1
- Spain Co knows he is not declaring his income in Spain and is facilitating tax evasion in Spain by paying the Gibraltar company - Stage 2
- To avoid being treated as having failed to prevent the facilitation of tax evasion (Stage 3), A Ltd will have to show it had reasonable procedures for prevention in place; e.g. risk assessments, specific engagement terms with Spain Co, adequate due diligence procedures and ongoing monitoring/review

CONSEQUENCES

Investigation:

- UK offence: Investigation by HMRC and potential prosecution by CPS
- Foreign offence: Investigation by SFO or NCA and potential prosecution by SFO or CPS

Sanctions:

- Unlimited fines
- Confiscation orders/serious crime prevention orders
- Loss of licences/opportunity to bid for public contracts
- Reputational damage
- Job losses

HMRC GUIDANCE

HMRC have set out six guiding principles for applying the defence that a business had reasonable prevention procedures:

- Risk assessment
- Top level commitment
- Due diligence
- Proportionality
- Communication and training
- Monitoring and review

ACTION REQUIRED 1

- Assess the nature and exposure of risk of associated persons facilitating tax evasion
- Commit “from top” to prevention/foster culture where facilitation is never acceptable
- Carry out due diligence: document who are associated persons and risks arising. What are opportunities to reduce risk?

ACTION REQUIRED 2

- Devise prevention procedures to take account of nature of business, complexity and level of supervision over those acting on its behalf
- Communicate prevention policies and procedures throughout the business including appropriate training
- Monitor and review policies and prevention procedures to accommodate changing risks and improve where necessary

SUMMARY

- FTC penalties are enormous
- Advisers/fiduciaries have own risks
  - Enabler legislation
  - Corporate criminal offence
- Health-checks and remedial action vital

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