

Going for gold?

Are you aware of the Criminal Finance Act 2017? If not, you should be, says Gary Brothers

Don't worry if you're not aware of it (well only for now) as you are in good company – a recent Ipsos Mori poll commissioned by HMRC reported that only a quarter of all businesses surveyed were even aware of the Criminal Finance Act 2017. And only 24% had assessed the potential risk of being exposed to the facilitation of tax evasion by their business.

So, what is it?

The Criminal Finances Act 2017 amends the Proceeds of Crime Act 2002 to expand the provisions for confiscating funds to deal with terrorist property and the proceeds of tax evasion. The Act received Royal Assent on 27 April 2017 and so is effective now and has been for some time.

Initially, the Act received much coverage in the professional accountancy and legal press as it introduced new corporate offences of failing to prevent the facilitation of tax evasion, meaning that now, for the first time, organisations (Companies and Partnerships) could be criminally prosecuted for the conduct of their staff or agents.

Three years on, has it been forgotten?

Admittedly, HMRC's criminal use of its 'new toy' has been underwhelming. While refusing to give full details to Freedom of Information Act requests, other than the barest of minimums, HMRC recently disclosed that there were "less than 5" current criminal investigations under way using the powers contained within the Criminal Finances Act 2017.

This article, however, is not about that corporate offence, but is rather about HMRC's civil use of the powers within the Act, which is altogether more active and interesting.

If there is any discernible pattern of increased investigation and enforcement activity by its specialist and ever-active Fraud Investigation Service, then HMRC appears to be seeking civil, non-criminal remedies, using these powers. Perhaps this is understandable, as that civil environment is an environment that HMRC's Officers are more comfortable operating within, as opposed to the criminal sphere.

In a recent BBC article, it was reported that eight gold bars, weighing as much as "an adult Staffordshire bull terrier" and worth an estimated £750,000, were seized from a Dubai-bound passenger at Manchester Airport in November 2018. The BBC went on to report that the gold bars, hidden in a lunchbox when they were discovered, were to be sold at auction in September 2020. Interestingly, for a 'criminal' power, the passenger was not prosecuted, but HMRC were quoted by the BBC as saying they had "applied for forfeiture of the bars" in the first use of its civil proceeds of crime powers under the Criminal Finance Act.

What many advisors seem unaware of is that, through the powers introduced by the Criminal Finance Act, and the amendments then effected to the Proceeds of Crime Act 2002 (or the 'PoCA') as a result, HMRC (and other law enforcement agencies) have now obtained the power to seize, under PoCA, assets of interest to them and then for those assets to be further the subject to forfeiture to HMRC, without the need for any underlying prosecution. The same powers already applied to cash seized under PoCA and advisors may have had experience of that.

This is yet another area where financial investigation powers are being afforded to HMRC, who continue to push at the boundaries of what they perceive is unacceptable tax evasion activity. The challenge for many of us in practice, of course, is that where a subjective judgement is needed – as in "is this tax evasion or not?" – we are sometimes left wondering at HMRC's ability to make that judgement objectively.

HMRC is, of course, a multi-faceted organisation dealing with both the administration of the tax system on the one hand and also any 'attacks' on it through the fraudulent evasion of taxes on the other, and so this power is a further regulatory tool in a growing armoury. But, as ever, care needs to be taken that HMRC are suing it proportionately and for the purposes intended.

The challenge for advisors in PoCA cases, where the Criminal Finance Act underpins HMRC's activity, is that 'proceeds of crime', cash or higher high value assets, can be routinely and relatively easily seized by HMRC if

HMRC believe them to be a product of criminal conduct. Given that tax evasion is criminal conduct, it is hard to see why HMRC would not use the new power regularly.

Advisors will no doubt be well aware that HMRC's Fraud Investigation Service appear to be among the busiest and most active arms of HMRC currently. For example, a recent Freedom of Information Act request revealed that HMRC has increased its use of account freezing orders by 177% on the previous year and forfeiture orders were up by 379% on the previous year.

The language and publicity around Unexplained Wealth Orders might catch the eye when stories of extravagant spending sprees in Harrods hit the press, but it appears that HMRC has woken up to the opportunity and is also increasingly using their various new civil PoCA powers, along with increasingly reaching for freezing orders. Readers might recall the recent publicity in connection with HMRC's first furlough fraud criminal case, when the alleged perpetrator was arrested in a dawn raid? In the same reporting it was revealed that HMRC had frozen funds held in a bank account relating to the business of the 57-year-old person concerned.

If that case is indicative of HMRC's thinking, we can only expect that HMRC's PoCA powers, and their use of them, are likely to become more active, routine and visible in the near future as HMRC gear up to tackle those suspected of defrauding the coronavirus furlough scheme and the other coronavirus support measures.

As ever, expert help is always recommended and is on hand.

Dealing with an ever increasingly active regulator in HMRC, across multi-disciplinary areas and agenda, requires a specialist eye and an experienced approach, and those impacted should be advised to take specialist advice at the earliest opportunity.

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