

# Tax offences and AML in the British Virgin Islands

Tax crimes are predicates for money laundering in the British Virgin Islands (**BVI**).

## Taxation in the BVI

The BVI has no capital gains tax, corporate tax, gift taxes, inheritance taxes, sales taxes or value added taxes.

Even though the BVI is a “zero tax” jurisdiction in respect of international business, there are other forms of taxation and revenue that are collected by the BVI Government in the form of payroll tax, stamp duty, land and house tax, customs duties, various European Union withholding tax and other miscellaneous taxes that apply to vehicles, hotels, petroleum, passengers and charters.

## Tax offences in the BVI

It is important at the very outset to distinguish between what is tax evasion and tax avoidance. Tax evasion is the illegal evasion of taxes by individuals, corporations and trusts. In contrast, tax avoidance is the legal use of tax laws to reduce one’s tax burden.

Conduct that amounts to tax evasion would under the Proceeds of Criminal Conduct Act 1997 (**PCCA**) and its associated legislation amount to “criminal conduct” and any monies that accrued from such criminal conduct would constitute, for the purposes of the PCCA, the “proceeds of criminal conduct”.

Importantly, under the Criminal Code 1997, fraud is a statutory criminal offence. The offence of fraud also has sub-offences such as:

- Obtaining a pecuniary advantage by deception
- Dishonestly dealing, concealing or falsifying any account or record or document made or required for an accounting or other purpose

Under the PCCA, a perpetrator could be charged with various offences such as:

- Assisting another to retain the benefit of criminal conduct
- Acquisition, possession or use of proceeds of criminal conduct
- Concealing or transferring proceeds of criminal conduct
- Tipping off

These offences, under the PCCA, carry significant monetary penalties and custodial sentences. In a corporate context, where an offence has been committed by a body corporate, the liability of whose members is limited, any person who at the time of the commission of the offence was a director, general manager, secretary or other such person who was purporting to act in any such capacity is liable to be prosecuted as if he had personally committed that offence and is liable to the conviction and punishment as if he had personally been found guilty of that offence. Court prosecutions under the PCCA regime do occur as was the case in *R v IPOC International Growth Fund Limited* (BVIHC 12/2008).

## The BVI’s regime to deal with tax evasion

The BVI is an active participant in the Financial Action Task Force and is a member of the regional sub-division of the Caribbean Financial Action Task Force. In consequence, the Government of the BVI continues to play a very important role in the international fight against tax evasion. To this extent, there are various notable developments that have taken place in this area from a legislative perspective:

- Enactment of the Beneficial Ownership Secure Search System Act 2017, which established a networked register of beneficial ownership information for BVI companies in order to implement the framework exchange of notes

agreement entered into with the United Kingdom in April 2016

- Enactment of the Criminal Justice (International Cooperation) (Enforcement of Overseas Forfeiture Orders) Order 2017, which updated and repealed equivalent measures from 1996 in order to provide a cutting edge framework for cooperation in the processing of forfeiture orders between the BVI and overseas courts, police forces and other regulatory authorities
- Enactment of the Proceeds of Criminal Conduct (Enforcement of External Confiscation Orders) Order 2017 and the Drug Trafficking Offences (Enforcement of Overseas Confiscation Orders) Order 2017, which cumulatively updated and expanded the BVI's regime for the enforcement of confiscation orders issued by overseas courts and authorities
- Enactment of the Terrorist Asset Freezing Etc Act 2010 (Overseas Territories) (Amendment) Order 2017, which enhanced cooperation powers between the UK and the BVI in listing persons for the purposes of freezing orders under the terrorist financing regime
- Strengthening of the obligations on BVI institutions that rely on eligible introducers under the Anti-Money Laundering and Terrorist Financing (Amendment) Code of Practice 2015 and the Anti-Money Laundering (Amendment) Regulations 2015

In the BVI, the Financial Investigation Agency (**FIA**) as a full Egmont Group member maintains constant dialogue with law enforcement authorities in other Egmont jurisdictions. The BVI Government acting with and through the FIA have signed numerous agreements (both on its own and through the UK) providing for extradition of individuals, cooperation with Interpol, cross-border assistance in criminal investigations and prosecutions and the implementation of EU restrictive measures and the United National sanctions regime.

The International Tax Authority is another BVI competent authority that handles tax matters and works with sister regulators on a global basis to facilitate mutual exchange of tax information relating to individuals and corporate vehicles. The BVI has:

- Enacted legislation in the form of the Mutual Legal Assistance (Tax Matters) Act 2003

- Entered into 28 bi-lateral tax information exchange agreements with various other countries
- Had the Convention on Mutual Administrative Assistance in Tax Matters extended to it by the UK and as such is a member to the CMAATM along with the other 136 jurisdictions
- Entered into bilateral competent authority agreements for the purposes of country-by-country reporting
- Enacted legislation for the purposes of the US Foreign Account Tax Compliance Act and the UK Crown Dependencies and Overseas Territories (UK FATCA/CDOT), which was superseded by the common reporting standards (**CRS**)
- Entered into multilateral competent authorities' agreements and enacted legislation relating to the CRS
- Most recently, enacted legislation to deal with the base erosion and profit shifting regime

To the extent there are breaches of these regimes, there are monetary fines and various regulatory administrative fines that can be imposed.

The above is just a summary of the measures that the BVI has taken to demonstrate its commitment to the international standards and policies regarding tax evasion.

## Recognising indicia of tax evasion and what steps to take

Entities that operate under different regulatory regimes have different risk appetites for dealing with matters relating to tax evasion, money laundering, terrorist financing and proliferation financing. These all share common characteristics, eg money launderers will in most instances seek to "disguise" proceeds of criminal conduct and "wash them clean" while tax evaders seek to conceal assets from detection.

In order to recognise when tax evasion might be taking place, financial institutions will need to have:

- Robust internal systems and controls
- An enhanced customer due diligence system
- Good record keeping policies and procedures
- Adequate employee training
- Suspicious transaction reporting

Having these in place is critical to detecting when there is likely to be some element of tax evasion taking place and knowing when to report this to the appropriate competent authority.

Training of staff is key to spotting when there might be some element of tax evasion taking place as staff of a financial institution will more likely than not be the first persons that are contacted by the perpetrator. Constant monitoring and screening will need to take place.

The following is a non-exhaustive list of indicia that can highlight tax evasion by a customer. These are only examples and financial institutions would be urged to assess each case utilising a risk based approach with the assistance of any risk matrixes that may have been established as relevant to the unique business model.

### *Customer structure*

- Uncommon structures or overly complex layered structures where a clear commercial purpose is not justifiable
- Structures that are designed to conceal information or make it difficult so that the beneficial owner information cannot be discerned
- An unusually large number of entities
- Using nominee title holders where there is no sound commercial purpose
- No professional tax advice taken to support the structure

### *Suspicious transactions*

- A series of transactions involving amounts below the reporting thresholds
- Split transfers or withdrawals under the cash transaction thresholds
- Frequent wire transfers without commercial purpose
- Deposit of funds into a nominee's name
- Circular transactions where funds are reinvested into the originator jurisdiction after being deposited in a foreign entity (with no record keeping requirements)
- Level of transaction not commensurate with the customer profile

### *Customer identification*

- Failing to disclose citizenship(s) or tax domicile
- Undisclosed nexus of customers
- Business not located where the customer lives
- National or resident of a high tax jurisdiction

### *Hold mail*

- Request for hold mail service without good reason

- Permanent hold mail arrangements
- Hold mail not collected for an extended period of time

### *Customer interaction*

- Insistence that the customer not be contacted by the financial institution
- Refusing to accept contact or communication from the financial institution
- Account opening takes place where the customer is only visiting the jurisdiction temporarily

### *Source of funds*

- Unable to disclose source of funds or source of wealth
- Source of funds is not explained
- Customer cannot confirm that the source of funds/wealth has been declared to the tax authority

Where these sorts of activities are spotted, the necessary reporting channels (either internal or external) should be immediately followed to ensure that there is no breach of the applicable law and regulation relating to tax offences. It is important to bear in mind that where there is a suspicion that tax evasion is taking place the person who has formed that suspicion is subject to various anti-tipping off requirements and breaching this is an offence under the PCCA.

### *Defences*

In certain cases, where a prosecution results there are certain limited defences that can be relied upon, for example:

- A party may have a defence if it disclosed the act concerned to the FIA and obtained and acted under some type of consent in aid of a law enforcement function
- A defence may arise where a party can show that it acquired, transferred, used or possessed the property for adequate consideration
- A statutory defence is created where a party reports a suspicious transaction to the FIA. A party may also have a defence where it can show that it did not know or had reasonable grounds to know or suspect that another party was engaged in money laundering

Documentary evidence should be kept in relation to:

- All transactions carried out by or on behalf of the perpetrator (eg records sufficient to identify the source and recipient of payments from which the investigation authorities will be able to compile an audit trail for suspected tax evasion)
- All reports made to the FIA
- All inquiries relating to the matter received by the FIA

## Concluding thoughts

The BVI authorities have a range of regimes on which tax evasion may be investigated and prosecuted. The AML regime has, for many years, entertained the notion that a person that commits tax fraud or evasion can be prosecuted under the BVI's AML regime.

As the drive for ever greater transparency gathers pace, through automatic exchange of tax information, beneficial ownership registers and other initiatives, it will be ever more important for financial institutions to ensure that they have sufficient and appropriate internal controls, policies and procedures and that their systems are up to the task in querying and identifying illicit activities and, where appropriate, reporting them to the authorities.

*This article first appeared in [Money Laundering Bulletin](#).*

---

© Harneys, September 20

Harneys is a leading international offshore law firm. From locations around the globe, Harneys advises the world's top law firms, financial institutions and corporations on the laws of British Virgin Islands, Cayman Islands, Cyprus, Luxembourg, Bermuda, and Anguilla. For more information about Harneys please visit [harneys.com](http://harneys.com) or contact us at [marketing@harneys.com](mailto:marketing@harneys.com).

The foregoing is for general information only and not intended to be relied upon for legal advice in any specific or individual situation. Bermuda legal services are provided through an association with Zuill & Co which is an independently owned and controlled Bermudian law firm.