

EXCLUSIVE EXPERT VIEW: UK Tax Authority Increasingly Takes Criminal Route

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- Kingsley Napley

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News Analysis

This article is by authors David Sleight (partner) and Edmund Smyth (solicitor), who work in the criminal litigation department of [Kingsley Napley](#). This publication's editors do not necessarily endorse all the views by such guest contributors but is delighted to have their expert contribution on a complex topic and invites readers to respond.

Like all things in life, prevention is generally better than cure and dealing with Her Majesty's Revenue and Customs in respect of personal tax affairs is no exception. A priority for all individuals and advisors is to make sure that you/your clients are not accused of evading tax.

However, the complexity of personal tax regulations combined with an increasingly aggressive approach by HMRC means that a growing number of individuals are finding themselves at the sharp end of a criminal investigation. Last week Thomson Reuters reported that the number of criminal prosecutions for tax evasion had jumped by almost a third year on year (795 prosecutions in 2013-14, up from 617 in 2012-13), with HMRC anticipating 1,165 prosecutions in 2014/15 - ie a 46 per cent increase this year to hit its target. This article seeks to explore the reasons for this trend and to suggest an appropriate response in the unwelcome event that HMRC puts your or your client's affairs in the spotlight.

It is plain that since the global financial crisis in 2007 and the resultant austerity there is political capital to be gained by appearing to pursue tax evasion more assiduously than before. "We are all in it together" [to coin a political phrase] means the tax authorities have been given enhanced budgets, and in some cases powers, to present a public display of aggression. The public mood regards with cynicism agreements or settlements (often described as "cosy") between the revenue and large taxpayers which are perceived as lacking in transparency. Additionally, there is the financial reality of a £35 billion (\$56.5 billion) tax gap (the difference between the amount owed to the Treasury and how much it actually collects). In fact some observers believe the gap may be closer to £70 billion.

HMRC is therefore under growing pressure to consider more actively the criminal route – which more readily allows for punitive penalties – as a means of resolving tax disputes.

The drive to increase the number of tax-related prosecutions is a global trend but in the UK stems from the 2010 Spending Review, which provided HMRC with the funds to significantly expand its criminal investigation wing, by up to 250 officers and investigators. In order to justify the extra spending, targets were set for the number of prosecutions to be brought in subsequent years; from 365 in 2011/12 increasing substantially to 1165 in 2014/15. There is understandable concern that in order to meet these targets that HMRC will choose to prosecute in cases where previously a civil remedy would have been sought. Simultaneously, the target and budget-driven climate is complemented by a narrowing of the paths to alternative, non-criminal disposals and the armoury

available to investigators and prosecutors is enhanced.

An example which evidences this change in approach is that of the Code of Practice (“COP9”) procedure. On 1 July 2014, HMRC reformed its Contractual Disclosure Facility (CDF) under COP9, to remove from those suspected of tax fraud the option of “denial” (which despite its name in fact involved engagement and cooperation), leaving only the stark choice for the suspect between on the one hand admitting fraud and entering into a contractual agreement to make full disclosure, and on the other refusing cooperation and inviting prosecution. In circumstances where HMRC’s suspicions are based on a misunderstanding or a mistake – sadly not unusual – the denial route established a formal structure for dialogue and allowed the innocent taxpayer the opportunity to cooperate with HMRC to achieve a satisfactory outcome. Now, refusal to participate in a CDF makes a criminal investigation – and all that comes with it (interviews under caution and so on) – all but inevitable. It is hard to see how this reform was intended to achieve anything other than an increase in prosecutions.

Tax offence

A further significant development is the ongoing consultation by HMRC (closing on 31 October) on a new tax evasion offence designed specifically to address taxpayer funds held offshore. The consultation is clear that the new offence will be one of strict liability and views are not sought on other standards of liability or intent. This means there is no requirement for the individual concerned to have intended not to pay tax, the mere fact of failing to declare taxable offshore income will make the offence complete. Whereas previously the tax authorities, when considering prosecuting an individual, were limited to the offences of cheating the revenue, offences under the Fraud Act 2006 or fraudulent evasion of income tax (s106A Taxes Management Act 1970) all of which required proof of mens rea (guilty intent), now they will have the option of a far simpler rule to prove a more broadly applicable offence. While the consultation document insists that overtly fraudulent cases will still be dealt with appropriately it will surely be irresistibly tempting for revenue officials to “downgrade” certain forms of conduct in return for a greater chance of a successful prosecution.

So what can an individual, or their advisor, do if they find themselves or their client under scrutiny by a potentially criminal HMRC investigation? The absolute first step is to seek expert legal advice. Criminal investigations require a completely different approach to civil inquiries or tax tribunals, and while the costs of getting those processes wrong can be high in monetary terms, they pale into insignificance when set aside the consequences of a criminal conviction; imprisonment; confiscation of assets; punitive financial penalties and often irreparable damage to reputations.

All is not lost once a criminal investigation has started. Through strategic negotiation the possibility remains of diverting a matter back to a civil path to settlement, or indeed of persuading HMRC that there is insufficient evidence to support a criminal prosecution. Such negotiation requires a delicate and careful approach. There is often a temptation on behalf of individuals to be too forthcoming as they attempt to prove their innocence. However, it is imperative to retain control over the process and over the amount of information provided to the authorities – it is after all for the authorities to prove the case against the individual not the other way round. Equally, adopting an overly defensive or confrontational approach may also be counterproductive. Having experts on your side with a track record of advising in a criminal investigation is therefore paramount; it can be the difference between facing criminal charges or not.

There are sadly no precise figures available for the number of criminal investigations pursued against the number of eventual criminal prosecutions. Anecdotally, we have found that it is often possible to

stop an investigation before it reaches the prosecution stage. Yet that is cold comfort to those who want to avoid the glare of the HMRC spotlight altogether. However, advisors and individuals need to be alert to HMRC's new emphasis on criminal investigation as part of its overall enforcement strategy given the consequences involved.

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