

Letter to HMRC – COP 9

Dear Inspector,
We write to highlight a particular issue that has been a cause for concern for tax investigations practitioners and, perhaps more particularly, for their clients for some time. The issue is the length of time that it takes to obtain confirmation of the application of Code of Practice 9 Civil Investigation of Fraud (CIF) procedures in circumstances where criminal prosecution by HMRC will generally be considered.

HMRC's Criminal Investigation Policy states as follows:

'It is HMRC's policy to deal with fraud by use of the cost-effective Civil Investigation of Fraud procedures, wherever appropriate. Criminal Investigation will be reserved for cases where HMRC needs to send a strong deterrent message or where conduct involved is such that only a criminal sanction is appropriate.'

However, the Policy makes it clear that HMRC reserves complete discretion to conduct a criminal investigation in any case and to carry out these investigations across a range of offices and in all the areas for which HMRC has responsibility.

By way of example, the Criminal Investigation Policy states that HMRC 'will generally consider commencing criminal rather than civil investigations' in the following circumstances:

- in cases of organised gangs attacking the tax system or systematic frauds where losses represent a serious threat to the tax base, including conspiracy;
- where an individual holds a position of trust or responsibility (for example, trustees, professional advisers, public office holders or elected representatives);
- where materially false statements are made or materially false documents are provided in the course of a civil investigation;
- where pursuing an avoidance scheme, reliance is placed on a false or altered

James Bullock of McGrigors LLP and Paul Roberts of Grant Thornton LLP write an open letter to HMRC to ask it to reconsider its procedure for clearance of potential prosecution cases into Code 9

document or such reliance or material facts are misrepresented to enhance the credibility of a scheme;

- where deliberate concealment, deception, conspiracy or corruption is suspected;
- in cases involving the use of forged documents;
- in cases involving importation or exportation breaching prohibitions and restrictions;
- in cases involving money laundering, with particular focus on advisers, accountants, solicitors and others acting in a 'professional' capacity who provide the means to put tainted money out of reach of law enforcement;
- where the perpetrator has committed previous offences or there is a repeated course of unlawful conduct or previous civil action;
- in cases involving theft, or the misuse or unlawful destruction of HMRC documents;
- where there is evidence of assault on, or threats to, or the impersonation of HMRC officials; or
- where there is a link to suspected wider criminality, whether domestic or international, involving offences not under the administration of HMRC.

In any of these situations, where a practitioner has been approached by a client whose offence involves one or more of these characteristics, the practitioner will sensibly advise the client to take legal advice. The upshot of the legal advice is likely to be that the taxpayer should make an outline disclosure and request CIF. In the event that CIF is approved, the practitioner will then in all likelihood advise the client to make a full disclosure

in accordance with the terms of CIF. In situations where CIF is not approved, the adviser and client will have to assume that a criminal investigation will be commenced and the client will then need to take urgent legal advice.

It should be noted that in making an outline disclosure, the adviser will have to provide HMRC with the name of the taxpayer and disclose the nature of the taxpayer's irregularities. The provision of these details is likely to amount to a partial confession, by virtue of which the taxpayer waives his privilege against self-incrimination under English law and under the European Convention on Human Rights, Article 6.

However, it is clearly very much in the interests of HMRC to encourage taxpayers finding themselves in one of the above situations to request CIF by making such an outline disclosure (notwithstanding the risk of prosecution) on the basis of HMRC's statement that its policy is to use the 'cost-effective' CIF procedure – even in the circumstances described above. We also note that HMRC states: 'when considering whether a case should be investigated under the Civil Investigation of Fraud procedure or is the subject of a criminal investigation, one factor will be whether the taxpayer has made a complete and unprompted disclosure of the offences committed'.

Until 2002 it was a relatively common practice of what was then the Inland Revenue's Special Compliance Office (SCO) to give clearance for the availability of CIF (then known as Code of Practice 9 or more colloquially *Hansard*) on a 'no names' basis. This practice was withdrawn (somewhat informally, but



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definitively nonetheless) in the course of that year – some time prior to the decision of the Court of Appeal in *R v Gill and Gill* [2003] EWCA Crim 2256 and the subsequent revision of *Hansard* into the CIF procedure in 2005.

In 2005, Special Civil Investigations (SCI) was created to replace both SCO



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- the circumstances are *not* such that HMRC would wish to prosecute.

We also appreciate that this process might involve the need for the Criminal Investigation Unit to confer with the Revenue & Customs Prosecutions Office, which is of course a separate body from HMRC. However, the stress caused by

recognise that such a swift turnaround is not achievable in practice in every case, or even in the majority of cases, but a period of at least two weeks or potentially six weeks or longer is simply too long if the system is to be credible.

Accordingly, we make the following suggestions about streamlining CIF requests.

- In all cases, prosecution risk should be dealt with by SCI – and ideally by a dedicated team in direct consultation with the resource that has now been established within the prosecution group.

- SCI should provide a guaranteed ‘response time’ for a decision as to the availability of CIF. Within that period, SCI can either give that confirmation (or not) or state that it needs more time in order to provide the confirmation. This would bear a similarity to the procedures used by SOCA in relation to anti-money-laundering reports. Based on our experience, it ought to be possible to guarantee an answer within one week in 90% of cases.

- We suggest that it is high time that HMRC consulted with other prosecuting authorities as regards developing a common framework when the conduct of a taxpayer also involves the commission of non-tax offences. In such cases, at present, before deciding to issue CIF, HMRC may liaise with other prosecuting authorities to check those other authorities’ intentions as regards the taxpayer making the disclosure. There is no formal confirmation that those other authorities will not proceed with a prosecution, however, even if they are content at that stage for CIF to be granted. Hence, the taxpayer risks providing information in his or her CIF report that could subsequently be passed to those other authorities. While it is possibly the case that such a taxpayer could have the information from the report ruled inadmissible in any ensuing trial of the wider offences, the position is by no means free from doubt. This issue can and does provide a deterrent to taxpayers from coming forward to seek CIF, and it is in everyone’s interests to find a solution that encourages disclosure and the use of CIF procedures.

We look forward to hearing HMRC’s thoughts.

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and the former HM Customs & Excise Civil Evasion teams. From 2005 we have seen the creation of CIF teams, operating outside SCI, within HMRC local offices. These CIF teams have increasingly run all but the largest and most complex cases under CIF.

Whether or not as a result of these changes, taxpayers who fall within one or more of the prosecution categories increasingly seem to be experiencing significant delay in securing decisions from HMRC as to whether CIF is available. We fully understand that HMRC’s internal processes need to be complied with and that these processes will inevitably involve SCI or the CIF teams checking with colleagues in HMRC’s Criminal Investigation Unit for confirmation that:

- a criminal investigation into the taxpayer in question is *not* already in progress; and

an unreasonable delay can frequently lead to taxpayers subsequently adopting a more defensive and less cooperative attitude, thus potentially impeding the CIF procedure.

More pertinently, the situation gives rise to an obvious issue for professional advisers advising the taxpayer, who will be asked how long it will take before they hear that CIF has been given. The inability to give a precise answer to this question could potentially make taxpayers more reluctant to make voluntary disclosures, and causes extreme anxiety about the likelihood of prosecution in cases where the delay stretches beyond that which the adviser may have anticipated.

Without wishing to hark back to the ‘good old days’, we can remember cases of this type where the requisite confirmation from the then SCO could be obtained within 72 (if not 48) hours of the outline disclosure being made. We fully