

HMRC's Criminal Investigation Policy (Lecture P1270 – 16.47 minutes)

This article considers HMRC's criminal investigation policy. Most advisers are unlikely to experience one of their clients being subject to a criminal investigation by HMRC. An awareness of the policy may mean that you are even less likely to experience such an occurrence during your professional career.

Why does HMRC have a criminal investigation policy?

The first point to note is that HMRC is not a prosecuting authority. In suitable cases, HMRC will conduct the criminal investigation, but the prosecution will be handled by the relevant prosecuting authority. In England and Wales prosecutions are undertaken by the Crown Prosecution Service; in Scotland they are undertaken by the Crown Office and Procurator Fiscal Service; in Northern Ireland the responsibility is with the Public Prosecution Service Northern Ireland.

HMRC does not have the resources to undertake criminal investigations into every taxpayer who is suspected of fraud, or other criminal offences. In addition, such investigations tend to take longer than civil investigations. Another consideration is that there is a higher burden of proof in criminal investigations (where the case must be proved beyond all reasonable doubt, rather than the civil standard, which is the balance of probabilities. Instead, HMRC operates a selective policy as to the circumstances in which it will conduct a criminal, rather than a civil, investigation. This provides HMRC with the necessary flexibility to manage its resources, and to reserve criminal investigations for the most suitable cases.

Consideration of the policy

HMRC publishes its criminal investigation policy, which can be accessed at: <https://www.gov.uk/government/publications/criminal-investigation/hmrc-criminal-investigation-policy>.

The policy makes it clear that criminal investigations are an important part of HMRC's overall enforcement strategy. The policy also states that HMRC's preference is to deal with cases of fraud using their civil fraud investigation procedures (under Code of Practice 9, the Contractual Disclosure Facility). Details of that process can be found in a separate session. HMRC reserves criminal investigation for cases where they need to send "a strong deterrent message or where the conduct involved is such that only a criminal sanction is appropriate". This is encouraging news, as, although the civil penalties can be substantial, the prospect of a criminal conviction, a custodial sentence and punitive confiscation proceedings can be far less attractive.

However, under the policy, HMRC "reserves complete discretion to conduct a criminal investigation in any case and to carry out these investigations across a range of offences and in all the areas for which the Commissioners of HMRC have responsibility".

The policy gives the following examples of the kind of circumstances in which HMRC will generally consider starting a criminal, rather than civil, investigation:

- in cases of organised criminal 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;

- 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 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 false or forged documents;
- in cases involving importation or exportation breaching prohibitions and restrictions;
- in cases involving money laundering with particular focus on advisors, 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, threats to, or the impersonation of HMRC officials;
- where there is a link to suspected wider criminality, whether domestic or international, involving offences not under the administration of HMRC.

HMRC does not provide details of all the factors that are taken into consideration when deciding whether to pursue a case as a criminal or civil investigation. The policy does refer to one factor, and that is whether the taxpayer has made a complete and unprompted disclosure of the offences committed. Where fraud has been committed by a taxpayer, careful handling is required to ensure that the case is started, and remains, under the civil fraud investigation procedures. Advisers should note that the policy does not make reference to the issue of materiality, and that is reflected in recent prosecutions, covered below.

The policy ends by noting that HMRC "may observe, monitor, record and retain internet data which is available to anyone". It is a suitable reminder that HMRC will use information gleaned from internet sites, blogs and social networking sites (where no privacy settings have been applied), and other 'open source' material, as part of its investigative activities.

Recent prosecutions

I have looked at several recent prosecutions involving tax fraud. These reflect the diverse approach that HMRC seeks to achieve by its criminal investigation policy. They also demonstrate that materiality is not a consideration, and neither is the age of the taxpayer, when HMRC decide how to conduct a case. With relatively few prosecutions for tax offences, advisers should be able to prevent their clients becoming another prosecution statistic where fraud is established, providing they take a pro-active approach, and specialist advice, to navigate the pitfalls that await.

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