

Code of Practice 9 investigations (Lecture P1245 – 12.58 minutes)

What is Code of Practice 9?

Where HMRC suspect tax fraud they may conduct either a criminal or civil investigation, and they maintain complete discretion as to which route they will use. Criminal investigation is usually reserved for cases where only a criminal sanction is considered appropriate, or where HMRC considers that it needs to send a deterrent message. Code of Practice 9 is HMRC's process for the civil investigation of suspected fraud cases. HMRC do not have the resources to conduct criminal investigations in all cases of suspected fraud, hence Code of Practice 9 provides an option for dealing with those cases.

The basic premise is that Code of Practice 9 provides taxpayers with immunity from prosecution for tax offences, in return for a full and complete disclosure.

The Contractual Disclosure Facility

The latest incarnation of Code of Practice 9 is the Contractual Disclosure Facility, which was introduced on 31 January 2012. There was a revision to the terms of the Contractual Disclosure Facility from June 2014, and that is the version that remains in use today.

The process is usually initiated by HMRC, with the taxpayer receiving a letter offering them a contract under the Contractual Disclosure Facility. The taxpayer is given two options:

1. Accept that there has been a loss of tax due to his fraud, and agree to participate in the Contractual Disclosure Facility;
2. Reject HMRC's offer to participate in the process.

The taxpayer has 60-days to respond to the HMRC offer and decide which option he is going to take. The 60-day period can only be extended in exceptional circumstances, although HMRC are currently giving a longer period to respond, due to the pandemic.

HMRC will not disclose what their suspicions are and will not communicate with the taxpayer or adviser during the 60-day period, except in very limited circumstances. This is to avoid prejudicing any subsequent criminal investigation.

If the taxpayer wants to choose the second option, they can sign the Rejection Letter and return it to HMRC within the 60-day period. HMRC will start its own investigation, which can be a criminal investigation. The Rejection Letter may be used in court or tribunal proceedings as evidence.

If the taxpayer does not respond within the 60-day period, HMRC will treat that as a rejection, and will start its own investigation, which can be a criminal investigation.

The disclosure process

If the taxpayer decides to take the first option, he must confirm his acceptance, and provide an Outline Disclosure of the relevant offences within the 60-day period. The taxpayer must ensure that sufficient disclosure is made to ensure that they receive the immunity offered. There is, usually, a significant amount of work to undertake, and it is important to start on receipt of the HMRC letter.

If HMRC accept the Outline Disclosure, the taxpayer is invited to a meeting where they will be questioned about their disclosure. They are then required to submit a formal disclosure report, necessitating further detailed investigation of their business and personal tax affairs, for up to the last 20 years. A timetable is agreed with HMRC for the submission of the report.

Typically, HMRC want the report within six months of the meeting with the taxpayer, although that is seldom sufficient time, and the matter should be discussed with the investigator. The report must contain full details of all irregularities, including those arising from non-deliberate behaviour. Full computations must be submitted, covering tax, interest and penalties, together with various certified documents.

The investigator will review the report and make such further enquiries as are considered necessary. At the end of the review, any additional liabilities established by HMRC will be agreed, and settlement will, usually be by a contract settlement (although any VAT liabilities will be recovered by assessment). If agreement cannot be reached the taxpayer has the usual right of appeal against any assessments issued by HMRC.

If HMRC consider that a full disclosure has not been made, they may start a criminal investigation. The risk of criminal investigation also applies if a false statement is provided to HMRC.

Voluntary request for inclusion

Although most Code of Practice 9 investigations are instigated by HMRC, it is possible for a taxpayer to seek inclusion in the process. This is sensible where the facts and circumstances of the case are such that the taxpayer has a disclosure to make and is at risk of criminal investigation. Where the case falls within HMRC's criminal investigation policy, or where the amounts of tax at risk are significant, and that tax has been lost due to the taxpayer's deliberate behaviour, consideration should be given to obtaining the protection afforded by Code of Practice 9. Advisers should note that the criminal investigation policy does not have a materiality limit.

HMRC do not guarantee that they will offer a taxpayer a contract under the Contractual Disclosure Facility when one is requested. For example, HMRC will not offer a contract where the taxpayer is already involved in a criminal investigation.

Use of specialist adviser

Accountants and other agents need to be very aware of their competences and capabilities when it comes to Code of Practice 9 investigations. If a client is not properly advised, the repercussions may not just be financial, and could end with the client being prosecuted. There are various ongoing obligations that the client must meet to avoid putting themselves at risk of criminal investigation.

HMRC use specialist investigators when conducting Code of Practice 9 investigations, and it is essential for a satisfactory outcome for the client to be represented by an adviser with specialist knowledge of the investigation process. HMRC recognise this in the Code of Practice, stating "many people find it helpful to appoint a specialist who is familiar with COP9, as well as their regular adviser". I am frequently asked to work alongside an accountant or other agent, providing specialist input. The appointment of a specialist adviser helps to protect not only the client, but also the regular adviser from claims of professional negligence.

Contributed by Phil Berwick (Director, Berwick Tax)