Friend or foe?

Anton Lane wonders why an HMRC officer might want to make life more difficult for a taxpayer – and outlines a case he worked on where exactly this happened

I have found the significant majority of HMRC's officers to be helpful and reasoned. So why would an officer choose to use formal powers? HMRC wouldn't deliberately structure circumstances to result in higher penalties, would they? An officer would not make life more difficult for a taxpayer because they complained, would they?

My career is unlikely to progress into politics and after this, less likely to be with HMRC.

Needless to state that every now and then you come across a 'circumstance' when dealing with HMRC that makes you consider a career change. After over two decades managing code of practice 9 disclosures, writing for Lexis, Tolley's, CCH and Croner-i on the topic, you build a false sense of security that your experience will allow you to find a way to work efficiently with HMRC.

That is until you have an officer who without regard for the facts, guidance, legislation, case law is intent on finding some way to find a liability or procure circumstances to leverage higher penalties. Such acts have no regard for the anxiety caused or the additional professional costs incurred. I would add at this point, most officers I have worked with over the past two decades have been collaborative in their approach and pragmatic. I would go as far to say, I have found the significant majority of officers to be helpful and reasoned.

Obviously if a person working in practice chooses to move to HMRC it may either be because they seek the 'power' perceived with policing the tax system, flexible working, a government-backed pension, or they were generally not capable of making their way up the professional ladder. Maybe my view is clouded by the frustration over one case. That case was opened for over four years. It appeared to be the first case the officer had ever dealt with – both since joining HMRC and I would guess during the time spent working in practice.

The initial disclosure being made, and the officer assigned to work the case, an opening meeting was requested. We didn't consider an opening meeting appropriate and given there is no legal requirement for our client to attend, we instead suggested the case would be better handled with us meeting HMRC.

To explain why a meeting was not appropriate: the clients had varied activities over the previous two decades including shop front businesses, market produce, speculative real estate in the UK and overseas, and they held rental properties. The client was unable to effectively recall details about their business or investment activities. Not because they were trying to be vague but simply because the client became muddled. For example, the client could not clearly recall whether properties were legally owned personally or by a company. The client did not know whether leases were entered personally or by a company.

Regarding the businesses, they were unsure as to when businesses were operated by the client or when the client let those businesses be managed by another. The client's mind would also move between subjects. The answers to initial questions were replaced with entirely different recollections relating to other ventures and activities.

A meeting with the client could have been managed by simply confirming very regularly that a particular area would be reviewed and disclosed in the disclosure report. However, there would be a risk that HMRC would have considered the client as uncooperative or untrustworthy especially if recollections were inaccurate. Our view was to bypass the opening meeting and move to a scoping meeting. We decided to remain open to a meeting with HMRC including the client but wanted to manage the process more carefully and to give us time to review information in detail.

We agreed to meet the officer and asked for an agenda and specific questions. The officer provided a very broad agenda and confirmed there were no specific questions. Having managed several hundred COP9 cases, I had never known an officer not to have specific questions. The officer would not disappoint. Upon attending HMRC's grey semi pre-fabricated offices, the officer announced he had reserved the meeting room for six hours. Obviously six hours would have been a long time for a meeting with no specific questions. Again, I was not disappointed when the officer announced he had 34 pages of questions. Evidently, the officer was working hard to impress someone. The meeting was considerably shorter, and no specific questions were answered in any detail. Instead, we kindly requested a copy of the questions and confirmed our client's disclosure report would include relevant disclosures.

As an adviser, we wouldn't want any client to enter a meeting aimed at potentially lasting six hours. The confirmation by HMRC they had no specific questions in advance of a meeting but having 34 pages of questions at the meeting is indicative of a non-collaborative approach. One could even consider the approach to be one intended to entrap a taxpayer, to expose the taxpayer to the potential of higher penalties or maybe just to revel in being in a position of advantage or control. This approach potentially goes against HMRC's guidance and would certainly increase the client's exposure to higher or unnecessary professional costs. The approach may also be non-standard; namely, different to the approach towards other taxpayers in similar circumstances. This could be regarded as unfair treatment towards one taxpayer and HMRC apparently has a Charter to treat taxpayers fairly.

If an officer starts their approach to a disclosure in the manner adopted in this case, it is likely the officer will continue to shall we say 'push the boundaries'. It was not unexpected that the officer raised queries and requested further information. Each query was answered and where possible further information provided. The officer however issued a formal notice to provide information. The notice requested five pieces of information previously provided and a further ten requests. Of those ten, seven were arguably out of time and the remainder requested speculation. The items out of time would have required the approval of an authorised officer and it was identified the team leader had authorised the request. Those requests had not previously been made and yet HMRC's guidance is to first make informal request especially when a taxpayer is being cooperative. There is no legal reason to make informal requests ahead of issuing a formal notice, but it does feel more gentlemanly where there is a cooperation. Why would an officer choose to use formal powers? Maybe the answer is that by 'needing' to issue a formal notice, it identifies a potential lack of co-operation, which may result in higher penalties. HMRC wouldn't deliberately structure circumstances to result in higher penalties, would they?

The one notice, however, was issued to both taxpayers. It was not a notice to a taxpayer because it was to more than one taxpayer. We appealed the notice and raised a complaint. An officer (not the case officer) responded confirming that the notice could be appealed but not complained about. Obviously, the complaint was not at the issue of a notice but of the behaviour adopted in issuing that notice. For example, an invalid notice was issued, requesting information already provided, requesting speculation and information not informally requested despite full cooperation being provided. More pertinent was the notice had been sanctioned by an authorised officer – the team leader. Assuming the notice were in fact wrongly issued and issued to invoke the potential of higher penalties, it was done so with the consent of a team leader.

The appeal to the notice was accepted and the notice withdrawn although the officer maintained that the notice was validly issued. Obviously by the success of the appeal, the notice was not validly issued. The officer did not want to admit their error. I have always believed the best way to change and improve is to first accept one's mistake. To accept a mistake allows you to accept you can be different, be better next time.

The operational lead for the case was also the officer that authorised the notice, so it was confirmed the officer appointed to the complaint was a different officer. This appears reasonable until following the response provided, we confirmed we had made a formal complaint. It appeared the appointed officer to the complaint did not recognise the complaint because the notice was appealable.

Following confirmation the complaint was formal, it was responded to by the officer authorising the notice – the team leader. I don't know if the manner the complaint(s) was being dealt with appears strange to others. HMRC operates a two-tier complaint procedure, which can then be escalated to the Adjudicator. I note that at this time, the complaint had been considered twice in only reaching tier 1. The first officer was appointed to deal with the complaint because of the 'conflict' associated with the authorising officer responding to the complaint. The complaint (a reconfirmed formal complaint) was then responded to by the authorising officer.

Most complaints are 'resolved' at tier one. It is probably no wonder they are 'resolved' – I suspect the complainer gives up in light of the difficulties being acknowledged and the fear that the officer may take grievance. An officer would not make life more difficult for a taxpayer because they complained, would they?

The information requested under the notice was provided. In previous correspondence we had stated that where information was not provided, it was because it was not available. This was reiterated item by item in our next response: the officer in their response confirmed that by having stated the information was not available, we had answered the request. The astute person will identify we had previously made such confirmation and the officer had chosen to only acknowledge that confirmation in the response to the formal notice.

Following the response, the officer sought to deny losses because they had not been claimed. In our experience, it is unusual within a COP9 case for losses to be denied where tax liabilities have been disclosed. This is because the intention behind COP9 is for the taxpayer to pay the correct amount of tax without regard for time and instead the actions are the subject matter of deliberations over penalties. It is not the intention to penalise the taxpayer through the prevention of allowing losses to reduce taxable amounts. In other cases, officers have accepted the offset so again we are left querying whether the treatment is fair under the Taxpayer's Charter. Needless to state, we did not accept the officer's contention.

We are concerned with the potential for inconsistencies that may derive from the action of one officer or maybe even a team. In our view, there is a responsibility for HMRC to take a consistent approach. There is no excuse for:

- Not adopting a collaborative approach where a taxpayer and adviser is cooperating.
- Wrongfully issuing notices especially where that notice requires the approval of an authorised officer.
- Requesting information formally which has already been provided.
- Systematically attempting to leverage a higher penalty position.
- Forcing taxpayers to face higher professional costs to protect themselves from the onerous approach adopted by an officer or a team of officers.

I can gladly confirm I have only experienced similar behaviour a few times during my career. I feel strongly that HMRC needs to be accountable and need to eradicate inconsistent treatment of taxpayers. Onto my career move, which is unlikely to be into politics and after this, less likely to be with HMRC.

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