HMRC drops Clavis Herald criminal investigation

Richard Wynne reports on a troubling case where it appears HMRC shot first and asked questions later

An email is being widely circulated that reports that HMRC has dropped its criminal investigation into the individuals behind the tax planning HMRC calls Clavis Herald SPT. The report appears to be correct based on our enquiries with parties linked to the case.

This is yet another high-profile case of an HMRC criminal investigation being launched very publicly that has gone on for many years only to be dropped later without any public comment. In the meantime, individuals named as subjects in the criminal probe have their businesses and reputations trashed, live under the threat of criminal charges and have to incur the costs of defending themselves.

HMRC gains an enormous payback from a criminal case such as this:

- A troublesome tax avoidance promoter is put out of business;
- The intervention receives widespread media coverage that acts as a deterrent; and
- Users of the scheme are put under almost irresistible pressure to settle their taxes or risk receiving the same fate.

But is this right and, more importantly, is it time that HMRC was held to account for using the criminal code in this way to address difficult domestic policy matters, powers that should be used instead to prosecute criminals?

Let's take Clavis Herald SPT as an example. HMRC made arrests on 20 July 2016. The individuals were not named but HMRC was happy to share what it was doing with the press. Paul Maybury, Assistant Director at HMRC's Fraud Investigation Service, said: "These arrests show that we are determined to tackle not only those suspected of tax fraud, but also the professionals who we believe abuse their position of trust to help them do it." The very public accusation was that tax advisors were assisting clients to commit fraud.

Shortly afterwards, HMRC wrote to users of the Clavis Herald SPT planning and told them that the planning was the subject of a criminal investigation – it was no great leap to work out who the individuals with a business based in Altrincham arrested in July were. The letter went on to offer terms for settlement if the users agreed that they had acted carelessly. The participants would settle the tax, interest and pay penalties but would avoid any more serious consequences – this was the sting. But what consequences? The headline message of criminal activity and the threat

that things could become worse made the implied threat of criminal proceedings obvious, despite there being almost zero prospect of any criminal proceedings being taken for the vast majority of participants in the scheme. Many participants genuinely feared they would be prosecuted and rushed to settle, even if they believed they had not done anything wrong.

The letters to participants followed earlier assessments issued by HMRC to recover PAYE. The reality was that the majority of assessments were made outside the normal time limits. The assessments could only be valid if the participants had behaved carelessly; that behaviour extended the time limit for assessment. HMRC had not carried out enquiries into the majority of the planning participants before it made its assessments. Consequently, the settlement terms offered under an implicit threat of possible criminal proceedings achieved a second vital objective: an admission of careless behaviour required for settlement that allowed HMRC to back fill its statutory requirement to have discovered the careless behaviour before it made the assessment.

Those that did not settle were made the subject of enquiries by HMRC, some of those enquiries were under Code of Practice 9: cases of suspected serious tax fraud. HMRC had extensive information and documents, for example emails, contracts, documents, etc. that could only have originated from the seizure of documents as part of the criminal case. These were distributed on an industrial scale within HMRC and then used to justify HMRC's earlier decision to make assessments based on an assumed discovery of careless behaviour.

As we hopefully approach the end of the Clavis Herald SPT story we can see some of the assertions made by HMRC starting to unravel. For example, the threats from officers that clients would be shown to be 'liars' and 'cheats' (yes, those actual words have been used) no doubt encouraged by the belief that the criminal investigation would deliver dividends have fallen short. The Tribunal seems equally unimpressed with this aspect of HMRC's approach – see the judge's comments in Avonside Roofing on the prospect of looking for evidence of behaviour after a discovery assessment based on careless behaviour has been made.

The result of these serious enquiries is a stalemate, where the users of the scheme argue strongly that they trusted the advice they were given and believed that the transactions were lawful and reported correctly. HMRC doesn't like the planning but is struggling to find convincing arguments to show the required careless or deliberate behaviour to validate the issue of extended time limit assessments and penalties.

We are acting for some clients who are alleged to have deliberately understated their tax position. One of the given reasons for this conclusion is because they didn't get a second tax opinion on the transactions. Just pause for a moment to think of the ramifications for everybody else, including all those not involved in tax avoidance schemes, if that logic is held to be valid.

We are left with an age-old dilemma of monitoring the use of power by public agencies in order to protect the rights of citizens. In short, the end does not justify the means. Paul Maybury's aspirations for HMRC in 2016 are perfectly valid but it is the end of the process not the start. HMRC cannot start with a conclusion based on suspicion, jump to the sanctions it wants to pursue and then work backwards to justify its decision.

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