Irish Tax Institute

Leaders in Tax

Registered Office
South Block
Longboat Quay
Grand Canal Harbour
Dublin 2

Tel.: +353 1 663 1700
Fax: +353 1 668 8387
E-mail: info@taxinstitute.ie
Web: www.taxinstitute.ie

Mr Declan Rigney
Assistant Secretary
Revenue Planning Division
Bishop's Square
Redmond's Hill
Dublin 2

21 August 2015

Dear Mr. Rigney

Re: Revenue Operational Instruction (OI) 063 of 2015 : Failure to Cooperate Fully with a Revenue Compliance Intervention

I am writing to you about Revenue's new Staff OI "Failure to Cooperate Fully with a Revenue Compliance Intervention" which was published, without notice or consultation, while the issue of what constitutes "non-cooperation" was under discussion at the TALC Audit sub-committee.

In our view, the circumstances in which a penalty for "non-cooperation" can apply are extremely broad, without adequate safeguards and without recognition of the obligations on Revenue to engage with taxpayers/practitioners in a reasonable and timely manner. We have outlined in detail below our concerns on the contents of the Instruction.

1. The wide-ranging and subjective nature of the factors that can constitute "non-cooperation".
2. The lack of recognition of the mutual obligation on Revenue to engage with taxpayers and practitioners in a timely and reasonable manner.
3. The lack of redress for a taxpayer/practitioner, outside of the Court process, where Revenue considers that a penalty for non-cooperation applies.
4. The interaction of this Instruction with the Audit Code and its implications for Qualifying Disclosures.
5. The reference to the possibility of an investigation being commenced where a Revenue request is not complied with.

1. The wide-ranging and subjective nature of the factors that can constitute "non-cooperation"

The scenarios in paragraph 3 of the Instruction which are viewed as indicative of a failure to cooperate fully are very wide-ranging and subjective in nature. There is no distinction between scenarios where a taxpayer or practitioner is genuinely engaging with Revenue but unable to comply with Revenue's request within the timeframe provided, and cases where a taxpayer/practitioner is deliberately delaying the process. For example:

- A taxpayer or practitioner may not be available due to business commitments at the time Revenue wish to schedule an audit. In addition, audits are often scheduled during the busy Pay & File season when it is not always possible for practitioners to facilitate audits and deal with tax returns in a timely manner.
- A taxpayer cannot predict with any certainty who Revenue will consider to be "appropriate personnel" to attend an audit meeting.
- There are no safeguards around unreasonable deadlines set by Revenue for providing information, or from requesting information that is not available or not relevant to the year or issue under audit.
- Legitimate reasons can arise as to why deadlines cannot be met and this is not reflected in the Instruction, for example where the information is not available or must be sourced from a third party etc.
- Even if a taxpayer/practitioner makes their best efforts to reply "fully" to Revenue's requests they can never have certainty that they have done so.
- The variety and complexity of IT systems means it is not possible to provide information at "all reasonable times" to Revenue and in the format requested, in spite of the best efforts of a

taxpayer. The idea of applying a penalty in these cases, before the audit has even commenced, presupposes a tax default arises.

We note that frequency of failures will be a factor in determining whether a practitioner has cooperated fully. However, it is not clear from the Instruction whether it is the frequency in a particular case that is the influencing factor or if Revenue considers that where a practitioner has not dealt with matters promptly in other cases, their current client could be liable to a penalty for "non-cooperation".

2. No recognition of the mutual obligations on Revenue to engage in a timely and reasonable manner

The Instruction deals with only one side of this issue and presumes that a taxpayer/practitioner is being deliberately uncooperative when they do not fulfil Revenue's request. There is no recognition of Revenue's role and obligation to engage with a taxpayer/practitioner in a timely manner or in a reasonable way.

We have consistently raised at TALC, through our Branch Network and at the Joint Institute/Revenue conference, the feedback from our members on the practical administrative challenges they face daily in dealing with audits and interventions including:

- The increasing volume of non-audit interventions.
- The need for a closure mechanism for long running audits.
- Long delays in Revenue responding to practitioner correspondence.
- The scheduling of audits in the lead up to the Pay and File deadline
- Lack of clarity on Revenue's requirements at the outset of an intervention which can lead to multiple and incremental requests for information.
- Unrealistic timeframes for responding to Revenue requests.
- Revenue reluctance on occasion to engage on complex technical issues.
- The practical difficulties in extracting data for eAudits, given differing IT systems.
- Lengthy delays in concluding eAudits, of up to 18 months in some cases.
- Lack of consistency in R&D tax credit audits on issues such as the definition of R&D that qualifies for relief, supporting documentation sought, the timeframe for closure etc

This is also against the backdrop of concerns about other Revenue service issues, including the closure of Revenue telephone lines during office hours etc.

3. The lack of redress for a taxpayer/practitioner

Currently, the only redress available for a taxpayer who disagrees with a penalty sought by Revenue is through the Courts, which can be a costly process in a public forum.
In this Instruction, if a person believes that "reasonable grounds" prevent him/her from cooperating fully with a compliance intervention, he/she should be requested to make a written submission on the matter. However, there is no indication of what Revenue considers to be reasonable grounds for not cooperating and what recourse the taxpayer has if they are unhappy with Revenue's decision/consider Revenue's behaviour to be unreasonable.

Furthermore, there is no reference in the template letters (Appendix A and B) to the right to make a submission in cases where the taxpayer cannot provide the information sought by Revenue within the required timeframe.

4. The interaction with the Audit Code and its implications for Qualifying Disclosures

It is unclear how this Instruction interacts with the provisions of the new Audit Code. Paragraph 3.14 of the Code states that a taxpayer who has made a Qualifying Disclosure must provide full co-operation during the course of Revenue's examination of the disclosure in order to retain the status of the Qualifying Disclosure. The definition of "cooperation" in the Code also differs from that in the Instruction. Because of the very wide ranging definition of co-operation in this Instruction, a taxpayer who has made a Qualifying Disclosure in good faith now can have little certainty that the benefits of such a disclosure can be retained. Inevitably this will have practical implications for the willingness of a taxpayer to make a Qualifying Disclosure.

Paragraph 3.16 of the Code also makes it clear that Revenue should provide any assistance required by taxpayers to enable them co-operate with the audit, including *"allowing them reasonable time to reply fully to correspondence and providing a timely response to submissions or queries from taxpayers or their agents."* This is not reflected in the Instruction.

The template letter to the taxpayer, in Appendix B, invites the taxpayer to make a "voluntary disclosure". The Voluntary Disclosure facility was replaced by the Qualifying Disclosure facility in 2008. The letter does not address the position where a taxpayer has already made a disclosure.

5. Reference to the possibility of an investigation being commenced

The template letter to a practitioner in Appendix A refers to use of "a Revenue investigation or inquiry for the client's liabilities to penalties" if you do not comply with Revenue's request. We fail to see how an investigation would be appropriate in situations where a Revenue request has simply not been responded to.

The Audit Code is very clear that an investigation is an examination of a taxpayer's affairs where Revenue believes from an examination of the available information that "serious tax or duty evasion may have occurred or a Revenue offence may have been committed." As such, it can only be assumed that the reference to this in the letter is made with a view to ensuring that Revenue's request is met.

We look forward to discussing these concerns at the next meeting of TALC Audit on 29 September 2015.

Yours truly

Cora O' Brien
Director