



# Taxing Matters

## Code of Practice 9 (COP9) with Adam Craggs

**Alice** Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at [www.rpc.co.uk/taxingmatters](http://www.rpc.co.uk/taxingmatters).

Today we are talking Code of Practice 9, or COP9 with Taxing Matters repeat offender, Adam Craggs.

Rather than repeat Adam's claims to fame, HMRC's solicitors' office, tax disputes partner at RPC, literally writing the book on ADR and tax disputes, contributing to every major tax disputes publication in the UK, I thought I'd go right to the heart of the matter.

Adam holds the great distinction of having walked into the start of a horror movie plot when he, in his student days was a security guard at an abandoned secure hospital facility and, contrary to everything I have ever been taught by Hollywood, nothing happened other than a raised pulse, Adam survived without incident, miraculous.

Adam, welcome to Taxing Matters.

---

**Adam** Thank you very much Alice.

---

**Alice** **So, what exactly is the Code of Practice 9?**

---

**Adam** When HMRC suspect fraud on the part of a taxpayer they have two routes they can go down; there's the formal criminal investigation route, where the taxpayer will be invariably interviewed under caution and at the end of that process a decision will be taken by the CPS as to whether or not to proceed with a charge and ultimately a trial.

However, there is a civil route which does sound rather contradictory (but this is HMRC which we are talking about) and if they decide not to go down the formal criminal investigation route, they can go down what is called the Code of Practice 9 route, COP9.

What this means is that they will write a letter to the taxpayer, or his or her advisor, and offer them the opportunity to participate in what is called the Contractual Disclosure Facility.

What this means is the taxpayer has the option of either accepting that they have behaved in a fraudulent manner and providing details of that fraud to HMRC and, ultimately, they will then pay any tax which is due, together with interest and penalties.

If they decide not to accept that offer, then HMRC will go away and carry out an investigation – which could be civil, or it could go straight to the criminal investigation – and the taxpayer may either participate and cooperate in that investigation or, if it is criminal, then, obviously, they have the right not to participate.

---

**Alice** **So, in what kinds of, particularly fraud cases, would HMRC consider using this process? Are there any criteria?**

---

**Adam** In practice, if HMRC become aware of or receive information and details of a very serious, substantial criminal tax fraud and they are satisfied that there is prima facie evidence which would be sufficient to go down the formal criminal investigation route, then that normally is the route they would go down, all things being equal.

If they feel that the taxpayer has technically behaved in a fraudulent manner, but it is not heinous, and perhaps they don't have a huge amount of evidence – the sort of evidence which they would require to justify a criminal investigation and ultimately a criminal prosecution – then they may well decide to go down the Code of Practice 9 route.

	<p>There are many advantages to HMRC in doing that. It is obviously far less expensive to go down that route rather than a formal criminal investigation and also at the end of the process they will manage to obtain a sum of tax, together with interest and penalties, for the Exchequer. So, it is a very different route; although there is fraud, it is a civil procedure route.</p> <p>But that said it is very serious for the taxpayer because if the taxpayer does accept the CDF, the Contractual Disclosure Facility route, then they do have to admit fraud, which, obviously, is a very serious matter for anyone, but especially for many taxpayers, who may be regulated; accountants and lawyers being the obvious examples.</p>
<b>Alice</b>	<b>So, assuming the taxpayer has made a decision to engage with this process, what are they expected to do? What does it entail from a taxpayer point of view?</b>
<b>Adam</b>	<p>They will receive, as I say, the initial letter from HMRC and they have 60 days in which to make a decision; and it's a fairly binary decision. You have to either accept that you will go down the CDF route and as I say, you provide within that 60-day period an outline disclosure, it's a standard form which HMRC provide with their letter. You can't vary that form or amend it in any way and you have to give, as I say, an outline of the fraud which, although it is an outline, it is still nonetheless fairly detailed because HMRC do expect to be able to form a view from that as to the level of the fraud and so on.</p> <p>If you decide not to go down that route, then you can either formally write to HMRC and inform them of that fact, or you can choose to do nothing. You are not under any obligation to formally respond to the letter and if you don't respond to the letter then HMRC will consider that as a rejection and will act accordingly.</p>
<b>Alice</b>	<b>So, if you elect to engage in this COP9 process with HMRC what kinds of outcomes can happen from your experience?</b>
<b>Adam</b>	<p>I should probably mention that the advantage to taxpayers if they have carried out some wrongdoing and acted in a fraudulent manner and decide to accept the offer within the 60 day period; they are expected to cooperate with HMRC fully and disclose any sort of wrongdoing or tax loss and HMRC will not have indicated what that is so the taxpayer has to be very honest, very open and tell HMRC everything. It may well be that HMRC are aware of one particular issue, but the taxpayer actually has committed two or three things which would constitute a deliberate and fraudulent behaviour. All of it has to be disclosed, so the taxpayer shouldn't try and second guess "what does HMRC know? I will just reveal my hand in relation to that particular aspect." You are expected to be very frank and honest and disclose everything to HMRC.</p> <p>If you do that then the quid pro quo that HMRC will not prosecute you criminally, which is obviously a huge advantage to the taxpayer. So, whilst it will cost the taxpayer financially and, obviously, there is also the reputational damage in having to admit a fraudulent behaviour, the advantage is that they will not face a criminal prosecution. So that's a very, very big plus for the taxpayer.</p> <p>But, as I say, the advantage for HMRC is they get a large sum of money at the end of the process and it's a lot cheaper for them than conducting a formal criminal investigation.</p>
<b>Alice</b>	<b>And when you've made this arrangement to disclose all of this, is there a limited amount of time in which payment can be made? Is that something that needs to be taken into account in engaging with the process or is there an avenue for negotiation?</b>
<b>Adam</b>	<p>HMRC will invariably ask for a payment on account during that process, so it can go on for a very long period of time, it obviously depends on the facts and the circumstances of the case, some COP9s can be concluded relatively quickly.</p> <p>The sort of complex COP9s which we deal with at RPC are not straightforward and, although you will give an outline of the disclosure within that 60 day period, you would normally work with that client's accountants to prepare a very detailed full disclosure report which would include everything. And in that would be numbers; so that you would calculate how much tax is accepted that HMRC have not received, which they should have. And you would then have a discussion with the Revenue about penalties.</p> <p>But before the process is concluded, HMRC will ask for a payment on account. And if a payment on account is made by the taxpayer, that goes towards establishing that the taxpayer has cooperated fully with HMRC during the process, which in turn is very relevant when it comes to the issue of penalties at the end of the process.</p> <p>One of the final things you deal with, once you've agreed with HMRC the amount, the quantum of tax that's been lost and is owed – interest is automatic so there is no discussion about interest – but then you have a discussion about penalties and hopefully you can persuade HMRC that the client has cooperated fully and</p>

therefore they should have the minimum penalty imposed upon them. But that said, there will be a penalty because, by definition, there has been deliberate conduct, which means, although HMRC have a discretion depending upon whether the action was concealed or not concealed and so on, and so forth, you can't get away from the fact there has been deliberate conduct so there would be penalty imposed at the end.

So, towards the end of the process you do have to sign a formal disclosure certificate which will confirm that you have disclosed everything to HMRC and that is an incredibly important document because if you haven't disclosed everything to HMRC then quite clearly, as I've mentioned, you may face a criminal investigation, and that form, that document will be false and HMRC will be entitled to use that.

Also, as part of the sort of sweep up at the end there are a number of other certificates which you will be expected to sign. One is a statement of your worldwide assets and liabilities, so you have to disclose everything whether you're a beneficiary in a trust, interest in the company etc; and also provide a certificate of disclosure in relation to all bank accounts and all credit card and debit cards.

So, it is very important that when those certificates are signed by the client, they are accurate and comprehensive and have not left anything out.

**Alice** **So, you've talked about the Contractual Disclosure Facility, what are the ways that that can be breached by a taxpayer? How do they break the protection they have just signed up to?**

**Adam** The biggest problem in practice, Alice, is where you have a client who has not been completely frank and candid with their advisers and have, I mentioned a few minutes ago, they may be aware of a number of issues, for example in days gone by, they may have had an offshore bank account that hadn't been disclosed to HMRC, or an offshore settlement, or they had been paid in cash, whatever it might be, there may be a number of issues and they have decided just to disclose one to HMRC as part of the CDF process.

It's a very, very dangerous tactic to deploy because if HMRC are already aware of the other issues or become aware of them, then the protection that they would have ordinarily got from the CDF process will go out of the window and evaporate and HMRC will then be entitled to actually commence a formal criminal investigation and with the consequences that will follow from that for the taxpayer.

**Alice** **What are those consequences for the taxpayer if they don't engage properly?**

**Adam** So, if they've withheld information, having decided to go down the CDF route, I hasten to advertise, then, as I say, HMRC would be entitled to flip the enquiry into a formal criminal investigation and ultimately the consequences of that for the taxpayer could be very severe indeed.

As we both know, HMRC tend to prosecute taxpayers for tax fraud, relying on the common law offence of cheating the public revenue, and what that entails is, potentially, life imprisonment and an unlimited fine.

Now, obviously in practice, not many taxpayers get locked up for life, but certainly, depending upon the size of the fraud, the taxpayer, if they are found guilty, could expect, typically, a four-year prison sentence and so that would have devastating effects for the taxpayer. Not only loss of liberty, but it is normally loss of livelihood; their business suffers, if it survives at all; often it affects personal relationships because husbands and wives sometimes decide that they've had enough if their partner has been imprisoned for fraud and start divorce proceedings.

So, it really is an absolute catastrophe for a taxpayer if they are not honest with HMRC and withhold any sort of relevant information or details as part of that CDF process.

**Alice** **So, from your point of view and from your experience, you've talked about engaging with accountants, why would someone engage a lawyer for a COP9 process?**

**Adam** If any taxpayer or taxpayer's adviser who receives notification of a COP9 – the Revenue themselves do advise that expert specialist advice should be sought. It's not run of the mill, it's not an ordinary HMRC enquiry so any adviser or tax adviser who doesn't have that expert experience does need to seek it out.

But in addition to that, the advantage of using lawyers is legal privilege and, just as in any other area where a lawyer is advising and assisting a client, legal privilege applies, which means that, all things being equal (subject to improper conduct on the part of the lawyer) then all correspondence and discussions with his or her client is privileged and cannot be disclosed and cannot be obtained by HMRC without the client's consent. And that isn't the case for any other tax adviser whether it be an accountant or a non-accountant, they don't have the advantage of legal privilege.

So, that is a big plus, it encourages clients to be very open and frank with their advisers, with their team of lawyers and accountants. And in my experience, it does encourage clients who do have something to disclose, to actually discuss it with their advisers.

Which comes back to the point where we were discussing a few minutes ago; sometimes clients are a little bit nervous of talking to non-lawyers because they know that HMRC could obtain that correspondence. When they have the comfort of knowing it's cloaked in privilege, then they tend to be very open with their advisers which means they get the best possible advice, can take the right actions and can make, where it is necessary and appropriate, full disclosure to HMRC.

**Alice** **So, what are your top tips for the Code of Practice 9?**

**Adam** Well, the first, and perhaps the most important decision for the client to make, is to decide whether or not they are aware of any conduct which would necessitate making that disclosure to HMRC as part of the CDF process and as I mentioned at the beginning of the podcast, there are just two decisions to be made: it's either "yes I think there is something I need to disclose to HMRC therefore I accept the offer of the CDF" or there isn't.

Often I have clients in front of me and they say "well genuinely Adam, I cannot – I have wracked my brains – and I cannot think of anything I've done which would have made HMRC to offer me Code of Practice 9", and in those circumstances you can't advise a client to accept that they have behaved fraudulently when they are not aware they have. They cannot supply any details of any such conduct. And also it would be very difficult, in practice, to fill out the outline disclosure form because you can't actually give them details of the fraud, because you're not aware of it.

So that is the really important question that has to be answered right at the outset. And of course that will then determine what follows; whether it will be a case of HMRC just going off and carrying out their enquiry on their own, or whether you will actually be engaged in the process in helping them and saying "yes, I've done this and I shouldn't have and these are the circumstances and the reasons, etc. etc."

So, that is massively important.

And then the second issue, which I stress to clients, is if they have decided to go down the CDF route, then you must disclose everything and cooperate with HMRC. You cannot try to be clever and hold something back because you might get away with it, but, if you don't get away with it, then there will be very serious consequences for you indeed.

**Alice** **So, other than those two things you have just talked about, are there any other major errors that you see taxpayers make when they are contemplating or going into this procedure?**

**Adam** They are the main two. There are some clients I've had where they've thought it was a sort of game of poker and they wanted to see what the Revenue knew before they revealed their hand which, you know, the Revenue have done this for many years, they are highly trained, very experienced and they will not reveal – for obvious reasons – what they know; they rely on the taxpayer to disclose everything themselves, so that would be a serious error as well, trying to sort of second guess what HMRC know.

I mean sometimes there are, you know, genuine situations where, and I have had this, where the client is aware of an issue which has been disclosed to HMRC fully and then HMRC consider there is another issue. And it can get quite frustrating because they are intimating to you and the client there is something else and they want you to tell them, and then you'll discuss it in private with the client saying "well look, the Revenue clearly think there is something else, there must be, what is it, what might be of concern to them" and sometimes it transpires the Revenue are just mistaken, have got the wrong end of the stick.

I had one case not too long ago where they finally started to give us a clue, a hint – it's almost like a board game – and they mentioned expensive German cars and then ultimately they gave us the brand, Mercedes Benz ultimately there was nothing in it, the client and his wife simply had two very nice Mercedes Benz cars, but the Revenue had thought that they were importing these cars cheaply from Germany, not declaring anything and selling them once they'd transferred the steering wheels over and so on and so forth. So, it was just a mistake on the part of HMRC, but it took quite a while before that became apparent, and you can imagine how frustrating it was for the clients – and for me – because we are all sort of sat in a room thinking "what could it be, what is it, , what concerns HMRC" and in the end we, you know, had a very frank discussion with the Revenue officer – who was a nice lady – and said "I'm afraid you will have to give us a clue because we do not know what you're referring to when you talk about expensive German cars." But it got sorted out in the end.

---

<b>Alice</b>	<b>So, given that we are all mid-lockdown still, and there is talk of a second wave, how do you envisage this process having an impact in the future around COVID or any upcoming risks?</b>
<b>Adam</b>	<p>Yeah, a very good question.</p> <p>Part of the process invariably involves a meeting with HMRC, so, assuming you've opted to go down the CDF route and you have given them the outline, disclosure details and so on, they are very keen to meet with you and the client to have a discussion etc, and that normally is in person. And obviously as a regulator and an investigative body, they do like to see the whites of your eyes and see body language and so on and, clearly, if those sorts of meetings are having to take place remotely via video link, then there is a disadvantage there.</p> <p>But, you know, until we are able to have face to face meetings, then those sorts of meetings will have to take place remotely, although as we all know, that isn't ideal, there is no alternative.</p> <p>I think also given the furlough scheme, and HMRC have already arrested someone for furlough fraud, I suspect that that may lead to quite a lot of COP9s. There will be some instances, obviously in the extreme cases, where the individuals who have participated in furlough fraud will be prosecuted and ultimately stand trial, but I think there will be some taxpayers in the less heinous category who may find themselves being offered Code of Practice 9 in relation to suspected furlough fraud.</p>
<b>Alice</b>	<b>Great. So what advice, if you've got a taxpayer sitting before you whose thinking about this, or are concerned that this may arise for them in the future, what advice would you give to anyone who is considering what to do around potential fraud or the risk of fraudulent conduct they have committed?</b>
<b>Adam</b>	<p>Well in relation to suspected furlough fraud, now is the time to act because there is going to be a sort of window of opportunity where you will have 90 days from the date of Royal Assent of the Finance Act which I think was 22 July, to disclose any sort of irregularities in relation to the furlough scheme whether oversight, so we're talking there about, innocent mistakes, civil, or even deliberate. There is this opportunity to contact HMRC, and I would encourage any employers who do think there may be something that needs to be reported to HMRC in relation to the furlough scheme, to do that as soon as possible and to seek out some expert legal advice as part of that process.</p> <p>More generally, so not furlough fraud specific, I will say to clients when I have the initial meeting, unless of course they tell me which isn't, frequent, "oh yes, I have been at it as it were, this is what I've been doing and it's a fair cop guv", but normally I do say to them "look, go away, and you know, we've got 60 days to make a decision, so go away, think about it very carefully, rack your brains, it's not easy" because, you know, speaking personally I can't remember what I was doing sort of 10 days ago and often with COP9s, the Revenue can go back 20 years, because you're talking about deliberate conduct here, so that's a long period of time and it's very difficult for people, especially business people, to remember what they've done from day one when they commenced their business activities, "so go away, you know, have a glass of wine or whatever works for you when you want to concentrate and think and then come back to me and if there is anything which you do need to disclose to HMRC then clearly the best route to go down would be the CDF route".</p> <p>But, as I've said, if there isn't anything, then clearly you can't pretend there is, and a client shouldn't go down the CDF route when they have no inkling whatsoever of what it is that concerns HMRC, then we won't go down that route. And that process is incredibly important.</p> <p>And if you don't go down that route then, as I've mentioned, HRMC will carry out an investigation and you may then find out what it is that was troubling them and then you can, if it's appropriate, engage with them and work collaboratively with them. So it's that initial process right at the outset, the client has to get that right.</p>

---

---

Alice

Great. Well thank you so much Adam for taking us through a quick run through of COP9 procedure. And as ever a big thank you to our producer extraordinaire Mary, problem solver Josh, and our musical genius Andrew Waterson. And thank you to all of our listeners for joining us.

As ever a full transcript of this episode together with our references can be found on our website at [www.rpc.co.uk/taxingmatters](http://www.rpc.co.uk/taxingmatters).

If you have any questions for me or for Adam, or any topics you would like us to cover in a future episode please do email us on [taxingmatters@rpc.co.uk](mailto:taxingmatters@rpc.co.uk). We would love to hear from you.

If you like this episode please take a moment to rate, review and subscribe and remember to tell a colleague about us.

Thank you all for listening and talk to you again in two weeks.

---



**RPC is a modern, progressive and commercially focused City law firm. We have 97 partners and over 700 employees based in London, Hong Kong, Singapore and Bristol. We put our clients and our people at the heart of what we do.**