# Non-payment of tax: when does this potentially give rise to reportable criminal proceeds?

The current pandemic crisis has put strain on the cashflows of many businesses. This note considers the obligations that an accountant may have if they become aware that a business that they work for, or one for which they act, is deliberately failing to pay their taxes when due.

This note focuses particularly on payroll taxes and VAT.

- Payroll taxes are deducted from the wages/salaries of employees by the employer. It is the employer's obligation to account for these taxes to HMRC within the prescribed time limits. HMRC may be willing to agree to "time to pay" arrangements where certain conditions are met, but these arrangements should be agreed in advance. If a business fails to pay its payroll taxes by the due date, interest is levied and there can also be penalties, depending on the circumstances.

- VAT is levied on sales to customers and collected when payment is received. VAT paid on goods and services used in the business can (in many cases) be offset in whole or in part against the tax collected from customers.

In general, late payment is a civil matter. But at what point does late payment become non-payment and when might this become a criminal matter?

If steps have been taken to disguise the true tax liability, then this is fraud and would be criminal behaviour. For example:

- some employees are not included in payroll returns;
- the amount shown on the payroll return differs from the amount actually paid to the employee; or
- VAT on sales is deliberately understated.

However, there are other cases where the business simply chooses not to pay on time. If this is a temporary, unforeseen matter – for example, the business has overdue monies due to it and does not have the banking facilities to cover the payment, and therefore delays the payment until the debtor has paid up - this is unlikely to be criminal. In general, it is advisable to contact HMRC as soon as difficulty making payment is expected to discuss the prospect of agreeing time to pay.

On the other hand, there are cases where the business is aware that it has structural cashflow issues. In these cases, it does not have the funds to pay bills as they fall due, but uses the funds withheld from salaries (or in the case of VAT, collected from customers) to fund other expenses, with no plan for payment of the tax due. Depending on the facts, if the business subsequently becomes insolvent with tax due, it should be considered whether this is fraudulent evasion of tax. The business may be in possession of proceeds of crime, which would mean that an accountant acting for that business would have obligations to report the money laundering activity, and/or apply for a defence against money laundering.

There are some key red flags to be alert to:

1. Has there been any deliberate attempt to disguise the amount of tax due?
2. Has there been a deliberate, reckless or wilful use of funds which should have been earmarked for tax payments to meet other obligations?
3. Has there been non-payment of tax and continuation of the trade in circumstances which should have indicated that the business could not meet its obligations as they fall due?

Where these factors are present, you should consider whether a suspicious activity report (SAR) should be made.

In addition, you should consider whether a Defence Against Money Laundering (DAML) application should be made if you are:

- in possession of,
- in control of,
- involved in the transfer of, or
- otherwise concerned with arrangements in relation to any type of dealing with
- the assets of a client which may be proceeds of crime.

A DAML was previously known as a consent application.

For further guidance see the CCAB Anti-Money Laundering and Counter-Terrorist Financing Guidance for the Accountancy Sector 2020 (chapter 6 covers SARs and DAMLs), and its appendices Guidance for Tax Practitioners and Guidance for Insolvency Practitioners. All at https://www.ccab.org.uk/anti-money-laundering-guidance-for-the-accountancy-sector/.

If you are providing advice to a business which has not accounted for its taxes when due for payment, you should consider your ethical obligations and may wish to consult the Helpsheet on “Dealing with errors” which sets out the relevant ethical considerations when you disagree with a client’s proposed conduct: https://www.icaew.com/technical/tax/pcrt/2019/helpsheet-c-dealing-with-errors.