



STATE OF NEW YORK  
DEPARTMENT OF TAXATION AND FINANCE  
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## **CRIMINAL PROSECUTION OF TAX FRAUD CASES**

### **GUIDELINES**

#### **Introduction**

Criminal sanctions play an important role in tax administration and the Legislature has recognized this fact through its enactment of numerous criminal penalties for deliberate taxpayer fraud and misconduct. It is the role of personnel assigned to the Special Investigations Unit (“SIU”) to identify and develop tax fraud cases that will best advance the law enforcement objectives underlying these criminal statutes. Although the SIU is charged with the responsibility and authority to use both civil and criminal tools to investigate and fight tax fraud, every investigation opened by the SIU is one where the Department has determined that criminal sanctions are a potential outcome. While ultimate authority for pursuing prosecutions rests with prosecutors – itself an important safeguard against improvident use of the criminal law – the referral of a case for prosecutorial consideration or, even more clearly, pursuit by the Department on its own initiative of an arrest or search warrant, is itself a significant step with likely adverse consequences to the subject of the action.

Given the gravity of the decision to pursue criminal sanctions, this memorandum sets out the factors that SIU personnel must consider when opening an SIU matter and, even more importantly, when determining to seek criminal sanctions. Whether the criminal process is initiated by referral to a prosecutor or by directly initiating a prosecution using the Department’s police powers, no action should be taken without careful consideration of the factors set forth in this memorandum. The considerations set forth in this memorandum apply not only to taxpayers but also to any individuals and entities, such as tax preparers, who participate in a tax crime, cause another to commit tax crime, or aid and abet activity in violation of the criminal law that defeats the collection of taxes due the State or interferes with the proper administration of the tax system.

## **I. FACTORS TO CONSIDER IN DETERMINING WHETHER TO SEEK CRIMINAL SANCTIONS FOR TAX FRAUD: GENERAL CONSIDERATIONS**

*Punishment of the offender:* One recognized objective of criminal law enforcement is to impose punishment for misconduct that is just and fair and designed to insure that the misconduct will not be repeated. The Department views deliberate tax fraud as serious misconduct which warrants punishment. Whether a criminal sanction is necessary to achieve this objective will turn on an evaluation of the particular case and the particular defendant. A comprehensive but certainly not exclusive list of factors to consider is set forth below, but in general those factors will include an assessment of:

- The nature and seriousness of the misconduct and the harm caused by that conduct.
- The putative defendant's history of tax offenses or misconduct.
- Whether there are other non-criminal sanctions available that are sufficient to punish the offender and to insure future compliance with the law.

*Deterrence of misconduct by others:* Another well-recognized objective of criminal law enforcement is to deter misconduct by others. Well-publicized criminal prosecutions serve as examples to others that misconduct will not be tolerated. To be effective in meeting this objective, each criminal prosecution should convey the message that taxpayers should comply with the law to avoid being likewise caught and punished for violating it.

The deterrent impact of SIU investigations and prosecutions is an essential part of the Department's strategy to increase voluntary compliance. Thus, where the Department identifies an area where noncompliance is widespread, criminal prosecutions may be appropriate even though the individual wrongdoing does not involve significant tax losses but the cumulative impact of that wrongdoing by many individuals causes the state great harm.

*Building respect for the law and creating a fair and equitable tax system:* Finding the right balance in criminal tax enforcement is crucial to the Department's tax gap strategies. Aggressive criminal tax enforcement is important to the Department's efforts to build respect for the tax law (including its filing requirements, record keeping requirements, and its subpoena compliance mandates) and to level the playing field for those taxpayers who are following the rules. We know, however, that criminal enforcement that is overly aggressive and harshly inflexible can be counter-productive. Our decisions in individual cases must be just, reasonable and balanced and must reflect our appreciation of the impact of the decision to pursue criminal sanctions on the individual or company whose conduct is in question.

We have a responsibility to the public and to the individual taxpayer to enforce the law with fairness and reasonableness.

## II. SPECIFIC FACTORS TO BE CONSIDERED

Each individual case must be addressed on its own merits and there is no litmus test to determine whether a particular case will be treated as a criminal matter. Sometimes factors beyond the four corners of the particular case will have to be considered including, for example, considerations of the Department's resources and priorities and the preference of our partners in tax enforcement – our District Attorneys and state prosecutors. This list is not intended to be exhaustive, but is merely a guide to help SIU personnel evaluate each case as it is opened, investigated and ultimately prosecuted.

### a. Factors relating to the nature and seriousness of the misconduct and the harm caused by that misconduct:

The inquiry should begin by examining what the taxpayer (or the subject of the investigation) did and how seriously wrong his or her actions were. Did the taxpayer engage in a scheme involving multiple acts of deception? Did the taxpayer repeatedly and knowingly create and file fraudulent documents? Did he or she enlist others in a criminal conspiracy? Is the target of the investigation a tax professional, rather than a taxpayer, who for compensation helped taxpayers defraud the state?

Here are some additional factors to consider when evaluating the nature and seriousness of the tax fraud or misconduct:

1. The size of the tax loss involved.
2. Whether the loss stems from multiple tax types.
3. Whether the loss persists over multiple time periods or for multiple taxpayers.
4. Whether the fraudulent tax activity is combined with other fraud or illegality.
5. The reasons for the fraud and the degree of venality displayed.

### b. Factors relating to the taxpayer or the subject of the inquiry:

The individual circumstances of the taxpayer or the subject of the investigation are obviously of crucial importance in determining whether a criminal prosecution is appropriate. Is this the taxpayer's first brush with the Department or does the taxpayer have a history of non-compliance? Has the taxpayer been cooperative, expressed remorse and made efforts to correct his misconduct and make the state whole? Can the taxpayer offer cooperation that will reveal other, perhaps more serious, misconduct by others?

It is appropriate for the Department to evaluate the remorseful, first-time offender more leniently than the recidivist who has been previously warned to comply with the law and it is also appropriate for the Department to consider offers of meaningful cooperation. Here are examples of some factors to consider:

1. The tax history of the putative defendant.
2. The criminal and other personal history of the putative defendant.
3. The circumstances of the individual putative defendant (age, health, family situation).
4. The reasons for the misconduct (whether motivated purely by greed or by some less culpable motivation).
5. The extent of restitution that the taxpayer or other subject has voluntarily made and his willingness or unwillingness to make the Department whole.
6. The putative defendant's willingness to cooperate with the Department in its investigation or audit of his conduct.
7. The putative defendant's willingness to cooperate in the investigation of the wrongful conduct of others known to him that can lead to significant tax recoveries or the exposure of significant fraudulent conduct by others.
8. Whether the subject of the inquiry has recognized that his or her conduct was unlawful and accepted responsibility for his actions.
9. Whether the putative defendant has demonstrated remorse for his misconduct and the resolve to correct the misconduct in the future.
10. The putative defendant's willingness to enter into a compliance agreement and to accept terms to assure the Department that there will be future compliance with the law.
11. The collateral consequences to the subject of the inquiry or to innocent third parties that might follow a criminal investigation, prosecution or conviction (e.g., loss of a license to engage in a profession, or the loss of innocent persons' employment; loss of vital community services, etc.).

*c. Factors relating to the strength of the case:*

Obviously, unless the misconduct can be proven to have occurred beyond a reasonable doubt, the case cannot be prosecuted. Here are some factors to consider that relate to whether the case can be successfully prosecuted:

1. The quality of the proof of the crime, particularly the intent elements and the resources required to pursue the case to establish those elements. Does the taxpayer have some legal defense to the possible charge that would defeat prosecution?
2. Is this a case that the prosecutor would be willing to prosecute? If the matter has been the subject of a prosecutor's request, ordinarily much deference will be afforded to the prosecutor because as a public servant responsible for enforcement of the criminal law, the prosecutor has determined, using substantially the same considerations as those set forth in this memorandum, that the matter should be pursued through criminal investigation. Where there is no prosecutor's request, the assessment of whether a prosecutor would pursue the matter may derive from general law enforcement or prosecutorial experience, prior dealings with the individual prosecutor, or discussions with the prosecutor setting forth an outline of the case in a manner that does not disclose the identity of the subject or tax secret information.

*d. Factors relating to the Department's objective of achieving general deterrence:*

Given the nature of the suspected misconduct and the defendant's particular circumstances, consideration must be given to whether this a case where the Department should expend the resources needed to prove the misconduct. The pursuit of even minor criminal offenses may be appropriate where necessary to deter others from engaging in similar unlawful conduct. Because fraud investigations are often time-consuming and difficult, consideration must also be given to whether the case is of sufficient importance to the Department's overall objectives to warrant the Department's investment of resources.

1. Is the type of misconduct widespread and does it relates to an area where specific or general deterrence is needed? By taking a criminal action against this offender, is other potential misconduct likely to be deterred?
2. Whether an alternative civil penalty, perhaps coupled with a compliance agreement or the appointment of a monitor at the offender's expense, an adequate remedy to address the offender's misconduct. Would it be adequate to prevent future misconduct and deter others from engaging in the same misconduct? Where deterrence is important, will the taxpayer waive secrecy of an administrative sanction so that the Department may publicize the administrative action to achieve a deterrent impact?