

With us magazine: top people in trouble

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LEADERS AND SENIOR EXECUTIVES



Coming to the rescue of senior business leaders

The actions of senior business leaders are under ever-increasing scrutiny, with government bodies, industry regulators and the media watching carefully for any signs of mismanagement or wrongdoing that may require further investigation. For any senior individual facing a regulatory, tax or white-collar crime investigation, obtaining the right advice at the right time can make all the difference.

In this article we examine two fictitious scenarios and highlight some of the key issues to be considered by an individual under investigation.

Scenario 1: Fraud authorities investigate Mr Andrews is a senior executive working within an international pharmaceutical business and is a UK citizen. He moves within this business to the Asia-Pacific region. Having settled into his new office in Singapore, Mr Andrews is contacted by the UK Serious Fraud Office in connection with a suspected fraud in the business unit he was responsible for in the UK.

Early analysis of the situation is essential, cautions Stephen Ross, head of the Civil Fraud Group: "At the outset, as much clarity as possible will need to be obtained from the authorities about the scope and nature of the allegation and, in particular, the type of alleged offence and the jurisdictions involved. Any advice, and plan of action and response to the authorities will often depend on the jurisdiction. Quite often prosecutors in more than one country may get involved. Until this clarity has been obtained it would be prudent not to travel."

"Mr Andrews could be facing suspension or even dismissal," warns Meriel Schindler, head of Withers' UK Employment team: "His employment contract needs to be closely assessed and, if it comes to it, negotiated. The immediate issue will be to ensure that Mr Andrews is supported by his employer and that his legal fees in response to an investigation, especially one with complex cross-border implications, are paid for, either under an existing Directors and Officers insurance policy and/or a corporate indemnity."

Meriel adds: "Where there is the suggestion of any potential criminal wrongdoing, this needs particularly close attention and continual review. If he is convicted, Mr Andrews may have to refund any financial assistance he has received in defending himself."

It is not uncommon for senior executives to move from the UK whilst their employment contracts remain subject to English law. As Meriel explains: "In Singapore, Mr Andrews would need to seek local law advice on any statutory protection, but English law could apply to any contractual disputes. His employer may also want to conduct an internal investigation and this will usually involve the employer's own lawyers interviewing the witnesses they consider relevant. Employees often underestimate how important the first interviews are in setting the agenda."

The reputation and media consequences of an investigation of this sort can be severe and can depend on how the public authorities react. Amber Melville-Brown, head of Withers' Media and Reputation team, continues: "If the allegation becomes public, how can the individual clear his name in the public eye and in the minds of prospective employers? And how can the online record be cleansed or corrected? As soon as the authorities contact him, Mr Andrews will need advice on how best to deal with any enquiries from clients and contacts, as well as on the protective measures he should put in place."

Advice on any fall-out in traditional and social media would also be key: "Ongoing media monitoring and reputation and privacy advice during and after any investigation is essential," Amber continues. "To weather this reputational storm he will need to know how, when and when not to deal with unexpected approaches from inquisitive third parties and investigating media. And ultimately, how to remedy his reputation and protect his privacy, if he gets a clean bill of health – or indeed, if he does not."

Scenario 2: Tax authorities investigate: Ms. Brown is a US national and a high profile senior banker within an international banking business. She moved to the UK in 2011 for a three-year contract with her current bank and stopped filing US tax returns during that period. Ms. Brown invested almost £900,000 in a scheme purporting to be a trading company that is developing a new form of e-communication.

Ms. Brown is now back in the US. However, the UK tax authority, HM Revenue and Customs (HMRC), is challenging Value Added Tax claimed on the investment because the business was not actively trading. There's now over £2 million of tax owing and HMRC is threatening to involve US agencies to pursue the funds.

Ms. Brown could face investigations in both the US and the UK. Seth Cohen, tax investigations/controversy partner in Withers' New York office, puts the potential US tax exposure into perspective: "US taxpayers are taxed on their earnings anywhere in the world. If Ms. Brown did not file in the US whilst living in the UK then there are a number of issues that may be resolved through a disclosure process. These issues can, and generally will, include criminal/civil prosecution. After a thorough review of her facts, our advice may be to make a voluntary disclosure before the US tax authorities catch up with her."

Seth continues: "There's increasing sharing of tax/asset information between many countries and the US and UK have a particularly robust relationship. As a result, Ms. Brown's risk of a multi-jurisdictional tax investigation goes up dramatically, and so addressing non-compliance prior to its discovery by the US is of the utmost importance if civil or criminal penalties are to be minimised."

Additionally, Seth counsels, it will be important to look at issues encountered by taxpayers entering or leaving the US with tax issues: "New rules state that US citizens may have their passport revoked if they are living in the US or abroad with a 'seriously delinquent tax debt' in excess of US\$50,000. If it's revoked Ms. Brown could find herself unable to travel internationally."

Maurice Martin, Withers' UK tax investigations consultant, advises: "Openness and promptness is everything with HMRC. We'd recommend Ms. Brown tries to initiate discussions with the team dealing with her case as soon as possible. If she attempts to ignore the investigation, or reneges on an agreed plan of action, it will go to the enforcement team, and they will be ruthless and inflexible! The best advice in cases like this is to try to reach a deal as soon as you can."

Tessa Lorimer, special counsel in the UK tax investigations team, suggests: "Ms. Brown is at risk of receiving an Accelerated Payment Notice, which will compel her to pay the disputed tax in advance of a tax hearing. There is no opportunity to appeal these notices, and Ms. Brown could face significant penalties if it is not paid within 90 days. If necessary, she can discuss the payment with the High Net Worth Unit at HMRC, which usually takes a reasonable approach to resolving these issues." Meriel Schindler warns of the potential impact of a full investigation: "If the case were to hit the news – and this is not an uncommon tactic for the tax authorities – Ms. Brown's relationship with her employers could be jeopardised. If the bank feels that her actions, or simply the publicity surrounding the investigation, have brought it into disrepute, she may be faced with a suspension or even dismissal. She should of course take advice on this as soon as it is first raised."

Harvey Knight, head of the UK Financial Services Regulatory Group, counsels that should Ms. Brown wish to return to the UK as a senior manager of any bank, she ought to consider how to resolve the matter in such a way that the UK financial services regulators would still take the risk of approving her as a senior manager: "The higher the profile of the individual, the greater the need for their past history to be as spotless as possible."

Amber Melville-Brown agrees: "Ms. Brown risks being tainted worldwide with the damaging label of a 'tax cheat'. Tax avoidance or evasion is the flavour of the month in the UK press; and her current location in the US makes little difference because news websites know no geographical boundaries. Given the media appetite for such stories, the right set of facts could easily see our girl becoming the 'poster boy' for tax avoidance – whether or not her involvement in the scheme was unwitting."

"Our advice would be to prepare for the worst in order to achieve the best result. We need to anticipate – and answer, to our own satisfaction – the many thorny questions that might be asked and then use this information to prepare reactive statements explaining our client's position, to be used in the event of any approach from the media. And we mustn't forget that those explanations may not be relevant and important just to the media, but may also need to be communicated to Ms. Brown's employers, regulators, customers and business contacts with whom it is just as important that she maintains and protects her valuable reputation."

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