

Know your rights

Jesminara Rahman explains the human rights HMRC has to safeguard when they are dealing with a taxpayer.

There are two basic human rights that taxpayers should be aware of when HMRC carries out a tax enquiry.

These are:

- The right to a fair trial, under Article 6 of the European Convention on Human Rights.
- The right to privacy, under Article 8 of the European Convention on Human Rights.

These Convention rights are protected in UK law through the Human Rights Act 1998 (HRA).

Rights under Article 6

1. The right to have a fair hearing

The right to a fair trial applies when a person faces a tax charge which is 'criminal' under Article 6. This includes charges that result in a civil penalty which is primarily punitive and deterrent in nature.

HMRC have to take into account the following when considering penalties:

Article 6 of the European Convention on Human Rights, which was incorporated into British law through the Human Rights Act 1998, gives taxpayers certain rights when HMRC are considering whether to charge certain types of penalties.

Taxpayers have the right under Article 6 not to answer HMRC's questions, when HMRC are considering penalties. This is sometimes called the right not to self-incriminate or the right to silence. This right does not cover information or documents that already exist. This means that taxpayers must give HMRC the information or documents that already exist, if HMRC have the legal right to ask for them.

HMRC will normally tell the taxpayer whether any penalties are due once HMRC have agreed the tax position. The taxpayer has the right to have the matter of penalties dealt with without unreasonable delay.

If HMRC charges a penalty, you have the right to ask for a review or to appeal. The taxpayer also has the right to ask for a review or appeal against both the tax and the penalty decisions to be considered together.

There is some differences between what penalties HMRC and the European Court of Human Rights (ECHR) considers to be covered by Article 6. In *Österlund v Finland* (Application No 53197/13) tax surcharges were considered to be a punishment to deter reoffending, hence the court considered this offence to be of a criminal nature.

The minor nature of the penalty did not remove it from the scope of Article 6. ECHR looked to the punitive nature of the tax penalty regardless of the amount and for HMRC the quantum plays a part in their decision of what they consider to be a criminal offence in regard to tax penalties.

Whereas HMRC viewed (CH300200) that any penalty where the maximum potential is 70% or more (of the amount used to calculate the penalty) then HMRC accepts that the penalties are criminal for Article 6 purposes.

The tax tribunal follows the ECHR guidelines and has rejected HMRC's quantitative interpretation of what is a criminal offence.

In *Bluu Solutions Ltd v RCC* [2015] UKFTT 95 (TC) this concerned a 1% penalty, so clearly the amount does not come into the consideration of what is of criminal nature in the eyes of the tribunal. HMRC argued that this was not criminal for convention/human rights purposes because it did not meet the 70% threshold set out above.

The tribunal considered the case law of the ECHR and domestic authorities and concluded that a tax penalty, which is meant to be punitive and to deter, is criminal for the purposes of Article 6. The tribunal also rejected an argument based on the proposition by HMRC that penalties intended to change behaviour were not punitive.

One interesting point is whether there is a right to a hearing in private with anonymity maintained under Article 6. A taxpayer may insist that a hearing of their tax appeal is held in private and that any report of the case does not identify their financial circumstances. Article 6(1) deals with circumstances where the public may be excluded from all or part of the trial and includes as one of the grounds “where ... the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

A taxpayer could argue in favour of a private hearing could also deploy the right to privacy in Article 6. If a taxpayer could be deterred from bringing an appeal by the possibility of public disclosure of his financial circumstances, then it seems arguable that the interests of justice would be in favour of a restriction on the reporting of the name and financial details of the taxpayer.

The right to privacy under Article 8

2. Article 8 (right to respect for private and family life) can be applicable to substantive tax rules and to procedural matters. But most cases have raised Article 8 in connection with information-seeking activities of tax authorities.

All HMRC enquiries involve some interference with the person’s right to privacy. Article 8 permits this provided that it is lawful and proportionate.

The right to privacy covers a person’s:

- private and family life.
- home.
- correspondence.

HMRC needs to consider the impact of their enquiries on the person’s right to privacy whenever HMRC are data gathering, using any form of surveillance, or intend to visit the person’s home or business so it does not infringe upon the taxpayer’s rights under Article 8.

What must HMRC do to protect a person’s right to privacy?

HMRC’s information and inspection powers include statutory safeguards (CH2000 & CH22000) to protect taxpayers from disproportionate interference of their Article 8 rights. There are also other legal, procedural and operational safeguards that HMRC officers must follow to ensure HMRC protects a person’s right to privacy.

The following guidance will cover most situations that may arise during an HMRC enquiry:

- Using Information and Inspection Powers (CH25000).
- Using the Internet for research (CH201600).
- Using HMRC digital devices in meetings (CH203540).
- Surveillance and Human Intelligence, see EM1806.

To assess whether HMRC’s planned activity is reasonable and proportionate, see the guidance at CH21360 and CH21380.

Article 8(1) of the European Convention of Human Rights gives everybody the right to respect for their private and family lives, their home and their correspondence. However, Article 8(2) specifically envisages that there will be some circumstances when it is necessary to interfere with a person’s rights of privacy and sets out the conditions that must apply before such an intrusion is lawful.

For HMRC's intrusion into the taxpayer's rights to privacy under Article 8 to be lawful, the actions carried out by HMRC must be:

- in accordance with law.
- necessary in a democratic society.
- in pursuit of a legitimate aim.

For HMRC this means that any intrusive action must be in accordance with the law and necessary for the economic wellbeing of the UK.

For HMRC to comply with the conditions of Article 8 any planned activity must be proportionate to the underlying need. HMRC would need to demonstrate the extent to which personal information is being sought under the Schedule 36(2) notices is proportionate and reasonable in the circumstances of the case. HMRC would have to illustrate with sufficient clarity the scope and manner of exercise to illustrate that it is reasonable and proportionate to conduct their exercise which maybe intrusive upon the taxpayer's privacy.

The tax tribunal found in the case *LH Bishop & Others v HMRC TC02910* that there was an unjustified interference with the appellants' human rights, specifically Article 8 (the right to respect for private and family right) when combined with Article 14 (which requires that the human rights to be enjoyed without discrimination). This was on the basis that there was a disproportionate application to those who were computer illiterate due to age, disabled in a way that made using a computer difficult or painful, or who lived too remotely from a reliable internet connection.

Conclusion

It is important to understand what our human rights are in order to safeguard our rights as the taxpayer to a fair hearing, particularly in criminal tax matters. We can already see that there is some difference in what HMRC and the tribunal considers criminal. It is because of Article 8 that HMRC issues the Human Rights Act and Penalties (CC/FS9) factsheet as soon as penalties are mentioned in a case, otherwise HMRC could potentially be breaching the taxpayer's rights to a fair hearing.

Although we cannot see it on this side of the fence, HMRC has to go through rigorous administration procedures in most cases; to adhere to what information and documents HMRC can access under the taxpayer's rights granted by Article 8 to be able to demonstrate what is reasonable and proportionate. Without these rights in place we would see an HMRC that is far less constrained.

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