

Why privacy should prevail

Krishna Mahajan explores a taxpayer's right to privacy during an HMRC enquiry – from it being opened to ultimate closure

Privacy and confidentiality in tax cases have always been important, particularly where the taxpayer is someone in the public eye. Whilst a tax enquiry, or indeed litigation, does not mean that the taxpayer has 'done something wrong', there are certain negative inferences made by the public and media that could impact future opportunities for the individual or corporate involved.

Privacy at the enquiry stage

When a taxpayer receives the dreaded brown envelope from HMRC, often the first concern is how to meet the potential liability, and whether it is properly due. When the dust settles, the potential reputational impact can become a significant concern for a taxpayer.

For example, where companies are required to tender for contracts (particularly for government work) or where individuals might be a household name, there is often a question relating to any open HMRC enquiries. It is not uncommon that the existence of an enquiry can be leaked to the press where it concerns high-profile individuals. In the worst case scenario, if a taxpayer is found to have deliberately underpaid tax, there is a risk of being 'named and shamed' in HMRC's list of 'deliberate tax defaulters'.

HMRC's Personal Information Charter sets out the standards a taxpayer can expect from HMRC when requesting or holding information during the course of the taxpayer's enquiry. HMRC will not share confidential information about any taxpayer to a third party as it has a statutory duty of confidentiality. However, HMRC can share information with other government departments, the police, the courts (subject to obtaining a valid court order) and foreign tax and customs authorities.

Prior to any proceedings being commenced, privacy law can provide protection for individuals in HMRC investigations. In the Supreme Court case of *ZXC v Bloomberg LP*, it was confirmed that in general, a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation. In *Sicri v ANL* it was found that this privacy right is not confined to law enforcement investigations but also other circumstances where persons have come "under suspicion by the state". While there is not yet any case law on the exact point, HMRC investigations are likely to attract such protection.

There are instances in which the public interest in the publication of private financial information overrides privacy rights. The 'public interest' justification will often arise in circumstances where the taxpayer has evaded or committed some other serious offence as there cannot be an expectation of privacy in covering up an unlawful act. It is, of course, difficult to establish whether there has been a deliberate evasion of tax, and in any case the distinction is not made until the end of an investigation. In the absence of clear evidence of wrongdoing and where privacy rights are engaged, the media may be reluctant to publish any allegations at the enquiry stage.

Whilst there is a certainly a recognised protection of financial information, there has been a move towards transparency of certain types of financial and tax information, and the public is becoming increasingly interested in the tax affairs of leaders and corporates.

Going to appeal

So what happens when you appeal against HMRC's decision and proceedings in the First-tier Tax Tribunal (FTT) are commenced?

The common law principle of open justice is well-established: trials are normally public, even in circumstances where private matters are litigated. There is no special treatment for high-profile individuals and anonymity must be 'strictly necessary'. As tax appeals are open, anyone can attend the hearing and as decisions are published, the taxpayer seemingly has nowhere to hide. The only exception to this could relation to group litigations where not all taxpayers are likely to be made; indeed in some, it is just the 'test claimants' (or the equivalent) that would be mentioned at the hearing or even in the judgment.

In *HMRC v The Taxpayer* (UT/2022/000070), the Upper Tribunal (UT) considered that the FTT had made "material errors of law" which resulted in a "blanket derogation from open justice by the backdoor" by allowing the taxpayer's privacy application to be granted. The UT decided that the taxpayer's name would be published two weeks after the appeal deadline had passed. The taxpayer did not appeal the UT's decision but instead, withdrew its appeal. The taxpayer then applied to the FTT to preserve their anonymity forever. The outcome of that application has not yet been published.

This suggests that the taxpayer was only willing to appeal against HMRC's tax assessment if they could do so anonymously. This may support an argument that anonymous appeals should only be permitted in exceptional circumstances and where there are strong arguments to do so. It does not appear that the taxpayer in this case presented sound reasoning to justify the grant of anonymity.

More recently, in *L v HMRC* [2024] UKFTT 00401 (TC), the taxpayer justified the application for anonymity on the grounds that there is a "risk of serious financial harm; and a serious risk to health, in particular mental health". The taxpayer's application was allowed and the FTT determined the case on the basis of a commercial risk and accepted that the taxpayer was at risk of harm to health.

Often, a tax dispute may go hand in hand with a claim of professional negligence against, for example, an accountant or financial advisor. Such claims would usually be held in open court and the pleadings (statements of case, defence, etc.) are available to the public. Whilst an application for anonymity can be made, the bar is, again, very high for it to be granted.

Alternative Dispute Resolution (ADR) can often be a way to avoid a public hearing through discussion of the issues and potentially early settlement. Confidentiality in ADR is often a cornerstone and without a final hearing, no judgment is published.

What next?

Whilst there may be a public interest argument to be run to disclose an ongoing investigation, the rule is generally that privacy prevails. It is unlikely that the existence of an appeal or the taxpayer's name

will be published or publicly available before the hearing is listed before the public listing is made available; the onus is on the taxpayer in the run up to the hearing to prove why their name should be anonymised.

The FTT, and higher courts will need strong arguments to be put forward to demonstrate why the principles of open justice should not apply to the taxpayer and what detriment may be caused by maintaining the status quo.

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