Equal treatment and selective enforcement

General Features



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The late Tom Bingham has been described as ‘the pre-eminent judge of his generation and a passionate advocate of the rule of law’. In this article, first given as a speech to the Bingham Centre for the Rule of Law, LITRG Chairman Anthony Thomas explores how the principles evolved by Lord Bingham should apply in the field of taxation

Key Points

The law must be applied equally to all sectors of society Big business should not be treated differently from smaller business HMRC are responsible for the collection of tax and must apply the law correctly

A Bingham principle states that the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation. It is axiomatic that equality before the law is a cornerstone of our society. There should not be one rule for the rich and powerful and another for the poor. Nevertheless, there is a widespread belief that HMRC seem to have forgotten that fundamental principle. That all should be treated as equal before the law may now be accepted without much question, although it has taken time to get there. There is now an important related issue – inequality in administration gives rise to unequal treatment and hence unfairness.

In the past year the tax profession has been the focus of considerable political and media attention. Much of it is ill-informed, ill-considered, ill-conceived, ill-thought-out, and often deliberately misleading; much is generated by people who are more interested in getting a memorable sound bite or sensational newspaper headline. Comments such as ‘there are few more worthless specimens of humanity than tax accountants and lawyers’ or statements deliberately made to confuse tax evasion with tax avoidance do nothing to improve understanding of the way our tax system operates.

Crusading against tax avoidance has become a popular – and populist – pastime. Our prime minister was at it again recently at the World Economic Forum in Davos, promising that this would be a key part of the G8 agenda. He urged business leaders to ‘wake up and smell the coffee’. The PM and his chancellor have an alarming record of promoting tax vigilantism. The constant elision of evasion and avoidance with the clear suggestion that those who have made legitimate arrangements to minimise their tax bill are somehow crooked wins few friends in the business world. When will politicians and senior Revenue officials state clearly that tax evasion is illegal and tax avoidance is not? Their views simply muddy the water and are unhelpful. It is worrying that the tax profession seems shy to enter the debate. There is a need for it also to ‘wake up and smell the coffee’ before it is too late.

Let us be perfectly clear: politicians and HMRC are a major part of the problem. For nearly 20 years they have enacted reams of badly worded, highly complex legislation with totally inadequate parliamentary scrutiny.

Consider the matter of transfer pricing – the real subject of the ire of Margaret Hodge and the Public Accounts Committee. HMRC have been active in this field for

years. The department and politicians have had decades in which to identify the problems and to raise concerns through the OECD or properly get to grips with them.

The head of Goldman Sachs, itself attacked by the PM over the company's efficient accountancy arrangements said that by 'criminalising every right thinking person who organises his affairs in a sensible way' risks letting the mob dictate tax policy. There were the comments made in India when the PM added there should be a moral obligation placed upon tax avoiders to pay up, given difficulties in changing the law. A tax system based on politicians' or HMRC's concepts of fairness and morality does nothing for me nor I suspect for many of you.

Politicians, aggressive lobbyists and press often equate tax fairness with closing loopholes, limiting incentives and pursuing tax cheats. They simply ignore what is really needed, namely to create a tax system that is fair, clear and applied equally to all taxpayers. Fairness should look to limit the legislation and rules that favour one segment of the taxpaying population over another.

In particular, big business should not be treated differently from smaller business and, in exactly the same way, there should not be one rule for the rich and another for the poor.

There must be confidence that the law is applied equally to all sectors of society. Available evidence indicates that complex laws applied oppressively by a fiscal authority result in lower rather than higher tax revenues. I think you will probably find that the US tax system provides a good example of that.

Then there is the attitude of HMRC to the rule of law. When Parliament makes the law, it is incumbent on HMRC to act within it. Equally, when the courts hand down an interpretation of the law HMRC are obliged to apply that interpretation no matter how unpalatable.

HMRC publishes an array of press releases, statements of practice, guidance notes and toolkits which at times add to the complexity of tax practice rather than assist tax practitioners. It is difficult to trust a tax authority when practitioners feel HMRC has the power to introduce de facto tertiary legislation with no parliamentary scrutiny. We need to get back to taxing in accordance with the rule of law.

There continues to be a perception of a ‘cosy relationship’ between big business and HMRC. Such relationships are bad. The Varney review drove HMRC to focus efforts through risk assessment and communicating and discussing this work with big business. Smaller businesses were excluded. Then there were meetings with big business, tax in the boardroom and closer working in a way that gives an impression these big businesses are a favoured group. Such meetings lack transparency; and no minutes or conclusions are publicly available. The excuse, ‘taxpayer confidentiality’, is used to provide officials with an impenetrable ‘force field’ which not even parliamentary committees can breach.

Should you receive a better service because you pay more tax? It would be a novel way to encourage growth but not one that sits well with the rule of law.

It is worth quoting an editorial from *The Times* last July. It read:

‘Dave Hartnett, the former head of HMRC, takes a pragmatic approach to settlements. His preference was to reach settlements with big companies over tax disputes rather than spend years in court. In many ways this worked effectively but he appears to have underestimated how vital it is that justice is seen to be done, particularly in an era of public suspicion that big companies and the rich and powerful get better treatment then the little guy.’

> **There should not be one rule for the rich and powerful and another for the poor**

HMRC are responsible for the collection of tax and must apply the law correctly. The Commissioners cannot move away from this position merely because the result seems unfair or unreasonable. To do so would be contrary to the will of Parliament. There may, though, be circumstances where applying discretion would result in a better management of the revenue and, in such circumstances, the commissioners can choose to apply discretion. This moves me on to another Bingham principle:

‘Ministers and public officers at all levels must exercise the powers conferred upon them in good faith, fairly, for the purposes for which the powers were conferred without exceeding the limit of such powers and not unreasonably.’

There is another important principle inherent in the law.

‘Questions of legal right and liability should ordinarily be resolved by the application of the law and not by the exercise of discretion of some official, in effect giving them quasi legislative powers.’

The current public perception is a belief that big business and the wealthy have access to the ‘corridors of power’ not available to the poor and smaller business. Of course it is sensible to concentrate resources into special teams to deal with larger taxpayers but little thought appears to have been given to the fact that, with the closure of the local network of offices, this is at the expense of denying a sophisticated resource to smaller taxpayers whose problems may be technically the same but financially very different and often relatively much more material. Call centres have proved to be less effective and indeed the inefficiency and ineffectiveness of HMRC’s call centres over the past three years have destroyed much of the respect and credibility of the fisc.

You will not be surprised to hear of the significant numbers of taxpayers who are digitally excluded, of the many vulnerable taxpayers struggling to cope with a new way of working with HMRC, and of those who are unable to deal satisfactorily with a complex tax system, which is becoming more complicated with RTI and Universal Credit. There must be equal treatment of all taxpayers. Sadly, with ever more resources siphoned off into specialist ‘hit squads’, there is a danger of the most vulnerable and poor in society being disadvantaged with the concomitant danger of the worst excesses of HMRC maladministration coming to the fore.