



Taxing Matters

HMRC as a Public Authority – what does that mean? with Harry Smith

Alice	<p>Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at www.rpc.co.uk/taxingmatters.</p> <p>Today we're talking about Her Majesty's Revenue and Customs, HMRC, what they can do and what they can't.</p> <p>To take us through this thorny topic we're talking with Harry Smith.</p> <p>Harry is a senior associate in RPC's tax disputes team, which frankly does what it says on the tin. Harry used to be a litigator for HMRC's solicitors office, so is brilliantly placed to know what the rules HMRC have to follow are and is now a specialist advising on a wide range of direct and indirect tax disputes with, HMRC so he is also well placed to know exactly how to enforce them.</p> <p>Harry, welcome to the podcast.</p>
Harry	<p>Thank you, Alice. It's good to be here.</p>
Alice	<p>So, what is a public authority exactly?</p>
Harry	<p>Well, it's really any authority that exercises a public function. there are the obvious examples of public authorities like HMRC, like other government departments.</p> <p>You can also have other institutions that although they're not strictly speaking, you know, your classic public authority as in a statutory body, they are nonetheless exercising a public function and so in that respect they can be bound by some of the same strictures that affect HMRC.</p>
Alice	<p>So when we talk about a public function, what are we talking about here?</p>
Harry	<p>What we're really talking about is doing something in a quasi-governmental, quasi-administrative, quasi-official capacity. So just to take an example like a horse racing regulator can be seen as a public authority for the purposes of some public law.</p> <p>I mean, in a sense this is getting a bit academic because in our context we're talking about HMRC, which is a paradigm public authority; it's a public body constituted by statute specifically to collect and administer tax so, in some senses we don't want to get this too complicated, but there are other semi-taxing bodies as well.</p> <p>For instance, bodies that collect statutory levy, like the construction industry training board exercises a sort of quasi-tax function, albeit that it's not governed by some of the same provisions as the revenue.</p>
Alice	<p>So, you've talked about being governed by statutory provisions and other provisions, what kind of restrictions does being a public authority place on it?</p>
Harry	<p>Well, there are a couple of broad categories. I mean, first there are the obvious ones, and so those are the provisions that are set out in the statutes that expressly regulate and govern HMRC.</p> <p>So, when HMRC was created in 2005 thanks to the merger of the old Inland Revenue and the old HM Customs and Excise, there was an act of parliament, the Commissioners for Revenue and Customs Act, now HMRC. That's got, that's got powers and it's also got duties.</p> <p>But there are other places to look as well. So, for instance the Taxes Management Act 1970 which contains a lot of the procedural rules and regulations that the Revenue have got to abide by in a direct tax context and also the VAT Act in a VAT context.</p> <p>So, that's sort of one broad category of the statutes that are directly applicable specifically to HMRC.</p>

Alice	You've talked about legislative processes. Are there any specific rules around those?
Harry	Well, there are quite a lot of mechanical provisions, if you like, which set out what the revenue can and can't do in the context of an enquiry, in the context of closing an enquiry, in the context of making an assessment. I think it's probably not worth talking about those in great detail now because I think there's probably another podcast's worth of information in there, but obviously there are those procedural provisions that the Revenue have got to comply with.
Alice	And what happens if you say don't comply with those?
Harry	Well, that is sort of a matter for a statutory appeal. We've seen quite a few cases recently where taxpayers have taken procedural points, so actually the Revenue didn't open an enquiry properly. Just to give an example, which has meant that it's messed up the procedure from the Revenue's perspective. And so the taxpayer has succeeded, where if the Revenue had dotted the i's and crossed the t's, the taxpayer would not have succeeded.
Harry	Then, sort of stepping back a bit you've got sort of, you've got provisions that are more generally applicable to public bodies, things like the Human Rights Act which contains provisions that all public authorities have got to abide by in exercising their functions, in making decisions, in setting policy. Moving away from statute, there are things like guidance that HMRC publish, and I'll come on later to why this is important, but these are in a way sort of self-imposed limits on how the Revenue specifically conducts itself. Stepping back still further you've got provisions that are, you know, not set out in any form of statute or codified in any way, but provisions derived from caselaw. One of the sets of provisions that is important for public bodies more generally, and this is derived from statute, is a duty to comply with human rights legislation in coming to decisions and in making policies. You might think well 'why is this relevant because I'm a corporate' but there are some human rights that are applicable to corporates; so the right to enjoyment of property, for instance, is applicable to legal persons as well as to individuals. In practice a lot of the relevant human rights are qualified. So, for example, this human right to the enjoyment of property is qualified; it isn't absolute. You know, the state does have a right to levy taxes and it is subject to that, so you might not get very far with that. And in practice raising human rights arguments in a lot of tax contexts is kind of seen as a last refuge of the damned, but it is nonetheless there.
Alice	You talked about a number of different powers and duties, when we are talking about duties that HMRC have to comply with, what are the sort of main ones that businesses might find relevant here?
Harry	So, one of the main ones is actually something that isn't set out in any statute at all and that's a sort of general administrative law duty to act, in effect, in a rationale manner. Another really important one is legitimate expectation. This is a doctrine in public law, so it's applicable in all sorts of contexts; in, you know, the context of hospitals denying treatment to people, or in an immigration context and people being deported. So, it's much wider than just, you know, businesses and their tax affairs or individuals and their tax affairs. But it's the principle that where a public authority has led a taxpayer to believe, and I'll use 'taxpayer' for the moment, where a public authority has led a taxpayer to believe that they are going to do something, or not do something, or act in a certain way, and that taxpayer has then, you know, relied on that assurance in planning its affairs, in doing things itself, there are, circumstances in which it's wrong for the public authority just to resile from that treatment that it said it's going to accord. If the taxpayer has a legitimate expectation, then there is a duty for that to be upheld.
Alice	So, in what kind of example might that happen?
Harry	So classically this arises where there has been a representation made to the taxpayer say, you know, "we will tax this in X manner and the treatment that you've adopted is correct and we agree with this, we've taken legal advice and this is what we say". For them then to turn around a couple of years later and say "oops actually, no this is wrong, and you owe us a lot of money" that expectation that they will do what they said they would do, can be in some circumstances can be enforced in the courts.

Alice	You've talked about legitimate expectations, what are the things that taxpayers might think about in creating a legitimate expectation with HMRC?
Harry	Well, a key here is to have all your cards on the table. I'm just thinking, particularly in a settlement context, if HMRC were to try and resile from the settlement, it would often be on the basis that not all the relevant information had been made available to them at the time. So in order to make things like settlements really robust, so that you can say really strongly, "actually we have a legitimate expectation that this will be upheld", you do need to put all your cards on the table with the Revenue and make sure that there isn't anything that they can then turn around and say "oh, well if we had known that we had never have agreed to this." That's applicable in general context as well not just in terms of settlements.
Alice	What particular things are likely to be deal breakers for a legitimate expectation in particular?
Harry	The key here is that the expectation has to be legitimate. So, it has to be reasonable for the taxpayer to rely on what the Revenue have said. So, you know, if you have a letter from the Revenue saying 'yes, the rate of corporation tax is 5% and we will tax you accordingly' then you would struggle I think to have that upheld because any reasonable taxpayer will know that the rate of corporation tax is not 5%.
Alice	What kind of things might a taxpayer fail to disclose that might cause an HMRC to resile from a legitimate expectation position?
Harry	It's things like full details of all the transactions, you know, if we're in a transactional context, everything that happened, everything that didn't happen, if you know that the Revenue are proceeding on the basis of an incorrect understanding of the facts then, that's not great and that's the sort of thing that could cause the Revenue to change their minds if they found out. You know, if those facts are material.
Alice	What would an example of that be that has come up in the courts?
Harry	Well, a few years ago there was a bit of a saga which related to capital gains tax treatment of share options and HMRC had originally issued some guidance and lots of taxpayers acted in accordance with it. And then some years later they realised that it was wrong, so they issued some fresh guidance that reversed it. And they agreed that they would allow taxpayers whose affairs were all closed off, to carry on relying on the old guidance. But for those who still had open enquiries they would hold them to the new treatment. One taxpayer in particular sought a judicial review of this, and at first instance he succeeded; and it was held that he had a legitimate expectation of being able to rely on the old guidance. However, on appeal this was overturned pretty comprehensively. I suppose this illustrates a couple of things. First, the power of a judicial review threat to compel at least some change of treatment, in that HMRC were, well happy is perhaps the wrong word, but HMRC were content to allow some taxpayers to rely on the old guidance. And second, it shows that there are limits to the legitimate expectation doctrine. HMRC can change their mind if they've issued guidance where it's, you know, actually completely wrong, and in circumstances like that the court held that the guidance wasn't unfair in those circumstances.
Alice	What would a court do in that situation to fix the problem?
Harry	In some circumstances, they can compel the Revenue to act in a particular way, to uphold their, you know, originally heralded treatment. They can issue a prohibitory order that's perhaps less relevant in a tax context, typically you see that more in, a sort of planning law context, something like that. Those are really the two main remedies and they can also issue a caution order that quashes a decision that has been made.
Alice	So basically, HMRC would be able to, or would be forced to, act in the way that they said they were going to, and the taxpayer could take advantage of the decision that HMRC had previously made, is that right?
Harry	Yeah. That's broadly right. Obviously, there are a lot of caveats. That's the broad thrust, yeah.

Alice	So where would you be looking for these legitimate expectations? Where would they come from?
Harry	<p>In order for an expectation to be legitimate it needs to be, so it needs to have been issued to a specific taxpayer or a specific group of taxpayers.</p> <p>And that can be by way of a general announcement to, I don't know the leasing industry just to take one example, where the Revenue were held to a practice that they had said they would abide by, or it could be in written communications between a taxpayer's solicitors and the Revenue.</p> <p>Your strongest case is always going to be where it's really specific to one taxpayer, if they have said to one taxpayer we will do this and then they don't.</p>
Alice	You also talked about the other principle of rationality, what are we talking about here?
Harry	<p>So, this is, well in lawyer speak, we'd call it "Wednesbury unreasonableness", just derived from the case that really first articulated this principle. It's taking a decision that no reasonable decision maker in possession of the relevant facts could have taken in those circumstances.</p> <p>It's a very, very high threshold to surmount.</p>
Alice	So what might be an example of where a decision has been found to be irrational?
Harry	<p>I suppose that a good example is the paradigm of these unreasonableness cases, in that as a term of art, the irrationality ground of judicial review is sometimes known as "Wednesbury unreasonableness" because that's the name of the case, and this was where a local licensing authority had tried to impose conditions on the ability of a cinema to open on a Sunday, back when that sort of thing was contentious, and these related to whether or not children could be admitted.</p> <p>The Court held that the decision was so illogical that it was irrational and, I mean given that this was in a more restrained time, they weren't quite told to go ahead and try again whilst sober, but that's rather the impression you get now!</p>
Alice	Is that the kind of situation where you would look at it and immediately say "that looks irrational" or is there a bit more of a nuance in it that might only arise when you look at it from the information that a taxpayer or a business has given you?
Harry	<p>It can be a bit of both.</p> <p>As I say there is a high threshold, so, ideally you would want to have like very raised eyebrows when you first saw it. But in the context, you know, somethings can even if looking at first blush they don't look completely bonkers, can emerge as being so when you are in possession of all of the facts.</p>
Alice	What would happen if an irrational decision was made, what's your remedy?
Harry	<p>So, the remedy would be forcing or the court ordering the decision to be made again, despite what may look like (it looks like an appeal process to the outside world), really what it's about is enforcing good administration. The courts are always going to be very reluctant to make decisions on behalf administrators and in that category, we include the Revenue for this purpose.</p> <p>You know, public authorities are public authorities for a reason, they have the expertise, they have the context and, yeah, that's what they do, they make decisions on these sorts of things. Courts don't. And to avoid allegations of judicial tampering, judicial overreach, the courts aren't going to explicitly make a decision again, but they certainly can order it to go back and be remade by someone else in the Revenue.</p>
Alice	From an outsider's perspective that might just sound like inviting the same decision to be made another time, is that what actually happens or is it a different reality?
Harry	<p>It can do. Although in practice, in circumstances like that, the threshold is, as I've said, is high so, in practice, if the decision is being made again, they are probably not going to come to the same result precisely because the original decision was irrational.</p> <p>So, unless you are incredibly unlucky, as a label it's not a substantive appeal, but in practice you might think, looking through slightly cynical spectacles that that is what it can amount to.</p>
Alice	So what other restrictions are there on HMRC's decision making ability?
Harry	<p>So, there is a general duty in caselaw to exercise powers for the purpose that they are set out for, and there is a duty to take account of all the relevant factors and not to take into account the irrelevant factors.</p> <p>Really this runs to procedural unfairness which is one of the grounds for judicial review.</p>

Alice	So, from an HMRC context what might it look like if a power was not being used for the purpose for which it was intended?
Harry	<p>HMRC have some fairly broad information gathering powers that they can use to compel the taxpayer to provide certain information. If they are using this in order to progress an investigation, to find out stuff about people's tax affairs then, fine, all well and good, that's what the provisions are intended for, and you can argue about whether it's right to make the relevant order and you can appeal it to the tribunal, fine.</p> <p>What then you can't do is just use these information notices to harass a particular tax payer that they don't like.</p> <p>Unless there's an actual reason for using them, they can't just say right we want you to provide absolutely everything ever in granular detail.</p> <p>So, you know, something like that would be using stuff not for its proper purpose.</p>
Alice	And what about the factors that are relevant and not using irrelevant factors. What might an example be of an irrelevant factor being taken into account or a relevant factor failing to be taken into account?
Harry	<p>So, for instance it could be the revenue failing to take account of, in a reasonable excuse appeal; you have a taxpayer who has been in hospital for six months and not able to access any of their documents and the revenue have chased them for replies and have issued a closure notice into the enquiry.</p> <p>In practice, you'd end up under alternative specific provisions appealing that, but if the ability to issue a challenge on that basis wasn't there you could step back and challenge it under public law grounds as well.</p> <p>And this might be a tangent, but I should say that the ability to seek remedies under administrative law, to seek judicial review, is subject to the inability to seek an alternative remedy.</p>
Alice	What do you mean by that?
Harry	<p>So, if there's a statutory appeals process, as there is for enquiries and as there is for closure notices and assessments, what you can't do is say "oh I'm going to seek judicial review of this decision" because actually there is a specific mechanism for appealing the decision in substance and that goes up to the Tax Tribunal which there's a specialist body designed to deal with it rather than to the Administrative Court which is more general. And from a policy perspective you don't want generalist judges having to hear these appeals because there is an alternative specialist body that is better placed to do it.</p>
Alice	Would you be able to use these powers in the context of the appeal process?
Harry	<p>This is an area that's in a bit of a state of flux at the moment. The First Tier Tribunal doesn't have jurisdiction to hear judicial review: so, at the moment it's a statutory creation and the appeals that it can and can't hear are set out, so if you try and raise public law arguments in that context, revenue Counsel are likely to try and bat you down.</p> <p>That said, it never looks great. So, I'd just go back to what I said earlier; there is an embarrassment factor if things don't look great it's more likely to just add to the weight of the case against the revenue.</p>
Alice	So, from a taxpayer perspective, if you do have a situation where you believe there has been either an irrational decision, or a factor taking into account that shouldn't have been, what would you do to start the process?
Harry	<p>The key thing to bear in mind is that, if you are going to issue an application for judicial review, you've got to be quick. The time limit for getting your papers into the court is "promptly or in any event within three months of the decision that you're complaining about".</p> <p>In practice the limit is less than that because you have to do a Pre-Action Protocol first and before that you end up having to get together your evidence to do a witness statement in support and make the application for permission to apply for judicial review, because there is this initial filter stage which is determined on the papers. or subject to renewal at an oral hearing (if it isn't granted).</p> <p>In order to get to the that stage you have to have a fairly full application ready and make it as substantial as you can and sort of to get to that stage in three months is actually quite a tight time frame.</p> <p>I think about 90% of judicial reviews are turned down at the permission stage because they are out of time.</p> <p>So, that's really the key thing, if you think that there is an irrational decision or that HMRC have turned round and changed their mind on something in an unconscionable manner, the key is to act quickly, take advice quickly, because if you end up a month down, then you're making it a lot harder.</p>

Alice	So, from a business perspective what kinds of things might you want to be on the lookout for, that might be indicators that this is the appropriate process and you do need some advice?
Harry	<p>Really the classic thing is if there is a representation that HMRC then resile from. If there is a really obvious changing of mind then you might think, “hang about, are they allowed to do this, is this okay?” And even if just to seek a sense check you might want to think about talking to some solicitors, not naming any names but here we are.</p> <p>That’s really the classic, “hang on, this isn’t right, let’s check.”</p>
Alice	What kind of things might you want to have together in order to properly check the question that has arisen in your mind?
Harry	<p>You’ll want to gather a complete history of the correspondence and of the communications that you have had with the revenue, partly in order to support any application for JR that is eventually made, and also just to set out ‘actually is this something we should be going for’ because it is a front loaded process and it does take some time and it’s not an especially cheap way of seeking a remedy.</p> <p>So, a complete history of what’s happened is key and having a witness available is also key. And also lining up your witness.</p> <p>You know, if you’re listening to this it’s probably because you’re interested in tax, so it’s probably going to be you, but if not, then it could be a finance director, it could be head of legal, or a tax manager, anyone who has been interacting with the revenue really and can give a history of what has happened.</p>
Alice	Is there any other particular area that might not immediately spring to mind that you’d need to look into or silo or keep evidentially secure just in case you need to go back to them later?
Harry	<p>Yes, as in any situation where you are contemplating legal proceedings, you do need to make sure that you have got correspondence secure.</p> <p>So, if you’ve got email deletion programmes in operation on your servers, put a hold on the documents, put a hold on the operation of those relevant email accounts, talk to your IT team.</p> <p>It would be embarrassing, I think is a way of putting it mildly, if you were to get to a hearing and find out that all the relevant emails had been deleted. If that has happened, it’s not insurmountable because it’s possible to seek disclosure from the other side, from the revenue, and both sides in public law proceedings have a duty of candour, so it’s a real “cards on the table” situation.</p> <p>But it’s clearly not to your advantage shall we say if you are trying to put together the evidence and you haven’t got it and you have to seek it from the other side.</p>
Alice	So, using this kind of application, how would you think about deploying it as a tactical matter in any kind of negotiation that you might be entering into with HMRC?
Harry	<p>It can be a really useful threat.</p> <p>If HMRC have changed their mind on something and you think no, you know, if there’s a credible prospect that you might judicially review something, it will do two things within the revenue.</p> <p>First, it will force them to think “hang on, should we be doing something else here?” Most of the good strong cases where people are seeking judicial review end up not getting to court because the Revenue may back down.</p> <p>The second thing that will happen, that can also be really useful, is that it will mean that things get passed over to the solicitor’s office (if they are not there already) and that can force a reassessment. It’s essentially another pair of eyes from the Revenue, looking at it from a slightly independent perspective. Granted, they’re still working at the same organisation but they’re looking at it from the perspective of ‘if this gets to court, are we going to win or are we going to lose?’ And so that can force a realistic assessment of the prospects of the Revenue defending something. And it can end up in front of counsel as well so a barrister will be independent and can also offer that advice. So, there are several opportunities involved for the revenue to change their mind and to back down gracefully.</p>

Alice	So, what other remedies might there be if the decision is one that you aren't happy with?
Harry	<p>Well, you know, rather than pushing the sort of the nuclear button of judicial review, HMRC does have a complaints procedure and of course there are the statutory appeal mechanisms in relation to certain decisions that the Revenue are going to make in relation to assessment and enquiries.</p> <p>But, to make a complaint to the Revenue, there's a first tier where it goes to the original team; there's a second tier where it goes to an independent party within HMRC; then they can go to an adjudicator; and finally, it can be referred by an MP to the Ombudsman.</p> <p>How effective the complaints procedure is, is, you know, people don't always have a great deal of stock by it, because ultimately you are asking HMRC to review their own decisions.</p> <p>So, there's always an incentive to say no, no, this is right, this is right on their part.</p> <p>That said I do think a lot of the perception, and certainly a lot of the statistics, are due to complaints being made, where people are over-egging it. Sort of, the stereotype it's, you know, perhaps an unkind stereotype, is that some taxpayers will end up getting a bit emotional and directing criticism at inappropriate targets.</p> <p>So, for complaints always keep it an absolutely neutral, straight bat, and I think that way they're more likely to be effective.</p>
Alice	And what about the down sides. What do you have to balance against those potential good outcomes?
Harry	<p>The main two which are interlinked are time and expense.</p> <p>It isn't a cheap process. It takes a fair amount of time to pull together a decent application for JR as well as your solicitors' fees, you'll have the fees of counsel involved, there will be the application itself and grounds for judicial review (which is the setting out the why as a matter of law this decision should be subject to judicial review) and there's also the assembly of the evidence. That can be reasonably simple, 'there's a complete file'. But if you've got to do an email troll, then clearly it takes a lot more time.</p> <p>It's a fairly front loaded process, so by the time you get to putting the application in, actually you've already pretty much got your evidence, you've already got most of your legal arguments, but of course they're going to be refined if you end up going all the way to the hearing in skeleton arguments that are prepared specifically for a hearing.</p> <p>But it is front loaded and there isn't really any way around that; in order for it to be a strong application someone's got to put the work in.</p>
Alice	So, if you were giving a business one piece of advice about dealing with HMRC as a public authority what would you say?
Harry	<p>I think if I were giving one piece of advice, I would say to remember that they aren't a commercial party. There are restrictions on what they can do in terms of how they can settle things, their litigation and a settlement strategy, as well as being restrictions on the procedures they can adopt but the flip side of that is that because they are a public authority their decisions are subject to adjudication if they are procedurally unfair or irrational.</p> <p>I suppose another effect of HMRC not being a commercial body is that they are bound by their Litigation and Settlement Strategy. This isn't a statutory but it is generally published HMRC practice that they've got to stick with and it affects the circumstances in which they can settle, it creates it in response to some of the "sweetheart deals" that they were doing with certain taxpayers that got them a lot of bad press about 10 years ago now and I think we discussed that more in the episode where we talk about alternative dispute resolution.</p>
Alice	Absolutely right. But just as a refresher, what kind of points might there be and that you'd have to think about in terms of their litigation strategy and settlement processes?
Harry	<p>It's things like where they've been advised that they have a greater than evens prospect of success on a particular point, it is very difficult for them to concede it. So, one tactic in coming to a sensible settlement is always ensuring that actually there is a way that HMRC can get it through their governance on that basis.</p>

Alice	And presumably that also ties back into the rationality of their decision making, they have to be rational and abide by this process?
Harry	Yeah, and stepping back, a lot of the provisions and litigation settlement strategy are to promote good decision making by the Revenue. So, there is a small extent to which they are to sides of the same coin.
Alice	<p>Well thank you very much Harry for taking us through this incredibly difficult and complex topic of HMRC as a public authority and thank you to all of our listeners for joining us.</p> <p>Now as ever a full transcript of this episode together with our references can be found on our website www.rpc.co.uk/taxingmatters.</p> <p>If you have any questions for me or for Harry or any topics you would like us to cover in a future episode, please do email us on taxingmatters@rpc.co.uk. We would love to hear from you.</p> <p>If you like this episode please take a moment to rate, review and subscribe and remember to tell a colleague about us.</p> <p>Thank you all for listening and talk to you again in two weeks.</p>



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