

# Restoring public trust in HMRC: settlements with large corporate taxpayers

A policy paper from the All-Party Parliamentary Group on Anti-Corruption & Responsible Tax<sup>i</sup>

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## 1 Introduction and recommendations

The first phase of a major government consultation on how the UK's tax administration framework might be reformed has just ended.<sup>1</sup> A central underlying pressure towards reform comes from a perception, which we share, that there is a shortfall in public trust in HMRC operations. This paper is based on, and elaborates upon, the recommendations made by the All Party Parliamentary Group on Anti-Corruption and Responsible Tax in response to that consultation. There are several areas in which public trust in the UK's tax administration framework needs to be bolstered, but this paper focuses in

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<sup>1</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/972148/The\\_tax\\_administration\\_framework\\_Supporting\\_a\\_21st\\_century\\_tax\\_system\\_-\\_call\\_for\\_evidence.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972148/The_tax_administration_framework_Supporting_a_21st_century_tax_system_-_call_for_evidence.pdf)

particular on the issue of public trust in HMRC when it comes to settling disputes with large corporate taxpayers.

There has been widespread concern over the last decade regarding settlements between HMRC and large businesses. These concerns came to a head in 2011-13 in connection with a number of deals investigated by the Public Accounts Committee,<sup>2</sup> and again in 2016 with regard to a deal between HMRC and Google.<sup>3</sup> Measures must be taken in this area to maintain and develop public trust in the tax system.

Accountability for these settlements, which are widely perceived to be too favourable, is constrained in two respects. First, there is the principle of taxpayer confidentiality, which has thwarted detailed parliamentary scrutiny of these matters. Second, there is HMRC's legal relationship with the Treasury, which enables the Treasury to direct policy for settlements between HMRC and large corporate taxpayers while shielding it from accountability. Our research suggests that discretionary operational choices that HMRC is accused of making to the detriment of the public exchequer may not be choices at all but courses of action which HMRC has been under a statutory obligation to make pursuant to directions from the Treasury.

This policy paper proposes two specific policy interventions to remedy these shortcomings: (1) a statutory pathway for disclosure of taxpayer information for the purposes of parliamentary scrutiny of HMRC settlements with large corporate taxpayers, and (2) an amendment to the legislation governing HMRC's relationship with the Treasury, prioritising HMRC's duties in respect of revenue collection over its obligation to pursue Treasury policy priorities.

## 2 Existing mechanisms for scrutiny of HMRC settlements with large corporate taxpayers

The principal existing mechanisms for oversight of HMRC in this regard are as follows:

### 2.1 National Audit Office

The National Audit Office has a right to obtain documents and information (including information about individual taxpayer matters) under s.8 National Audit Act 1983. This provides HMRC with a statutory route for disclosure which overrides their duty of confidentiality.<sup>4</sup> It was along this pathway that, in 2012, following condemnation from the Public Accounts Committee of the conduct of HMRC in settling matters with large corporate taxpayers, the National Audit Office obtained the information necessary to conduct an exceptional review of five such settlements.<sup>5</sup> The detailed underlying findings were made by retired high court judge Sir Andrew Park and were not disclosed to the public, although the National Audit Office's published report contained anonymised summaries. Park found that the settlements had all been reasonable.

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<sup>2</sup> <https://www.theguardian.com/politics/2011/dec/20/inland-revenue-sweetheart-tax-deals>;  
<https://www.theguardian.com/politics/2013/dec/19/hmrc-lost-nerve-tax-avoiders-mps>

<sup>3</sup> <https://www.theguardian.com/business/2016/jan/25/mps-launch-corporation-tax-inquiry-criticism-130m-google-hmrc-deal>

<sup>4</sup> s.18(3) Commissioners for Revenue and Customs Act 2005

<sup>5</sup> National Audit Office, 'Settling large tax disputes', 14 June 2012, available at <https://web.archive.org/web/20190530134536/https://www.nao.org.uk/wp-content/uploads/2012/06/1213188.pdf>

Even as a one-off scrutiny mechanism this process suffered from a number of defects. Principally, the details were not made public, and so it was not possible for the findings to be reviewed independently. In addition, the personnel involved were figures from the tax industry establishment, having the consequence that the process may, to some observers at least, seem not to be neutral and objective.<sup>6</sup>

## 2.2 Assurance Commissioner

HMRC responded to the initial wave of criticisms of their handling of settlements with large taxpayers by instituting a number of governance reforms, and in particular with the creation of the role of ‘Assurance Commissioner’.<sup>7</sup> The Assurance Commissioner sits at the head of a formal internal governance structure for the resolution of tax disputes, and reports on settlements with large taxpayers. The first such report was in relation to the year 2012/13 and it continues to be published on an annual basis.<sup>8</sup>

The fact that the Assurance Commissioner’s scrutiny is internal and the details of the settlements are not made public means that the concerns which have been driving calls for public scrutiny of HMRC settlements with taxpayers cannot be allayed by it. In 2016 the Public Accounts Committee again called for public scrutiny of HMRC settlements with taxpayers (prompted by a surprisingly favourable-seeming settlement with Google), even though the Assurance Commissioner structure had been in place for four years.<sup>9</sup> At around the same time as the Public Accounts Committee report the government announced that the ‘arrangements for assuring large tax settlements in HMRC will be reviewed’.<sup>10</sup> The outcome of that review (if indeed it took place) has not been published.

## 2.3 Judicial and ministerial scrutiny

Case law confirms that HMRC has ‘a wide managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return that is practicable having regard to the staff available to them and the cost of collection’.<sup>11</sup> In other words HMRC should raise as much money as possible, but it can decide how best to do that given its resource constraints, without intervention from the courts.

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<sup>6</sup> For further discussion see Judith Freedman, ‘Restoring trust in the “Fairness” of corporate taxation: increased transparency and the need for institutional reform’ in Sjoerd Goslinga, Lisette van der Hel-van Dijk, Peter Mascini & Albert van Steenberg, eds., *Tax and trust: institutions, interactions and instruments*, The Hague: Eleven International Publishing, 2019, pp. 121-142

<sup>7</sup> Treasury Minutes Cm 8305 February 2012, available at [https://web.archive.org/web/20190530170654/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/238201/8305.pdf](https://web.archive.org/web/20190530170654/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238201/8305.pdf), p. 59

<sup>8</sup> The report was published separately for the first four years of the new governance structure – see <https://web.archive.org/web/20190604125834/https://www.gov.uk/government/collections/how-we-resolve-tax-disputes> – but is now incorporated into HMRC’s Annual Report and Accounts.

<sup>9</sup> <https://web.archive.org/web/20160320015756/http://www.publications.parliament.uk/pa/cm201516/cmselect/cmpubacc/788/788.pdf>

<sup>10</sup> <https://web.archive.org/web/20190604134908/https://www.gov.uk/government/news/new-executive-chair-and-chief-executive-officer-appointed-to-lead-hm-revenue-customs>

<sup>11</sup> *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1981] STC 260, (‘Fleet Street Casuals’) at 269 per Lord Diplock; see Stephen Daly, ‘Drawing the boundaries of HMRC discretion’, in *Essays in Honour of Judith Freedman*, ed. Rita de la Feria & Glen Loutzenhiser, Bloomsbury Publishing, 2020

In principle, since HMRC is a non-ministerial department, there is in addition no ministerial accountability for decisions taken pursuant to this discretion. This administrative distance between HMRC and ministers is said by HMRC to be for the purposes of fairness and impartiality in its decision-making.<sup>12</sup> This is indeed a standard and important constitutional principle. For example, ensuring that tax authorities are ‘semi-autonomous’ is part of a package of technical anti-corruption measures that developing countries have been encouraged to adopt in recent decades.<sup>13</sup> Further, ministers should not participate in HMRC determinations as a matter of constitutional propriety having regard to the separation of powers, since HMRC can exercise a quasi-judicial function.<sup>14</sup>

As is illustrated, however, by the recent news story about Prime Minister Boris Johnson texting Sir James Dyson to say that he would ‘fix’ a tax issue for him, the UK does not necessarily practice what it preaches in this regard.<sup>15</sup> This is a serious problem, which is considered further below, but on a formal level at least the principle of operational independence on the part of HMRC means that ministerial accountability for favourable deals with large corporates is not constitutionally appropriate.

### 3 Issues to consider in addressing the scrutiny gap

There are a number of issues to consider in this context, principal among which are as follows:

#### 3.1 Confidentiality

HMRC officials are required by statute to keep taxpayer information confidential.<sup>16</sup> Legislation permitting the disclosure of individual taxpayer information for the purposes of scrutiny of large corporate taxpayers’ settlements with HMRC could, however, be enacted.<sup>17</sup>

There would very likely be significant pushback against such a policy proposal on the basis of the broad principle of taxpayer confidentiality. As a matter of principle this pushback would be misconceived. The obligation of confidentiality imposed as a matter of general law on public bodies such as HMRC is subject to the possibility of disclosure in the public interest in any event, leaving aside the fact that it may be abrogated by statute. Given that the taxpayers in question are large UK-listed public companies or foreign multinationals with a significant economic footprint in the UK, there is a clear public interest in settlements between HMRC and such entities being scrutinised to an adequate level of public satisfaction.

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<sup>12</sup> HMRC Annual Report and Accounts 2017-18, p. 60

<sup>13</sup> Michael Keen, ‘Taxation and Development — Again’, International Monetary Fund working paper 12/220, September 2012

<sup>14</sup> A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8<sup>th</sup> edn., London, 1915

<sup>15</sup> <https://www.bbc.co.uk/news/uk-politics-56819137>

<sup>16</sup> s.18(1) Commissioners for Revenue and Customs Act 2005. There is an exception in s.18(2)(a)(i) which allows for individual taxpayer information to be disclosed for policy reasons, but the courts have held that this exception is a narrow one. It is not enough for the disclosure to be merely ‘expedient for some collateral purpose’ – significantly more justification than that is required in order to rely on the exception: *R (on the application of Ingenious Media Holdings plc and another) v Revenue and Customs Commissioners* [2016] STC 2306; see Stephen Daly, ‘Public disclosures and HMRC’s duty of confidentiality: *R (Ingenious Media) v HMRC*’ (2017) 1 British Tax Review 10.

<sup>17</sup> See s.18(3) Commissioners for Revenue and Customs Act 2005

Equally importantly, such pushback would also be misconceived from the point of view of the practical realities of what would happen in the event that a matter does not settle. In such an instance the matter would proceed to the tax tribunal, where the ethos as regards confidentiality is reversed: the very strong presumption is that everything is out in the open, because justice should be a public matter.<sup>18</sup> Consider, for example, how TV presenter Lorraine Kelly's personal tax affairs became a matter of much media interest when it was determined by a tax tribunal that for tax purposes the 'Lorraine Kelly' persona was actually a performance played by Lorraine Kelly.<sup>19</sup>

In view of this presumption that a contested matter will be made public if it goes as far as litigation, when large companies enter into transactions which generate sufficient levels of tax risk that litigation is a realistic potential outcome, they are themselves deliberately engaging the risk that the relevant tax and commercial information will enter the public domain.

By the same token, in settling the matter (rather than requiring the taxpayer to make out their case in an appeal) HMRC is granting confidentiality in respect of information which would otherwise end up in the public domain. There is no particular reason why, as a matter of policy, this optional confidentiality for companies in their tax affairs should be within HMRC's gift, aside from the fact that it can assist in encouraging a taxpayer to settle. It is this specific policy advantage that should be weighed in the balance with the advantage of public scrutiny, rather than any deep-seated general principle of confidentiality.

### 3.2 HMRC's relationship with the Treasury

As noted above, HMRC is a non-ministerial government department, which means that, in principle, it is independent of government for the purposes of operational decision-making. As regards policy, by contrast, HMRC is a ministerial department 'in all but name'.<sup>20</sup> This is because it is under a statutory obligation to do what it is told by the Treasury. Section 11 of the Commissioners for Revenue and Customs Act 2005 requires HMRC to 'comply with any directions of a general nature given to them by the Treasury'.<sup>21</sup>

The practical functioning of this relationship is almost entirely opaque. The Treasury's own literature on the subject says that there should be a 'framework document' setting out the relationship between a non-ministerial department and the ministerial department with a watching brief over it.<sup>22</sup> But there appears to be no such framework document as between HMRC and the Treasury – or at least not in the public domain. The closest approach to such a formally documented relationship is the fact that

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<sup>18</sup> *Revenue and Customs Commissioners v Banerjee (No 2)* [2009] EWHC 1229 (Ch); for the more general principle that justice should be administered in public see *Scott v Scott* [1913] AC 417.

<sup>19</sup> <https://www.theguardian.com/business/2019/mar/20/lorraine-kelly-theatrical-artist-tax-tribunal-judge-rules>

<sup>20</sup> The Institute for Government, 'The Strange Case of Non-Ministerial Departments', 2013, available at <https://www.instituteforgovernment.org.uk/sites/default/files/publications/NMDs%20-%20final.pdf>

<sup>21</sup> s.11 Commissioners for Revenue and Customs Act 2005

<sup>22</sup> HM Treasury, 'Managing Public Money', March 2018, p. 53, available at [https://web.archive.org/web/20190528171208/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/742189/Managing\\_Public\\_Money\\_MPM\\_with\\_annexes\\_2018.pdf](https://web.archive.org/web/20190528171208/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742189/Managing_Public_Money_MPM_with_annexes_2018.pdf); there are a number of such framework documents in the public domain relating to other non-ministerial departments – there appears to be no standard as to what they should contain and in how much detail since they vary significantly.

HMRC's published departmental plans name the ministers responsible and appear therefore to constitute the product of a structured goal-setting process as between the Treasury and HMRC.<sup>23</sup>

It is, in any event, not on this macro policy level that the relationship is a cause for concern. The policy concern raised in this section is the possibility that the discretionary operational choices that HMRC is accused of making to the detriment of the public exchequer are not choices at all but courses of action which HMRC has been under a statutory obligation to make pursuant to directions from the Treasury. For example, HMRC may in the past have been directed by the Treasury to go easy on large corporates generally, or to make no disclosures to the Public Accounts Committee about individual settlements with large corporate taxpayers.

It would not be surprising if directions of this sort have been given. A light touch as regards enforcement against large corporates is generally identified as part of the UK's international competitiveness strategy. Indeed this has been express policy under previous governments since the late 2000s,<sup>24</sup> and we see little indication that it has changed. HMRC would have been required by statute to comply with any such direction provided that it is of a general (*e.g.* sectoral) nature rather than being expressly referable to specific individual taxpayers. Legally, (and this lies at the core of the issue) such a direction would have trumped HMRC's duty to raise as much money as possible.

Inferentially, it would appear that the Treasury has indeed to some degree been involved in HMRC decision-making with regard to settlements with large corporate taxpayers. For example Google's 2016 corporation tax settlement with HMRC seemed to have been stage-managed so as to be announced by George Osborne at Davos.<sup>25</sup> It is also possible to see a glimpse of this facet of the relationship between HMRC and the Treasury in *R (on the application of UK Uncut Legal Action Ltd) v Revenue and Customs Commissioners*,<sup>26</sup> which was a court case in which HMRC's conduct in respect of a settlement with Goldman Sachs was challenged by an activist group. In that case it emerged that the senior HMRC official intervening in the settlement at a high level had taken questionable matters into account. Specifically, he had not wanted HMRC to embarrass George Osborne by digging in its heels on a technical point. This consideration should not have played a role in the official's decision-making, and it is therefore quite reasonable to cast doubt on HMRC's operational independence in this context. As already noted, this possibility calls into question the UK's compliance with standard constitutional safeguards against corruption.

In summary, HMRC's status as a non-ministerial department appears to have a double function. In addition to shielding individual taxpayers' tax affairs from ministers, it serves to shield the Treasury from accountability on a policy level for decisions in individual cases ostensibly taken independently by HMRC. It follows that any policy intervention with the purpose of improving scrutiny of HMRC's settlements with large corporate taxpayers needs to address the possibility that HMRC is being held accountable for decisions effectively taken by the Treasury.

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<sup>23</sup> <https://www.gov.uk/government/publications/hm-revenue-and-customs-hmrc-outcome-delivery-plan>

<sup>24</sup> HM Treasury and HMRC, 'Corporate Tax Reform: delivering a more competitive system', November 2010, 2.20-21, available at

[https://web.archive.org/web/20190706154732/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/81303/corporate\\_tax\\_reform\\_complete\\_document.pdf](https://web.archive.org/web/20190706154732/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/81303/corporate_tax_reform_complete_document.pdf)

<sup>25</sup> <https://www.theguardian.com/business/live/2016/jan/23/davos-2016-george-osborne-christine-lagarde-world-economy-live>

<sup>26</sup> [2013] STC 2357

## 4 Proposed policy interventions

We propose the following interventions:

### 4.1 Establishment of a parliamentary committee to publicly scrutinise HMRC settlements with specific large corporate taxpayers

Neither the principle of taxpayer confidentiality, nor the rules which give effect to that confidentiality, are absolute. With appropriate procedural safeguards, confidential information about large corporate taxpayers could be made public for the purposes of scrutiny by a parliamentary committee convened for that purpose. The reasons noted above for keeping HMRC decision-making separate from ministers would not apply to backbench and opposition party parliamentarians. This is particularly so in view of the fact that the purposes of the committee would be scrutiny rather than to exercise executive functions. The following would be required in order to bring such a committee into being:

- Legislation creating the statutory pathway to disclosure of the information in question. This would be the equivalent to s.8 National Audit Act 1983 by means of which the National Audit Office gains access to individual taxpayer information.
- An administrative mechanism for selecting the cases to be scrutinised. One option would be to adapt a mechanism from existing procedures instituted for the purposes of HMRC's own internal scrutiny of high-value settlements with large corporate taxpayers. There is a concern, however, that this would omit matters where substantial amounts of tax are at stake, but no dispute arises in the first place. The committee could therefore institute a system of scrutinising the affairs of other large corporate taxpayers, perhaps selected at random from a target class specified on an objective basis e.g. those falling within an existing statutory framework for large businesses.
- The establishment of the committee itself. This would require an amendment to the Standing Orders of both the House of Commons and the House of Lords, and other administrative steps at the parliamentary level. One question which arises is whether the committee would need to be resourced so as to be able to engage expert professional assistance in its scrutiny.
- Formal procedural safeguards for taxpayers. By way of comparison, the tax tribunal has a number of procedural safeguards which are relevant to the disclosure of private information. Without these safeguards the tax appeal process might impact adversely upon litigants' human right to privacy (which, perhaps surprisingly, is a right potentially enjoyed even by large public companies<sup>27</sup>). For example, it is possible to apply for material in the evidence before the tribunal to be redacted before it is made public. The tribunal rules<sup>28</sup> could be amended to provide that similar applications may be heard by the tax tribunal in relation to evidence going before the scrutiny committee.

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<sup>27</sup> It may be noted however that the right is of more limited effect in a business context than in, say, a domestic context: *Niemietz v Germany* [1992] ECHR 13710/88 at paragraph 31

<sup>28</sup> The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (S.I. 2009/273)

Alternatively, Parliamentary scrutiny could be conducted behind closed doors, as is the case with the operations of the Intelligence and Security Committee of Parliament. This approach would, however, suffer from the same shortfall as the existing mechanisms from the point of view of reassuring the public that these deals are not excessively favourable.

## 4.2 Constraining the Treasury's power over HMRC

The creation of this mechanism for scrutiny of HMRC's settlements with large corporate taxpayers could be combined with a move to amend s.11 Commissioners for Revenue and Customs Act 2005 so that it prioritises HMRC's revenue collection objective over directions from the Treasury. It could for example make use of the well-known judicial formulation cited above and provide as follows (with the additional text in italics):

In the exercise of their functions the Commissioners shall comply with any directions of a general nature given to them by the Treasury, *except insofar as such directions constrain the exercise of the Commissioners' managerial discretion as to the best means of obtaining for the national exchequer from the taxes committed to their charge the highest net return directly from taxpayers that is practicable having regard to the staff available to them and the cost of collection.*

The words 'directly from taxpayers' have been introduced in addition to the judicial formulation adopted here, in order to forestall any suggestion that a light touch in respect of large corporate taxpayers increases the amount of taxes collected because it encourages investment. The purpose of this amendment is precisely to ensure that the notorious 'Laffer curve' approach to fiscal policy (i.e. tax less to obtain more) plays no part in HMRC's decision-making at the operational level. Instructions from the Treasury to a non-ministerial department behind closed doors are an inappropriate mechanism for giving effect to such a policy position. Such a policy should be offered up for challenge in the forum of electoral politics and legislated for if determined to be desirable.

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