IN THE UPPER TRIBUNAL **UT/2022/000070**

(TAX AND CHANCERY)

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

A TAXPAYER

Respondent

BUNDLE INDEX FOR HEARING
IN OCTOBER 2024

Core Documents

TAB	DOCUMENT	DATE	PAGINATION
APPLICATION DOCUMENTS			
1.	Taxpayer's Application To Continue Anonymity	9.4.24	3
2.	HMRC's Response to the Taxpayer's Application (**"HMRC's Response"**)	29.4.24	8
3.	Submissions by Tax Policy Associates Ltd	7.5.24	18
4.	Submissions on behalf of PA Media	7.5.24	20
5.	Submissions on behalf of TML & NGN	8.5.24	25
UT HEARING ON 21 NOVEMBER 2023			
6.	HMRC's Skeleton Argument	31.10.23	45
7.	A Taxpayer's Skeleton Argument	7.11.23	63
8.	UT Judgement	10.1.24	83
SKELETON ARGUMENTS FOR OCTOBER 2024 HEARING			

Other Documents

TAB	DOCUMENT	DATE	PAGINATION
CORRESPONDENCE BETWEEN PARTIES & UT			
9.	Judge Richards's June 2022 proposal	9.4.22	98
10.	Open letter from HMRC	18.5.22	102
11.	Letter from A Taxpayer to HMRC	9.6.22	103
12.	Letter from HMRC to A Taxpayer	9.6.22	104
13.	Directions of Judge Richards	16.6.22	106
14.	A Taxpayer's Privacy Application	29.6.22	110
15.	HMRC's response to Taxpayer's UT Privacy Application	1.8.22	117
16.	Email from HMRC to UT	30.8.22	127
17.	HMRC Amended Skeleton Argument re Anonymity proceedings	7.11.22	132
18.	Emails from the Appellant and Respondent to the UT	9-14.12.22	151
19.	Interlocutory Hearing Decision & Directions	19.12.22	156
20.	Email from HMRC to UT	18.1.23	174
21.	Email from HMRC to Tribunal re A Taxpayer application	17.4.24	176
CORRESPONDENCE FROM THIRD PARTIES			
22.	Dan Neidle X post	12.1.24	177
23.	Carol Vorderman X post	12.1.24	178
24.	The Times (per the email from Mr David Brown to the UT)	15.4.24	179
25.	Email from The Times to Tribunal enc letter	26.4.24	182
26.	Email from Mark [redacted]	1.05.24	184

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BETWEEN:

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Appellants

- and –

A TAXPAYER

Respondent

RESPONDENT'S APPLICATION
TO CONTINUE ANONYMITY

Application

1. The Respondent hereby applies for a direction that these Upper Tribunal proceedings and the decision of 11 January 2024 will remain anonymised.

Reasons

2. The Respondent has not appealed the Upper Tribunal's decision and, instead, has decided to withdraw his appeal to the FTT against HMRC's decisions.

3. The Respondent respectfully submits that in those circumstances he ought to be permitted to retain the existing anonymity.

4. The direction can be made either under the Upper Tribunal's general power to regulate its own procedure (UT Rules, r.5) or under the Upper Tribunal's power in r.14(1) to prohibit the disclosure of specified information relating to the proceedings or matters likely to lead to the identification of a person who should not be identified:

> "(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of—
> (a) specified documents or information relating to the proceedings; or

(b) any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified."

5. Granting the direction sought is consistent with the approach taken in the other cases of which this Tribunal is already aware. In essence, a party to litigation who has sought anonymity but been refused it has the choice as to whether to continue with the proceedings and have the proceedings continue in public or to withdraw from the proceedings and maintain their pre-existing privacy/anonymity.

6. Such a direction is in the interests of justice because it allows the party to find out whether they will be entitled to anonymity/privacy, if they proceed, without having to give up their privacy in order to find that out.

7. Thus, in *JK v. HMRC* [2019] UKFTT 411 (TC):

> "[40] I refuse the application for anonymity. I do not consider it justified on any grounds put forward by the appellant. It seems to me that the appellant now has the choice referred to by Lord Atkinson in *Scott v Scott.* He may pursue his appeal in public with the consequent risk of reputational damage if in his appeal he relies on his diagnosis, or he may choose not to pursue the appeal. (If he goes ahead with the proceedings, I would make the order to keep his contact details private as set out in §38.)
> [41] Nevertheless, I am anonymising this decision on the anonymisation application. That is for two reasons.
> [42] Firstly, I have said that the appellant should be given the choice: pursue his appeal in public, or withdraw it. It is for him to make that decision. I am not going to make that an empty choice by publishing this decision under his name."

8. Similarly in *A v. Burke and Hare* [2022] IRLR 139:

> "[68] The Claimant indicated that if the price of obtaining payment of her alleged right to arrears of holiday pay was the publication of her name in the merits judgment, she would prefer to drop her claim. In this situation I was asked not to publish her name on this judgment. Ms Lord pointed out that if her name was published on the judgment the Claimant would suffer a loss of privacy merely because she had sought to obtain anonymity as opposed to seeking a remedy for her alleged right to holiday pay. I was advised that the hearing before the EJ took place in private. Ms Lord submitted that it would be unfortunate if the Claimant was forced into the open merely because she wished to challenge the EJ's decision.

…

[71] For the reasons given, and on the understanding that the Claimant intends to drop her claim against the Respondents, I will continue the anonymity order pronounced by Griffiths J in respect of this judgment and that of the EJ."

9. This choice is also part of the premise of §21 of *Zeromska-Smith v. United Lincolnshire Hospitals* [2019] EWHC 552 (QB), upon which both the UT and HMRC relied in the present proceedings:

> "[21] Finally, I wish to say something about the timing of any application for anonymity in cases which are not approval hearings for protected parties or children. Here, the application was made at the start of the trial, without any notice having been given to The Press Association in advance. This put the court reporter in an awkward position, and did not allow for full consideration of the issues or properly prepared submissions on behalf of the Press. Mr Feeny, for the Defendant, understandably took a neutral stance, although, when I adjourned the application, he helpfully provided to the court some additional authorities, for which I was very grateful. But, in general, it seems to me that such an application should be made and heard in advance of the trial, and should be served on the Press Association. There are two reasons for this. First, and most obviously, it gives the Press Association a proper opportunity to make representations, whether orally at the application or in writing in advance. Secondly, the outcome of the application may inform any decision taken by a Claimant in relation to settlement. Thus, if a Claimant in a sensitive case such as the present knows that, if the matter goes to trial, her name will be published in the press, she may consider that to be an important factor in deciding whether or not to accept an offer of settlement – in some cases it could tip the balance. For these reasons, an application for anonymity should be made well in advance of the trial and Claimants (and their advisers) should not assume that the application will be entertained at the start of the trial (because of the disruption to the trial which may ensue, if the application needs to be adjourned to enable the Press Association time to prepare submissions), nor that it will be "nodded through" by the judge, where the Defendant takes a neutral stance and there is only a court reporter to represent the interests of the press."

10. Thus, what is envisaged by the early application for anonymity is that it will be decided anonymously and "the outcome of the application" will be able influence settlement discussions. The premise is, therefore, explicitly that the unsuccessful applicant's name will only become public "if the matter goes to trial" (but not if the matter is settled) – that requires that the decision on anonymity does not name the individual if the matter is settled.

11. Indeed, this UT stated at §59:

> "As explained in that case, an applicant may wish to take into account a refusal of anonymity in considering whether to pursue an appeal, and the timetable for hearing the substantive appeal should not be at risk because of an appeal by either party against a decision on an application for privacy or anonymity."

12. Accordingly, the Respondent submits that it is clear that an individual in his position should be given a choice as to whether to pursue the appeal or withdraw and retain anonymity. The Respondent has decided to withdraw his appeal and retain anonymity.

13. This is consistent with the principle that rights, such as the right to privacy, should not be rendered illusory or nugatory, but instead should be practical and effective:

> "Where such a right exists in law it would potentially be a breach of article 6 ECHR (right to a fair trial), read with article 13 (right to an effective remedy) if it were rendered illusory or nugatory by the absence of any power to suspend or stay the adverse decision of HMRC until the appeal can be determined." (*OWD Ltd v. HMRC* [2019] UKSC 30 §77, see also §58(iii))

14. If the proceedings relating to the determination of anonymity/privacy were not themselves anonymous/private, the position in respect of Article 8 of ECHR would be, essentially, that if a person with a right to privacy requests anonymity/privacy and is unsuccessful, they will thereby have created their own publicity. It would amount to saying that the applicant must either accept publicity (because the point is now outside their control) or not exercise the right. That renders the right theoretical or illusory. The ability to have a judicial determination on the effect of one's right is an integral part of having a practical and effective right.

15. Avoiding the deterrent effect on exercising one's right to privacy, and obtaining a judicial determination on that issue, is also consistent with the principle of ensuring access to justice. Of course, the risk of one's name being published in a decision on a failed anonymity application does not actually stop the applicant making the application, but it is an impediment or deterrent.

16. In *R (oao Haworth) v. HMRC* [2021] UKSC 25 the Supreme Court considered the right of access in the context of a legislative scheme that allowed HMRC to issue 'follower notices', the effect of which was to impose a substantial penalty on a recipient who did not give up

their appeal to the FTT (i.e. they were fully entitled to continue with their appeals in the face of a follower notice, but would have to pay a penalty for doing so).

17. A restricted interpretation of HMRC's power to issue such follower notices was adopted to minimise the deterrent effect:

> "[61] Even taking those differences into account, the principle of statutory interpretation referred to in *UNISON* supports, in my view, the Court of Appeal's conclusion. There can be no doubt that the threat of the substantial penalty is intended firmly to discourage a taxpayer from pursuing his appeal. As Lord Reed said at para 80 of *UNISON*, where a statutory power authorises an intrusion upon the right of access to the courts, it must be interpreted as authorising only such a degree of intrusion as is reasonably necessary to fulfil the objective of the provision in question. Applying that principle, the use of the word "would" in the provision requires that HMRC must form the opinion that there is no scope for a reasonable person to disagree that the earlier ruling denies the taxpayer the advantage. Only then can they be said to have formed the opinion that the relevant ruling "would" deny the advantage. An opinion merely that is likely to do so is not sufficient."

18. The threat of publicity in the event of a failed anonymity application will firmly discourage litigants from applying for anonymity. In turn, it will also discourage those who may have succeeded in obtaining anonymity from pursuing their legal case at all (because they dare not find out whether they are entitled to anonymity due to the risk if they fail).

19. Indeed, the more serious the reason for applying for anonymity in the first place (e.g. risk of physical harm), the stronger the deterrent effect of being uncertain as to whether the applicant's identity will be published (in a decision about anonymity) if the application is unsuccessful. That would be a perverse result.

20. These reasons all support the approach borne out by the case law referred to above that a litigant who seeks anonymity but does not achieve it has the choice of whether to continue (with publicity, in due course) or withdraw and maintain privacy. As already explained, this Respondent has chosen to withdraw and maintain privacy.

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9 April 2024

Reference: UT/2022/000070

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

BETWEEN:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS ("HMRC")

Appellant / Respondent

and

TAXPAYER

Respondent / Applicant

HMRC'S RESPONSE TO THE TAXPAYER'S APPLICATION FOR PERMANENT ANONYMITY 29 APRIL 2024

INTRODUCTION

1. This is HMRC's response to the Taxpayer's application of 9 April 2024 for permanent anonymity. By email of 16 April 2024, the UT extended time for this response to 29 April 2024.

2. The Taxpayer's application is misconceived for essentially the same reasons as his original privacy application to the FtT. The application wrongly assumes that anonymity in his circumstances should be granted *as of right*. But there is no basis for this assumption in either the UT Rules or the authorities. The moment the Taxpayer's formalistic argument fails, the application has no substantive merit of its own and should be dismissed.

3. The UT has previously indicated in correspondence that it intends to determine the application on the papers. HMRC is content for the UT to proceed on that basis provided that this does not impact potential onward appeal rights. If permanent

anonymity is granted, this has potentially serious ramifications. HMRC does not want to find there is a procedural bar to an appeal because the application has been determined without a hearing. HMRC does not believe there is such a bar but raises the point for completeness. Should the UT wish to hear oral argument, HMRC would of course be happy to attend a hearing.

4. On 26 April 2024, Ms Leyla Linton from the Legal Department of the Times wrote to the UT indicating that Times Media Limited intends to make submissions by 30 April 2024. HMRC's position is that:

    a. The UT has jurisdiction to permit such submissions pursuant to r.5(3)(d) of the UT Rules – and this is an appropriate case in which the UT should grant permission. ***Lobler v HMRC*** [2015] UKUT 152 (TCC) is an example of the UT exercising this power (see [4]-[5]).

    b. (As HMRC has indicated separately) HMRC consents to the Times Media Limited being provided with a copy of the application and this response.

5. The UT's appeal decision has already, quite understandably, generated media interest including from:

    a. The Times (per the email from Mr David Brown, a journalist with the Times to the UT of 15 April 2024);

    b. Dan Neidle;[1] and

    c. Carol Vorderman.[2]

[1] Dan Neidle of Tax Policy Associates is a British tax lawyer (formerly head of UK tax at Clifford Chance), investigative journalist and commentator. In December 2023, he was awarded Investigation of the Year at the British Journalism Awards for his coverage of Nadhim Zahawi. His thread on the social media platform X has attracted over 1.8million views: https://x.com/DanNeidle/status/1745814875232719127

[2] Carol Vorderman is a broadcaster, media personality and writer. She currently presents a radio show on LBC. Her repost of Dan Neidle's post on the social media platform X has attracted over 1 million views: https://twitter.com/carolvorders/status/1745842647015518408

6. Accordingly, if (contrary to HMRC's position) the UT is minded to grant the application, HMRC would respectfully request that before doing so, the application, this response and Times Media Ltd's submission should be served on the Press Association in order to give them the chance to consider it and make any additional submissions they wish to make. Cases such as ***Zeromska-Smith v United Lincolnshire Hospitals NHS Trust*** [2019] EWHC 552 (QB) ("***Zeromska-Smith***") indicate that it is appropriate to involve the Press Association in matters that would in effect result in reporting restrictions (see [1], [10] and [21]).

BACKGROUND

7. The UT is already familiar with the background to these proceedings. It is, however, worth repeating that:

    a. The Taxpayer had ample opportunity to preserve his privacy in relation to this UT appeal entirely by agreeing to Judge Richards' (as he then was) June 2022 proposal (as slightly modified by HMRC). This proposal would have resulted in a variation in the FtT Directions by consent and without any UT hearings or decisions being required. Had there not been a UT decision, the Taxpayer could have settled without any risk of this matter coming to the attention of the public. He chose not to do so.

    b. The Taxpayer has been on notice from the outset of the UT proceedings that HMRC did not agree to these being in private and/or anonymised.

8. Accordingly, the Taxpayer has voluntarily continued his defence of this UT appeal in full knowledge of the risk that his name may in due course become public.

9. Since time for appealing to the Court of Appeal expired, there have been the following relevant developments:

    a. As at the date of this response (and to the best of HMRC's knowledge), the Taxpayer has not withdrawn his appeal to the FtT.

b. To the best of HMRC's knowledge, the Taxpayer has also not withdrawn his outstanding costs application before the FtT in relation the FtT's set aside and reinstatement of its privacy application.

c. Notwithstanding that UT's decision in the appeal was released on 10 January 2024, no communication in relation to settlement was received by HMRC prior to 9 April 2024.

d. The Taxpayer's representatives have now contacted HMRC, but no settlement has been agreed.

THE LAW

10. The default position is that all hearings must be held in public (r.37(1)). There are no specific UT Rules concerning anonymity of decisions.

11. Albeit in a different context, the Court of Appeal's judgment in ***JIH v News Group Newspapers Limited*** [2011] EWCA Civ 42 ("***JIH***") sets out at [19]-[22] relevant principles where the protection sought is an anonymity order (in particular, [21]).

HMRC'S POSITION

Preliminary point – prematurity

12. As matters currently stand, the Taxpayer has not actually withdrawn his substantive appeal to the FtT (or his outstanding costs application, which does not turn on reaching any formal settlement with HMRC about his tax liabilities), nor has he provided any timeframe for doing so. Notwithstanding that the UT's decision was released on 10 January 2024, making clear the risk of his name being published in due course at [63], the Taxpayer took no steps to contact HMRC about settlement prior to 9 April 2024. Accordingly, <u>at the very least</u> it would be premature for the UT to grant a direction for permanent anonymity while the FtT proceedings are still live.

HMRC's arguments in response

13. During the course of these appeal proceedings, the UT has already had substantial written and oral argument from HMRC, including on the authorities concerning privacy, anonymity and the principle of open justice. Bearing in mind that Times Media Limited will also be making submissions, this response does not repeat the extensive legal arguments HMRC has already made to the UT but will take them as read and simply focus on the arguments raised in the application.

14. Leaving aside prematurity, on any view the Taxpayer's application is misconceived. It is based on a wrong assumption that in his circumstances the Taxpayer has a choice *as of right* to withdraw his substantive FtT appeal or to be named. In effect, the Taxpayer is making the same type of formalistic argument as his original privacy application before the FtT – and it is wrong for the same reasons.

15. Were such a right to anonymity to exist, one would expect this to be clearly stated in the rules or in the authorities. Instead, the UT Rules start from the footing that public hearings are the default position. The authorities (including ***JIH*** at [21]) show that the correct approach is an evaluative one: balancing open justice against harm from publication. The hurdle for obtaining anonymity is a high one.

16. The moment that the Taxpayer cannot show he has a *right* to anonymity in these circumstances, his application must fail. This is because at no point (either before the FtT or the UT) has he submitted any cogent grounds or evidence of any harm he may suffer were his name to be revealed (and he has had plenty of opportunity to do so). If the UT agrees with HMRC that there is no *right* to continued anonymity and the proper approach is a balancing exercise, the Taxpayer has provided nothing to justify infringement of the open justice principle.

17. None of the cases relied upon by the Taxpayer establish that anonymity in his circumstances should be *as of right*. All three of the cases relied on by the Taxpayer concerned privacy applications supported by cogent grounds and evidence based on the applicants' sensitive personal circumstances:

a. ***JK v HMRC*** [2019] UKFTT 411 (TC) ("***JK***") concerned an applicant wishing to keep his mental disorders private. Moreover, and in any event, [40]-[42] of ***JK*** appears to be based on a misreading of ***Scott v Scott*** if these paragraphs might be interpreted as meaning there is an absolute *right* to anonymity in respect of all applications and/or appeals concerning privacy (see further below).

b. ***A v Burke and Hare*** [2022] IRLR 139 ("***Burke and Hare***") concerned an appellant who did not wish her profession as a stripper to be made public. At [68]-[71] the EAT does not say that anonymity in relation to her privacy application is available as of right but clearly performs, in those paragraphs, a balancing exercise on the facts and circumstances of the case; and

c. ***Zeromska-Smith*** concerned a claim for damages for psychiatric injury arising out of the stillbirth of her daughter. Moreover, nothing in [21] (on which the Taxpayer relies) says that anonymity in relation to a privacy application will be granted as of right.

18. In cases such as ***JK*** and ***Burke and Hare***, it is not difficult to see how a court may conclude that while the applicants did not have sufficient grounds to justify a private substantive hearing and/or an anonymised decision in the substantive litigation, in all the circumstances their grounds were nevertheless sufficient to justify privacy and anonymity in relation to the application itself.

19. The Taxpayer is not in the same position. At no point has he submitted any grounds or evidence as to why his personal circumstances are such as to justify privacy – either in relation to the substantive appeal *or in relation to these privacy proceedings*. It should be recalled that directions were specifically made for the provision of evidence if the Taxpayer wished to apply for privacy *in relation to this UT appeal* (see Direction 4 of the directions of Judge Richards of 16 June 2022). The Taxpayer chose not to submit any evidence, instead relying on the wholly formalistic argument that if he were not granted privacy in relation to the UT appeal, that would render the FtT's direction nugatory. That reason is now defunct since the FtT's direction has been set aside.

20. It is worth noting that the application in ***JK*** was made by the taxpayer in person and HMRC remained neutral (so it is far from clear whether the FtT received legal argument from either party).

21. [40]-[42] must be read together with the FtT's earlier observations on the correct approach, including at [18] where the FtT observed:

> "*18. … In particular, it is clear from the citation above from Scott v Scott that* ***the mere fact that holding the hearing in public and/or publishing the decision might deter would-be litigants from litigation is not enough to justify anonymisation****. The test is* ***whether anonymisation is necessary for justice to be done****. So* ***if the harm from publication is likely to be sufficiently serious such that a litigant would not realistically be able to assert his or her rights then it can be said that anonymisation is necessary for justice****. For instance, asylum seekers might be granted anonymity in immigration tribunal hearings where the Tribunal considers there is a real risk of serious reprisals against the asylum seeker or his family back in the country from which the litigant seeks asylum.*"

22. Accordingly, the FtT acknowledged that there is a balancing exercise in every case and the mere fact that litigant might be deterred from appealing is not enough to justify anonymity. So even ***JK*** does not establish "*The premise… explicitly that the unsuccessful applicant's name will only become public "if the matter goes to trial" (but not if the matter is settled) – that requires the decision on anonymity does not name the individual if the matter is settled*" (per paragraph 10 of the application) and the risk of one's name being published in a decision on a failed anonymity application is not an unacceptable barrier to justice (contrary to the submission at paragraph 15 of the application).

23. So far as HMRC can see, there is also nothing in ***Scott v Scott*** which can be interpreted as setting a precedent that anonymity must be available as of right in relation to failed privacy proceedings (and to the extent that the FtT suggested otherwise, the FtT was wrong). It is unclear which passage the FtT is referring to. Two passages in Viscount Haldane's judgment refer to the making of choices (at 439 and 449) but in different contexts – and nothing in Lord Atkinson's judgment can be interpreted to mean that anonymity can be *as of right* in any case. At 450, Lord Atkinson refers to examples of cases where "*Perpetual silence as to what transpired*

*at the hearing of such a case in camera **may** become absolutely essential in order to avoid the perpetration of this wrong; otherwise the whole object of a suit brought to protect property might be defeated by the form of procedure adopted by the tribunal from which the relief desired was sought to be obtained*" (**emphasis added**) – but this concerned an entirely different context where privacy and ongoing anonymity ***may*** be found to be justified on the specific substantive facts. No such facts exist here.

24. From paragraph 13 of the application onwards, the Taxpayer again raises arguments that have failed previously in relation to rights not being rendered illusory or nugatory, relying on ***OWD***. ***OWD*** has nothing to do with privacy at all. Moreover, and in any event, if the Taxpayer is named in these appeals, it is as a result of his own flawed tactical decisions (namely, to rely solely on formalistic arguments subsequently proven to be wrong, without putting forward any cogent grounds or evidence as to why privacy and/or anonymity should be justified).

25. Similarly, there is no parallel to be drawn between anything said by the Supreme Court in ***Haworth*** and the present case. At paragraph 18 of the application, the Taxpayer complains that "*The threat of publicity in the event of a failed anonymity application will firmly discourage litigants from applying for anonymity…*". If revealing the Taxpayer's identity in the present case discourages future spurious applications with no credible basis like this one, that is to be actively encouraged.

26. At paragraph 19, the Taxpayer suggests that uncertainty over anonymity will be a stronger deterrent effect for those with serious reasons for applying for anonymity in the first place. But that is a bad point for 2 reasons:

    a. First, what may or may not be the right approach in those cases in no way influences the position in this, very different, case; and

    b. Secondly, the cases show that where an applicant has put forward cogent grounds and evidence, anonymity in relation to the privacy application is more likely to be granted.

27. Accordingly, publishing the Taxpayer's name here will discourage spurious applications without foundation and will encourage anyone minded to make a privacy application to do so with cogent grounds and evidence, exactly as the law intends.

CONCLUSION

28. When the Taxpayer made his initial application for privacy to the FtT, he should have been aware that privacy is the exception and must be properly justified by the evidence. Moreover, he would have been well aware of HMRC's position that he should not maintain anonymity in the event HMRC won its appeal.

29. The Taxpayer can still of course prevent the detail and quantum of his dispute with HMRC becoming public knowledge by withdrawing his appeals against the closure notices. That is a matter for him – but it should have no bearing on the status of the UT's decision in these proceedings.

30. There is no legal basis for permanent anonymity to be granted, either as a matter of legal right or on the facts of this case. These privacy proceedings have wasted a substantial amount of HMRC's time, cost and resource (as well as occupying substantial tribunal time). This appeal is now finally determined; the Taxpayer has lost and there is no reason for keeping his name private any longer. This entire misconceived action now needs to be brought to a close. At no stage has the Taxpayer put forward any cogent grounds or evidence as to why he merits privacy and/or anonymity. To this end, he is no different to any other taxpayer who is a party to a UT appeal and the temporary anonymity order should now be lifted.

31. Accordingly, this application must be refused.

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29 April 2024

I am writing this on my phone on a busy train and so would be happy to expand on my reasons next week if that would help.

Kind regards

Mark [redacted]

[redacted]

Reference: UT/2022/000070

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

BETWEEN:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS ("HMRC")

Appellant / Respondent

and

TAXPAYER

Respondent / Applicant

SUBMISSION BY TAX POLICY ASSOCIATES LIMITED REGARDING THE TAXPAYER'S APPLICATION FOR PERMANENT ANONYMITY

7 MAY 2024

INTRODUCTION

1. Tax Policy Associates Limited ("TPAL") is a think tank established to improve tax policy and the public understanding of tax. It was founded in 2022, as a non-profit company limited by guarantee, by Dan Neidle, former head of UK tax at law firm Clifford Chance LLP.
2. With the Upper Tribunal's kind permission, TPAL has received a copy of, and reviewed, the Taxpayer's application of 9 April 2024 and HMRC's response of 29 April 2024.
3. TPAL would respectfully ask the Upper Tribunal to accept this submission under its case management power in rule 5(3)(d) of the Upper Tribunal rules.

SUBMISSIONS

4. TPAL agrees with HMRC's response, and makes two additional points.
5. First, in the interests of open justice, it is right that the identify of a taxpayer seeking anonymity for frivolous reasons (indeed, entirely undeclared reasons) should be disclosed. This argument is stronger if the taxpayer is a person in the public eye (TPAL does not know if that is the case).

6. Second, TPAL believes that, for many wealthy individual and corporate taxpayers, the prospect of their name becoming public at an FTT discourages frivolous tax litigation. However, if the Taxpayer's application succeeds, taxpayers of means with technically marginal cases would be able to employ a new strategy. They could file an appeal together with an application for anonymity. If the anonymity application succeeded, they would continue with the appeal. If it failed, they would drop the appeal and remain anonymous. They would have a "one-way bet". This would be a burden on Tribunals and on HMRC; it would also be against the interests of open justice, and the wider public interest.

7. TPAL respectfully asks the Upper Tribunal to order that future applications and responses relating to this matter be served on TPAL.

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7 May 2024

IN THE UPPER TRIBUNAL UT/2022/000070

TAX AND CHANCERY CHAMBER

BETWEEN:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellant

-and-

THE TAXPAYER

Respondent

PA MEDIA'S RESPONSE TO APPLICATION FOR ONGOING ANONYMITY

Introduction

1. PA Media – the national news agency for the UK and Ireland, formerly the Press Association ("**PA**") – makes the following submissions in relation to the Respondent's application of 9 April 2024 for ongoing anonymity ("**the Application**").
2. Said direction for anonymity, if granted, would apply to the proceedings before this Tribunal as well as the Judgment of Bacon J and HHJ Thomas Scott ("**the UT Judgment**") in *HMRC v The Taxpayer* [2024] UKUT 00012 (TCC).
3. In summary, PA opposes the Application and submits that anonymity should not be continued.
4. PA endorses the Appellant's submissions that the Application is misconceived[1] as a matter of law and that there are potentially serious ramifications[2] should ongoing anonymity be granted.

The facts

5. The Respondent originally appealed to the First Tier Tribunal ("**the FTT**") after the denial of income tax deductions by the Appellant in relation to "arrangements".
6. In July 2021, the Respondent made an application to the FTT for various directions in relation to publicity and privacy, including that the Appeal be heard in private, that

1 See Appellant Skeleton Argument of 29 April 2024 at §2
2 *Ibid* at §3

the decision be anonymised and that the Respondent be anonymised in continuing proceedings.

7. In September 2021 the FTT issued several directions, including the direction that preliminary proceedings in this matter shall be heard in private.

8. The Appellant was subsequently granted Permission to Appeal and in the UT Judgment handed down in January 2024 the FTT was found to have erred in law in granting the direction.

9. In response, the Respondent now seeks a direction that the Upper Tribunal proceedings and the UT Judgment will remain anonymised, following the Respondent's decision to withdraw his appeal to the FTT.

The law

10. The starting point when considering any reporting restrictions, including in the tribunals, must be the principle of open justice, a vital constitutional principle which ensures the public can access, understand and scrutinise the work of the courts which do justice in their name.

11. Open justice is not merely a lofty ideal. It "*lets in the light and allows the public to scrutinise the workings of the law, for better or for worse*": *R (Guardian News and Media) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420 at §2.

12. In *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966, 977, Lord Woolf MR explained why proceedings must be subject to "*the full glare of a public hearing*":

> "*It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely.*"

13. The identity of those involved in court proceedings is a central aspect of the principle of open justice. As the Supreme Court put it in *R (C) v Secretary of State for Justice* [2016] UKSC 2 at §1, "*the names of the people whose cases are being decided, and others involved in the hearing, should be public knowledge*".

14. Lady Hale JSC added at §36: "*The public has a right to know, not only what is going on in our courts, but also who the principal actors are.*"

15. The importance of identifying individuals before the courts, and its importance to the media, was expressly recognised by the Supreme Court in *Re Guardian News and Media* [2010] UKSC 1. In the well-known passage at §63, Lord Rodger JSC said:

> "*What's in a name? 'A lot', the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. …* "

16. More recently, in *Lu v Solicitors Regulation Authority* [2022] EWHC 1729 (Admin), Kerr J upheld the rejection of an application for anonymity brought by a respondent who had been acquitted of misconduct. He said at §5 and §6:

> *"I have found this appeal difficult. It shows the problems we are experiencing in our justice system with the notion of open justice. We repeatedly stress its importance, yet increasingly undermine it by the creeping march of anonymity and redaction. Parties, witnesses and ordinary workers…are routinely anonymised without asking the court or giving the matter much thought.*
>
> *"A common misconception is that if the identity of a person in legal proceedings is not directly relevant, there is no public interest in that person's name being known. The justice system thrives on fearless naming of people, whether bit part players or a protagonist...Clarity and a sense of purpose are lost. Reading or writing reports about nameless people is tedious.*"

17. The principle of open justice is, of course, not absolute. But any derogation from the general rule can be justified "*to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice*": *Attorney-General v Leveller Magazine* [1979] AC 440, 450.

18. This is because reporting restriction orders, which represent derogations from the principle of open justice, are "*exceptional, require clear justification and should be made only when they are strictly necessary to secure the proper administration of justice … they are measures of last resort*": *R v Sarker* [2018] EWCA Crim 1341 at §29(vi).

19. Ultimately, when considering an application to make such an order or other deorgation from open justice, the Court must carry out the familiar "*ultimate balancing test*", as set out by the House of Lords in *Re S (A Child)* [2005] 1 AC 593 at §17.

Submissions

20. Firstly, PA submits that the Respondent's Application mischaracterises the provision of anonymity as the default position, rather than an exception. He has no entitlement to anonymity, and should not have been granted it without clear, cogent evidence and reasoning subjected to sufficient scrutiny.

21. This submission is made out by a wide range of case law surrounding the open justice principle, as well as the default position of the UT rules that hearings are held in public.[3]

22. In the Respondent's written submissions at §12, he submits that "an individual in his position should be given a choice as to whether to pursue the appeal and withdraw and retain anonymity".

23. PA respectfully submits that this misunderstands the choice the Respondent currently has, which is not one of pursuing the Appeal or maintaining anonymity by withdrawing as envisaged.

24. Instead, PA submits the choice is – as set out in the UT Judgment - between whether to pursue anonymity and have this request properly scrutinised and only granted on basis of clear and cogent evidence, or to not challenge the finding that he is not entitled to a derogation from the open justice principle and become identified.

25. Discussions about open justice and when to permit derogations from the principle will often feature the balancing exercise between the interests of the parties, press and public at large[4]. However, PA submits that no balancing exercise has been conducted in this case. As described by the learned judges in the UT Judgment at §56:

> *"The taxpayer has been able to avoid the open justice principle for all preliminary proceedings for over two years, without any consideration having been given to his reasons for seeking privacy or anonymity.*"

3 As per Rule 37(1)
4 See §18.

26. This is clearly an undesirable position and one that should not be maintained or repeated. PA respectfully submits that to continue this position would pose serious ramifications and amount to an erasure of open justice and the rights therein via the back door.

27. PA also respectfully submits that the suggestion made by the Respondent at §19 of his submissions regarding a deterrent effect for those seeking anonymity is misconcieved.

28. As accepted in the UT Judgment, rational and persuasive reasons, if not clear and cogent evidence, are needed for departing from the principle of open justice. If a prospective Applicant's fear of publicity is derived from a rational reason and/or is supported by evidence, an application for anonymity will be considered and the appropriate balancing exercise undertaken. Therefore, those with legitimate requests for anonymity do not need to be deterred.

Conclusion

29. For the reasons set out above, PA respectfully submits that the ongoing anonymity sought by the Respondent would amount to an unjustified derogation from the open justice principle and should be refused.

30. If the Application is refused, the current anonymity of the Respondent should also be lifted.

[redacted]

Law Editor, PA Media

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7 May 2024

IN THE UPPER TRIBUNAL **Case No. UT/2022/000070**
(TAX & CHANCERY CHAMBER)

B E T W E E N :

THE COMMISSIONERS OF HIS MAJESTY'S REVENUE AND CUSTOMS

Appellant

and

A TAXPAYER

Respondent

WRITTEN SUBMISSIONS ON BEHALF OF TIMES MEDIA LIMITED & NEWS GROUP NEWSPAPERS LIMITED

A. INTRODUCTION

1. These written submissions are made on behalf of Times Media Limited ("**TML**"), publisher of The Times and The Sunday Times newspapers, and News Group Newspapers Limited ("**NGN**"), publisher of The Sun newspaper (together "**News UK**").

2. TML and NGN oppose the application by the Taxpayer for a final anonymity order in "*these Upper Tribunal proceedings and the decision of 11 January 2024*" on the grounds that:

   2.1 mere assertion, unsupported by evidence, that publicity and intrusion created by the failed anonymity application will harm the Taxpayer's Article 8 rights is not sufficient reason for displacing the important principle of open justice. It is a cornerstone of the rule of law that public justice should be publicly reported unless the interests of justice otherwise require. An anonymity order can only be justified in exceptional circumstances where it is strictly necessary to secure the interests of justice.

2.2 the authorities do not establish a general approach that applicants for anonymity orders should be given anonymity on the application so that if unsuccessful they can choose whether to "*continue (with publicity, in due course) or withdraw and maintain privacy*". The authorities establish that an application for anonymity is to be determined on its own merits, and where sought on privacy grounds, by the court or tribunal determining whether the consequences of disclosure would be so serious an interference with the applicant's Article 8 rights that it is necessary and proportionate to interfere with the ordinary rule of open justice.

2.3 the Upper Tribunal ("**UT**") has already directed that if the Taxpayer chooses to make a further application relating to anonymity in relation to the preliminary proceedings, such an application would fall to be determined by the FTT on its merits. By applying to prolong the order of the UT the Taxpayer is seeking to obtain the benefit of permanent anonymity on his application for anonymity and in the preliminary proceedings generally, without having produced any evidence of harm or prejudice, which the UT has already ruled *"is not an outcome which is open to taxpayers, since it results in a blanket derogation from open justice by the backdoor*". This application is an attempt to substitute a temporary interim order for a full and fair adjudication and should be dismissed as being totally without merit.

3. Further, TML and NGN seek disclosure of the following documents referred to in the judgment of Bacon J and Judge Scott dated 10 January 2024 ([2024] UKUT 12 (TCC) ("**the UT's Judgment**") pursuant to Rule 5(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) ("**the UT Rules**"):

3.1 the transcript of the hearing before the FTT on 19 July 2021 (referred to in para 29-31 of the UT's Judgment);

3.2 the appeal papers, including the substantive Notice of Appeal to the FTT against certain decisions of HMRC denying him deductions for income tax purposes;

3.3 the September 2021 decision of the FTT (Judge Sukul) (referred to in paras 8-10 of the UT's Judgment); and

3.4 the directions by UT Judge Richards dated 19 December 2022 (referred to in para 15 of the UT's Judgment).

B. THE TAXPAYER'S APPLICATION

THE APPLICABLE LEGAL PRINCIPLES

Derogations from open justice

4. The principle of open justice is vital to the proper functioning of the courts and tribunals in a democratic society. Ordinarily, civil proceedings in this jurisdiction are conducted in open court/tribunal, enabling members of the public and media to attend and observe the proceedings. Subject only to any restrictions that are imposed or automatically apply, a person who attends a public hearing is entitled to report what has taken place during the proceedings.

5. Rule 37 of the UT Rules reflects the fundamental rule of common law that the default position is that proceedings must be heard in public. The UT's power to derogate from those principles relied on in this case is Rule 14(1)(a) which provides that the UT may make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify any person whom the UT considers should not be identified.

6. As this is a derogation from the principle of open justice, the following principles apply (drawn from the ***Practice Guidance (Interim Non-Disclosure Orders)*** [2012] 1 WLR 1003 [9]-[13] and [16]) and the recent decisions of Nicklin J in ***Farley -v- Paymaster (1836) t/a Equiniti*** [2024] EWHC 383; ***Lawrence -v- Associated Newspapers Limited*** [2024] EMLR 3. [2023] EWHC

2789 and ***Various Claimants -v- Independent Parliamentary Standards Authority*** [2022] EMLR 4[1]:

6.1 Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see Article 6.1 of the ECHR and ***Scott -v- Scott*** [1913] AC 417.

6.2 The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: ***AMM -v- HXW*** [2010] EWHC 2457 (QB) at [34].

6.3 Derogations from this general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: ***R -v- Chief Registrar of Friendly Societies, Ex p New Cross Building Society*** [1984] QB 227, 235; ***Donald -v- Ntuli*** [2011] 1 WLR 294 [52]–[53].

6.4 There is no general exception to open justice where privacy or confidentiality is in issue.

6.5 Restrictions on open justice come in different forms. The most restrictive type of order is a direction that the court's proceedings will be held in private, the effect of which is to exclude from the hearing everyone except the parties, including members of the public and media. A court will only sit in private where it is been demonstrated, convincingly, that it is necessary to do so. Even then, the court will strive to provide as much information about the proceedings and why the court has found it necessary to sit in private: ***JIH -v- News Group Newspapers Ltd*** [2011] 1 WLR 1645 [21(9)] and [35].

[1] On 1 May 2024 Nicklin J was appointed by the Lord Chief Justice as the chair of a new Transparency and Open Justice Board, which will lead and coordinate the promotion of transparency and open justice across the courts and tribunals of England & Wales.

6.6 Often, the legitimate aim sought to be achieved by the relevant restriction can be imposed by measures short of the court sitting in private. In this category fall anonymity orders, reporting restriction orders, and orders restricting access to certain documents from the court file that would otherwise be available to non-parties.

6.7 The burden of establishing any derogation from the general principle of open justice lies on the person seeking it. It must be established by clear and cogent evidence: ***Scott -v- Scott*** [1913] AC 417, 438–439, 463, 477; ***Lord Browne of Madingley -v- Associated Newspapers Ltd*** [2008] QB 103 [2]-[3]; ***Secretary of State for the Home Department -v- AP (No.2)*** [2010] 1 WLR 1652 [7]; ***Gray -v- W*** [2010] EWHC 2367 (QB) at [6]-[8]; and ***JIH -v- News Group Newspapers Ltd (Practice Note)*** [2011] 1 WLR 1645 [21]. The court will scrutinise with care any application that the name of a party or other details about the claim should be withheld from the public. Mere assertion that a party may suffer some harm is unlikely to discharge the burden to justify the order.

6.8 Where justified, the restriction must go no further than strictly necessary to achieve their purpose

7. Anonymity orders are usually justified on one of two "*principal grounds*": (i) the maintenance of the administration of justice; and (ii) prevention of harm to other legitimate interests (see ***Various Claimants v Independent Parliamentary Standards Authority*** [2022] EMLR 4 at [36], citing the Divisional Court in ***R (Rai) v Crown Court at Winchester*** [2021] EWHC 339 (Admin) at [39]). The first category of case is where, without the relevant order being made, the administration of justice would be frustrated. Examples of this type of justification include cases involving trade secrets or other confidential information where, if no derogations from open justice were granted, the proceedings themselves would destroy that which the claimant was seeking to protect, thereby frustrating the administration of justice

8. Restrictions on open justice to protect legitimate interests, including the right to respect for private life under Article 8, raise more difficult issues.

> "The starting point is the recognition that open justice (and probably of greater practical significance, the privilege that attaches to media reports of proceedings in open court) will frequently lead to some interference with the legitimate interests of parties and witnesses. Media reports of proceedings in open court can have an adverse impact on the rights and interests of others, but, ordinarily, 'the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public': ***Khuja -v- Times Newspapers Ltd*** [2019] AC 161 [34(2)] per Lord Sumption.": ***Lupu v Rakoff*** [2020] EMLR 6 [28]-[30]

9. The importance of parties (and witnesses) to civil proceedings being identified publicly was explained in the following paragraphs from ***Various Claimants v IPSA*** (supra) at [38] cited in ***Dixon v North Bristol NHS Trust (*** [2022] EWHC 1871[2] at [57]-[62]:

> "[38] …[T]he names of the parties to litigation are important matters that should be available to the public and the media. Any interference with the public nature of court proceedings is to be avoided unless justice requires it: ***R -v- Legal Aid Board, ex parte Kaim Todner (A Firm)*** [1999] QB 966, 978g. No doubt there will be many litigants in the courts who would prefer that their names, addresses and details of their affairs were not made public in the course of proceedings. In ***Kaim Todner***, Lord Woolf MR explained (p.978):
>
> > "It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation. In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which

[2] Pending an application for permission to appeal to the Court of Appeal an interim public judgment was handed down by Nicklin J (***EGC v PGF NHS Trust*** [2022] EWHC 1908 (QB) which is referred to in the UT's Judgment at [42]-[43]). Following confirmation that the Claimant did not intend to appeal a full public judgment was handed down: ***Dixon v North Bristol NHS Trust (*** [2022] EWHC 1871.

> will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule…
>
> There can however be situations where a party or witness can reasonably require protection. In prosecutions for rape and blackmail, it is well established that the victim can be entitled to protection. Outside the well established cases where anonymity is provided, the reasonableness of the claim for protection is important. Although the foundation of the exceptions is the need to avoid frustrating the ability of the courts to do justice, a party cannot be allowed to achieve anonymity by insisting upon it as a condition for being involved in the proceedings irrespective of whether the demand is reasonable. There must be some objective foundation for the claim which is being made." (emphasis added).

As Nicklin J, explained in ***Dixon*** at [62]:

> "Media reports of proceedings in open court may well have an adverse impact on the rights and interests of others, but, ordinarily, "the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public": ***Khuja*** [34(2)]. More widely, "courts do not exist in a vacuum. Their decisions are properly subject to criticism in the press and in Parliament. That cannot happen if the key facts are not publicly known": ***AG -v- BBC*** [57]"

10. Where a party to the litigation seeks an anonymity order on the grounds that identifying him/her will interfere with his/her Convention rights, the court or tribunal must assess the engaged rights. Warby LJ provided a distillation of the principles concerning anonymity orders and other derogations from open justice in ***R (Marandi) -v- Westminster Magistrates' Court*** [2023] 2 Cr App R 15 at [43]:

> "(1) The starting point is the common law principle of open justice, authoritatively expounded in ***Scott -v- Scott*** and subsequent authorities at the highest level. …
>
> (2) The general principles that (a) justice is administered in public and (b) everything said in court is reportable both encompass the mention of names. As a rule, '[t]he public has a right to know, not only what is going on in our courts, but also who the principal actors are': ***R (C) -v- Secretary of State for Justice*** [2016] 1 WLR 444 [36] (Baroness Hale). …

(3) When considering the application for derogation in this case the judge was right to identify and apply a test of necessity. Under the common law as it existed prior to the entry into force of the Human Rights Act 1998, anonymity could only be justified where this was strictly necessary 'in the interests of justice': see ***Khuja*** [14]. This was and remains an exception of narrow scope: see the tests cited in ***Clifford -v-Millicom*** [2023] ICR 663.

(4) The threshold question is whether the measure in question – here, allowing the disclosure of the claimant's name and consequent publicity – would amount to an interference with the claimant's right to respect for his private and family life. This requires proof that the effects would attain a 'certain level of seriousness': ***ZXC -v- Bloomberg LP*** [2022] AC 1158 [55], ***Javadov -v- Westminster Magistrates' Court*** [2022] 1 WLR 1952 [39]…

(5) The next stage is the balancing exercise. The question … is whether the consequences of disclosure would be so serious an interference with the claimant's rights that it was necessary and proportionate to interfere with the ordinary rule of open justice…

(6) The cases all show that this question is not to be answered on the basis of 'rival generalities'[3] but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case. That is why 'clear and cogent evidence' is needed. This requirement reflects both the older common law authorities and the more modern cases. In ***Scott -v- Scott*** at p.438 Viscount Haldane held that the court had no power to depart from open justice 'unless it be strictly necessary'; the applicant 'must make out his case strictly, and bring it up to the standard which the underlying principle requires'. ***Rai*** is authority that the same is true of a case that relies on Article 8. The Practice Guidance is to the same effect and cites many modern authorities in support of that proposition. These include ***JIH -vNews Group Newspapers Ltd*** [2011] 1 WLR 1645 where, in an often-cited passage, Lord Neuberger of Abbotsbury said at [22]:

> 'Where, as here, the basis for any claimed restriction ultimately rests on a judicial assessment, it is therefore essential that (a) the judge is first satisfied that the facts and

[3] citing Sir Mark Potter P in *A Local Authority v W* [2006] 1 FLR 1, [53]

circumstances of the case are sufficiently strong to justify encroaching on the open justice rule …'

Tax appeals

11. As was by stated by Bacon J in the UT's Judgment at [24]-[25]:

> "Where a taxpayer brings a tax appeal, the principle of open justice will inevitably result in some intrusion into the taxpayer's privacy. However, that is a necessary price in most cases, as explained by Henderson J in ***HMRC v Banerjee*** [2009] EWHC 1229 (Ch) in the context of an application for anonymisation of a judgment which (as in this appeal) related to the deductibility of payments for income tax, as follows, at [35]:
>
> > "…taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."
>
> 25. In relation to hearings before the FTT, in ***Moyles v HMRC*** [2012] UKFTT 541 (TC) ("*Moyles*"), another case concerning the deductibility of payments, the then president of the FTT, Judge Bishopp, cited with approval the above passage from ***Banerjee***. Having described the presumption that hearings would be in public as "nowadays stronger than it might have been perceived even a few years ago", Judge Bishopp emphasised (at [14]):
>
> > …There is an obvious public interest in its being clear that the tax system is being operated even-handedly, an interest which would be compromised if hearings before this tribunal were in private save in the most compelling of circumstances.""

12. In dismissing an application for anonymity in the FTT in ***Clunes v HMRC*** [2017] UKFTT 0204 (TC) Judge Bishopp cited the extract from the judgments in ***Banerjee*** and ***Moyles*** above and stated:

> "If Henderson J's observations in *Banerjee* and mine in *Moyles* are taken together they make it clear that I cannot properly grant the application. Any taxpayer who was not in the public eye but who, for example, would prefer his friends or neighbours not to know of his financial affairs, would find it impossible to persuade the tribunal to grant him anonymity; as Henderson J said, the public interest in the outcome of tax litigation, whether in the High Court or in this tribunal, outweighs the desire of the taxpayer for anonymity, and the inevitable resultant intrusion into matters which might otherwise remain confidential is the price which must be paid for open justice, however unpalatable the individual taxpayer might find it to be. Moreover, the structure of rule 32 makes it quite clear that there is a strong presumption in favour of public hearings, and that the circumstances in which that presumption may be overridden are wholly exceptional"

SUBMISSIONS

13. The Taxpayer by this application, "*seeks to* ***retain the existing anonymity***" pursuant to Rules 5 and/or 14 of the UT Rules on the grounds that (i) "*such a direction is in the interests of justice because it allows the party to find out whether they will be entitled to anonymity/privacy, if they proceed,* ***without having to give up their privacy*** *in order to find that out.*" (paras 5, 6 and 20); (ii) the Article 8 rights of an applicant for anonymity/privacy measures are rendered illusory or nugatory if applicants for anonymity/privacy measures are deterred from making such applications by the threat of publicity (paras 13-19); and (iii) that such an approach is said to be consistent with the approach taken in other cases where "a *party to litigation who has sought anonymity but been refused it has [been given] the choice as to whether to continue with the proceedings and have the proceedings continue in public or to withdraw from the proceedings and* ***maintain their pre-existing privacy/anonymity***" (paras 5-12). It is said to be "*clear that an individual in his position should be given a choice as to whether to pursue the appeal or withdraw and* ***retain anonymity***" (para 12) and that "*the unsuccessful applicant's name will only become public "if the matter goes to trial but not if the matter is settled*" (para 10).

(i) Applicants for anonymity should be able to "*maintain their pre-existing privacy/anonymity*"

14. The Taxpayer's argument is based on the false premise that (i) the starting point for a party who applies for anonymity and/or privacy in proceedings is that they are entitled to "*pre-existing privacy/anonymity*" and that "*they [can] proceed, without having to give up their privacy in order to find.. out*" whether they will be entitled to anonymity/privacy; and (ii) the current anonymity direction by the UT was justified by the Taxpayer's privacy rights.

15. The correct starting point for consideration of anonymity orders in the UT, as in all courts and tribunals, is the principle of open justice and that the proceedings (and any applications in those proceedings) will be heard in public. Tax appeals are subject to the strong common law principle that justice should be administered in public and fully reportable save in exceptional circumstances where restrictions are necessary to secure the proper administration of justice. This promotes the rule of law and public confidence in the taxation and tribunal system. Those general principles encompass the identity of the parties (see ***Marandi*** at para 10(2) above) and *a fortiori* apply to a taxpayer who has voluntarily initiated the proceedings himself (with specialist legal advice).

16. Given the importance of open justice, the Tribunal starts from the position that any derogations from the principle of open justice: (1) can only be justified in exceptional circumstances, when the Tribunal is satisfied that the restriction is strictly necessary to secure the proper administration of justice; (2) must be established by clear and cogent evidence by the person seeking the order; (3) and where justified, must go no further than strictly necessary to achieve their purpose.

17. To 'hold the ring' until the application has been determined, applicants for anonymity are invariably granted anonymity on a temporary interim basis, but an interim anonymity order is not itself determinative of rights. Like any other interim order, it is simply imposed in order to facilitate the administration of

justice by maintaining the status quo prior to the determination of the application, so that effective anonymisation can take place if the application is successful.

18. The only reason the Taxpayer's name appears not to have been disclosed is the imposition of an interim order to hold the ring. Once that purpose falls away, *w*hether the Taxpayer should be granted an order anonymising his application for anonymity falls to be determined on its merits and by the Tribunal conducting the balancing exercise referred to at paragraph 10(5) above. To prolong the life of such an order is to evade a merits-based evaluation of whether anonymity is justified.

19. The Taxpayer may choose to withdraw his appeal and not proceed to a substantive hearing which will result in the Taxpayer avoiding the further publicity and scrutiny of his affairs involved with a full public substantive appeal. This was the point being made in the UT's Judgment at [59] and in ***Zeromska-Smith v United Lincolnshire Hospitals*** [2019] EWHC 552 at [21]. But it does not follow that by withdrawing from the proceedings that the interim order for anonymity will continue indefinitely. The Tribunal is under a duty to carefully consider whether the derogation that has been sought is justified and goes no further than strictly necessary. Where, to hold the ring, the court or tribunal makes a temporary anonymity order, without full evidence and without performing the established exercise of striking a balance between the various rights under the Convention, such a temporary order endures only until the parties and the court or tribunal are ready to deal substantively with the question of whether to make an anonymity order. If the proceedings are not pursued at a trial or full substantive appeal the justification for the interim anonymity order falls away unless the court or tribunal determines that a final order for anonymity should be granted in respect of the preliminary stages.

20. In this application, the Taxpayer has not produced any evidence, let alone "*clear and cogent evidence*" to justify a permanent anonymity order being made. His contentions, addressed below, are (i) that it is in the interests of justice that applicants should generally have privacy and/or anonymity in bringing such applications in order to prevent them being deterred from bringing such

applications or claims by the threat of publicity should they fail; and (ii) that similar cases have established a general approach of permanent anonymity in respect of unsuccessful applications for anonymity (where the claimant has then discontinued) for this reason.

(ii) Interests of justice that applicants for anonymity should be able to apply anonymously as the threat of publicity renders privacy rights illusory

21. Where Convention rights are engaged, the issue is whether the consequences of disclosure would be so serious an interference with the claimant's rights that it was necessary and proportionate to interfere with the ordinary rule of open justice (***Marandi*** at [43] referred to at paragraph 10 above).

22. The threshold question is whether disclosure of the Taxpayer's name and consequent publicity as a litigant who has made an application for anonymity - would amount to an interference with his right to respect for his private and family life. This requires proof that the effects would attain a "*certain level of seriousness*": ***ZXC*** (supra) [55], ***Javadov*** (supra) [39] cited in ***Marandi*** at paragraph 10 above. It appears to be the Taxpayer's case that the impact of disclosure of the fact that he has made an application for anonymity/privacy would amount to a serious interference with his Article 8 rights but no evidence to support that contention has been adduced.

23. In any event, even assuming that the threshold test is satisfied as it is self-evident that disclosure of the fact that he has made an application for anonymity will be harmful to his Article 8 rights, the nature and degree of such an interference on the facts of an individual case are not, however, self-evident matters. It does not flow inexorably from the content of the UT's Judgment that disclosure of the Taxpayer's name in that context would cause him serious reputational harm[4], still less that it would result in any particular degree of interference with his enjoyment of private or family life. Nor is the weight to be attributed to such interference a self-evident consideration (see ***Marandi*** where Warby LJ made a

[4] The right to protection of reputation is a right which is protected by article 8 of the Convention as part of the right to respect for private life: see, for example, ***ZXC*** (SC) (supra) at 118-121;

a similar assessment of the applicant's failure to adduce evidence to meet the threshold test).

24. The risk that anonymity and privacy applications on occasion attract publicity (separate to or in addition to the media's interest in the substantive appeal) which may harm the Article 8 interests which the applicant is seeking to protect is mere assertion (or to use Warby LJ's words in ***Marandi*** a "*generality*"), and is not sufficient reason to justify a derogation. This is a familiar conundrum to applicants for anonymity and privacy orders. The answer to the conundrum is that, if applicants choose to seek bring themselves within the class of exceptional cases which justify a derogation from the principle of open justice, they have to accept the risk that it may create publicity if they fail. But, as was stated by Lord Woolf CJ in ***Kaim Todner,*** "*It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings*" and Henderson J in ***Banerjee*** "*The inevitable degree of intrusion into the taxpayer's privacy which [a tax appeal] involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat*".

25. This does not render an applicant's Article 8 rights nugatory or illusory or impede access to justice. If an Applicant's Article 8 rights are engaged, the authorities establish that a tribunal or court will take into account whether the threat of publicity will affect the willingness of a party or witness to take part in a case (see ***Clifford***, referred to at paragraph 28 below) but it is not a general rule that a court or tribunal will order anonymity where a party asserts that it will abandon a claim or an appeal if the derogation sought is refused.

(iii) Case law supports a general approach of anonymity for applicants on their applications for anonymity and/or privacy

26. None of the authorities cited by the Taxpayer establish a general rule that applicants for anonymity should have a choice of "*whether to continue (with publicity, in due course) or withdrawn and maintain privacy*". ***JK v HMRC*** [2019 UKFTT 411(TC) and ***A v Burke and Hare*** [2022] IRLR 139 are

both examples of where a tribunal determined that the applicant should have anonymity on the application for anonymity on their facts. They do not establish this as a general rule.

27. Further, this argument is to ignore clear authority that there is no such general rule and applications are to be determined on their merits by a fact specific balancing exercise. The judgments in ***Banerjee***, ***Moyles*** and ***Clunes*** are all examples of failed applications for anonymity, notwithstanding that the refusal by the Tribunal to grant them anonymity impacted on their reputation or otherwise interfered with their Article 8 rights, and in the case of ***Moyles*** and ***Clunes*** without reference to whether the applicants had decided to withdraw their substantive claim or not. In ***Moyles*** a similar argument - that the applicant's fears for the reputational damage he may be caused by the revelation of his identity may lead him to withdraw the appeal and that such a result must be regarded as contrary to the interests of justice – were held insufficient to justify the anonymity and privacy measures sought.

28. In ***Clifford*** (supra) at [47] – [48], on an appeal from the Employment Tribunal, the Court of Appeal considered the approach courts and tribunals should take where a party asserts that they will abandon a claim or defence if the derogation sought is refused:

> "I do not consider ***Kaim Todner*** or ***Moss*** to be authority for the bald proposition that a court or tribunal must always ignore an assertion that a party will abandon a claim or defence if the derogation sought is refused… Of course, a threat to abandon a claim or defence or part of it if anonymity is not granted cannot be enough of itself to justify an application for that relief. And as Viscount Haldane LC emphasised in ***Scott v Scott*** (at p439), "A mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish is not … enough"… But Viscount Haldane acknowledged (at p439) that a case might come within the exception to the open justice principle "[i]f the evidence to be given is of such a character that it would be impracticable to force an unwilling witness to give it in public". And one of the illustrations which Earl Loreburn gave of the underlying principle (at p446) was a case in which "the administration of justice would be rendered impracticable" because "the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court". Courts and tribunals must take a strict and disciplined approach to cases where this kind of assertion is made. But in my judgment, the question of whether publicity would affect the willingness

> of a party or witness to take part in a case is in principle a relevant factor. ***Deripaska v Cherney*** [2012] EWCA Civ 1235 [21] provides some modern support for that view.
>
> 48. In ***Kaim Todner*** the applicants did not want the name of their law firm to be associated with a decision of a court. In ***Moss***, the court rejected the claimant's case that publicity would risk a breach of his Article 8 rights. In other words, there was no reasonable basis for seeking anonymity in either case. Here, there were Mr Frechette's concerns, and his statements as to what he would do if the case had to proceed with no restrictions on publicity. His concerns and his intentions were not just asserted. They were explained in some detail by him in two witness statements and supported by other evidence. The EJ made no finding that what he said was insincere or unreliable. She accepted (at [96]) that his stated intention "may well" be genuine. She was wrong to rule those matters out of consideration. She should have considered them and assessed their reasonableness. If she held them to be more than "mere feelings of delicacy" but to have some reasonable foundation she should have factored them into her consideration of whether the order sought was more than just desirable, but necessary in the interests of justice."

29. In this case, the Taxpayer does not assert that he will withdraw his appeal if anonymity is refused; only that he should have the benefit of anonymity on the grounds that applicants for anonymity will generally be deterred by the threat of publicity if they are not given anonymity. This is plainly insufficient.

(iv) Scope of the Taxpayer's application and anonymity by the backdoor

30. The scope of the Taxpayer's application is stated in paragraph 1 of the application to be "*a direction that these Upper Tribunal proceedings and the decision of 11 January 2024 will remain anonymised*". However, it appears from paragraphs 10 and 20 of the Taxpayer's application that the application is not limited to anonymity on the application but is intended to seek, or will be used to argue in the FTT for, anonymity in respect of all of the preliminary proceedings since 2019 such that the Taxpayer's "*name will not become public*" and that he can "*continue (with publicity, in due course) or withdraw and maintain privacy*".

31. As was the case of the Taxpayer's earlier application to the FTT this is not an outcome which should be open to the Taxpayer since it results in a blanket derogation from open justice by the backdoor. To hold otherwise allows a

temporary holding order by the Upper Tribunal to become a substitute for a full and fair adjudication of the application for anonymity. That this is not a permissible has already been pointed out by the Upper Tribunal.

32. Further, if it is to be the Taxpayer's case as regard the preliminary proceedings in the FTT, that the applicant cannot be effectively anonymised on the application without all of the preliminary proceedings being anonymised (because of the risk of jigsaw identification from the procedural detail set out in the UT's Judgment), this is another reason why this application in the UT should fail. If not, the practical effect will be anonymity for the Taxpayer for all of the preliminary proceedings in the FTT (and appeal to the UT) without any proper evaluation having been given to his justification for seeking anonymity.

33. The position of TML and NGN is that they wish to report the Taxpayer's appeal, the outcome of the appeal and the open justice issues, with reference to Taxpayer's identity because this would make the piece considerably more meaningful and engaging for readers. There is a serious public interest in tax cases (as explained in the cases set out in the UT's Judgment and referred to at paragraph 12 above). Any form of anonymisation places the facts at one remove and makes it harder for an interested reader to follow the case. Debate about tribunal proceedings and matters of public interest relating to deductions for income tax suffers if the media are required to present anonymised reports in a way which they consider will not interest readers or help them absorb the information.

34. For these reasons, TML and NGN submit that the application is totally without merit and should be dismissed.

C. ACCESS TO DOCUMENTS

35. TML and NGN seek access to (and permission to report on) the following documents:

    35.1 the transcript of the hearing before the FTT on 19 July 2021 (referred to in para 29-31 of the UT's Judgment) and any other transcripts of the preliminary proceedings;

35.2 the appeal papers, including the substantive Notice of Appeal to the FTT against certain decisions of HMRC denying him deductions for income tax purposes;

35.3 the September 2021 decision of the FTT (Judge Sukul) dated 15 September 2021 (referred to in paras 8-10 of the UT's Judgment); and

35.4 the directions by UT Judge Richards dated 19 December 2022 (referred to in para 15 of the UT's Judgment).

36. The legal principles to be applied on an application of this nature are now well settled and well understood.

37. Where documents have been placed before a judge and referred to in the course of proceedings, the default position is that the media should be permitted to have access to those documents in accordance with the open justice principle. Where access is sought for a proper journalistic purpose the case for allowing it will be particularly strong: ***R (Guardian News and Media Ltd) v City of Westminster Magistrates Court*** [2012] 3 WLR 1343, [2012] EWCA Civ 420.

38. The principles laid down in ***Guardian News and Media*** were endorsed by the Supreme Court in ***Cape Intermediate Holdings Ltd v Dring*** [2019] UKSC 38 [2020] AC 629. In ***Cape*** at [42] the Supreme Court explained the reason for open justice being the default position:

> "The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide cases—to hold the judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly….But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken. For this they have to be in a position to understand the issues and the evidence adduced in support of the parties' cases".

39. In evaluating the grounds for opposing access, the Tribunal must carry out a fact-specific proportionality exercise.

> "Central to the court's evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose

and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others" (***Cape*** at [38]).”

40. The grounds for TML and NGN's application are:

40.1 the direction that preliminary hearings in this matter in the FTT shall be heard in private has been set aside by the UT as being unjustified. Therefore, the hearing on 19 July 2021 was a hearing which should have been open to the public. As it is a hearing that should have taken place in public it stands to reason that the transcript should now be disclosed to the media and public.

It is noted that it is stated at para [53] of the UT's Judgment that should "*the Taxpayer decide to withdraw or settle his appeal and not pursue the Privacy and Anonymity Application, that benefit [of privacy for all preliminary proceedings] would not be reversible*". This is plainly right save that where there is a transcript available, the public and the media can now access the hearing and such transcripts should be provided.

40.2 In order to properly understand the arguments the public should have access to the appeal papers, including the substantive notice of appeal to the FTT. There is a significant and legitimate public interest in understanding the full circumstances of the appeal. It is difficult for the public to understand why so much public money and tribunal resources has been spent on this appeal without some knowledge of the substantive appeal.

40.3 Further, the release of the documents sought will allow informed press and public consideration of the various matters that were taken into account when decisions were made by the FTT to proceed in private. If the details of the substantive appeal are not disclosed, it is inevitable that there will be a good deal of uninformed speculation about this issue. There is therefore a strong public interest in allowing public access to the notice of appeal and original application for anonymity and privacy which set out the matters which were before the FTT, and the reasoning process that led to the decisions which were made. There is a strong and

legitimate public interest in the public understanding the work of the Tribunal and being able to see that it is being done properly and fairly.

40.4 All of the documents sought were read by and referred to by the UT and therefore the default position of access by the media should apply (***Guardian News and Media Ltd*** (supra)).

41. For these reasons, TML and NGN submit that their application should be granted and in conjunction with the Taxpayer's application for anonymity.

SARAH PALIN

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8 May 2024

Reference: UT/2022/000070

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

BETWEEN:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS ("HMRC")

Appellant

and

TAXPAYER[1]

Respondent

HMRC'S SKELETON ARGUMENT

For hearing: 1.5-day hearing (starting on either 21, 22 or 23 November 2023)

Pre-reading time: 3.5 hours

Suggested pre-reading:

1. The FTT's Directions of 15 September 2021 [**Core/Tab 1**]
2. Grounds of Appeal [**Core/Tab 7**]
3. UT's Decision granting permission to appeal of 16 June 2022 [**Core/Tab 8**]
4. Taxpayer's response [**Core/Tab 9**]
5. UT's decision of 19 December 2022 [**Core/Tab 10**]
6. Parties' skeleton arguments
7. *Mr D v HMRC* [2017] UKFTT 0850 (TC)
8. *Zeromska-Smith v United Lincolnshire Hospitals* [2019] EWHC 552 (QB)

(The cases at 7. and 8. contain useful summaries of the key authorities.)

[1] **Note** the Directions released by the UT on 19 December 2022, including Direction 1 requiring the parties and the UT to refer to the Respondent as the "Taxpayer". Per Direction 2, the hearing is to take place in public.

A. Introduction

1. This appeal raises a short point of law. HMRC appeals the Direction of the First-tier Tribunal (the "**FTT**") on 15 September 2021 (the "**FTT Privacy Direction**") **[Core/Tab 1/PDF 3]** that:

> "3. *Preliminary proceedings in this matter shall be heard in private*."

2. HMRC contends that the FTT erred in law (see the grounds summarised in the Upper Tribunal's (the "**UT**") decision on permission to appeal of 16 June 2022 [**Core/Tab 8/PDF 57**]):

> (a) by directing that "preliminary proceedings" were to be in private without having received any evidence from the taxpayer dealing with the need for such a Direction;
>
> (b) by failing to take into account, or by failing correctly to apply, common law on the principle of open justice which indicated that such proceedings should be in public; or
>
> (c) by failing to consider alternatives to the FTT Privacy Direction that were more proportionate having regard to the principle of open justice.

B. Background

3. The underlying FTT appeals concern the Taxpayer's entry into the same tax avoidance scheme as that used in *Northwood v HMRC* [2023] UKFTT 351 (TC).

4. The essential background to this appeal is summarised by the UT in directions issued on 19 December 2022 (the "**UT Directions**"):

> *"4. The Taxpayer appealed to the First-tier Tribunal (Tax Chamber) (the "FTT") against decisions that HMRC had made relating to his tax liabilities. After making those appeals, he made two categories of application to the FTT. The first (the "Stay Application") was that his appeals should be stayed behind two cases that were proceeding as "lead cases". The second (the "FTT Privacy*

Application") was that hearings relating to his appeal should be in private and that his identity should be anonymised in documentation produced in connection with the FTT proceedings.

5. In the FTT proceedings, the Taxpayer produced no evidence in support of the FTT Privacy Application although in its determination of that application, the FTT reports that it was submitted on his behalf that the Privacy Application was made (i) to protect the Taxpayer's private or family life; (ii) to maintain the confidentiality of sensitive information; and (iii) to avoid prejudice to the interests of justice."

5. The FTT deferred the question as to whether the substantive hearing would be in private.[2] It was purely for this reason that the FTT made its Direction 3 in relation to interlocutory proceedings as the FTT explained in the FTT Privacy Direction at [17] [**Core/Tab 1/PDF 6**]:

> *HMRC do not however object to the Appellant's proposal that the Tribunal defer consideration of the application to closer to the substantive hearing date (although they do not concede that interim proceedings should remain anonymised if the application is ultimately refused). I agree with that approach and I have therefore directed, in the interest of fairness and justice, that preliminary proceedings in this matter shall be heard in private to prevent the Appellant's outstanding anonymity application being rendered futile."*

6. The UT (see paragraphs 7 and 8 of the UT Directions) recognised that the FTT Privacy Direction was "*made without having received any evidence from the Taxpayer explaining the harm he might suffer if hearings were conducted in public"* and that *"the phrase "preliminary proceedings" was not used in any technical sense"* but was a reference *"to interlocutory proceedings prior to the substantive hearing in the FTT".*

7. There was a substantial amount of correspondence subsequent to the FTT's Privacy Direction about precisely what was said at the FTT hearing. None of this matters here because:

[2] The FTT deferred the issue of privacy over the substantive hearing to shortly before the hearing itself. At the time, HMRC agreed to that course of action. With the benefit of hindsight, it should not have done. Moreover, the FTT's directions contradict the guidance given by the High Court on the timing of privacy applications in *Zeromska-Smith v United Lincolnshire Hospitals* [2019] EWHC 552 (QB) at [21].

a. It is common ground that HMRC did **not** agree to the FTT granting privacy over interlocutory proceedings (which is the issue now before the UT); and

b. In any event, the grant of privacy and anonymisation is a matter that the Tribunal alone must determine, irrespective of any consent that might be given by the parties. Indeed, as Sir Christopher Staughton warned in *Ex p P,* The Times, 31 March 1998, "*when both sides agree that information should be kept from the public, that was when the court had to be most vigilant*".

C. Relevant law concerning anonymisation and privacy

Rules

8. Rule 32 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides, so far as is relevant:

> *"**32.— Public and private hearings***
>
> *(1) Subject to the following paragraphs, all hearings must be held in public.*
>
> *(2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private if the Tribunal considers that restricting access to the hearing is justified—*
>
> *(a) in the interests of public order or national security;*
>
> *(b) in order to protect a person's right to respect for their private and family life;*
>
> *(c) in order to maintain the confidentiality of sensitive information;*
>
> *(d) in order to avoid serious harm to the public interest; or*
>
> *(e) because not to do so would prejudice the interests of justice.*
>
> ...
>
> *(3) Where a hearing, or part of it, is to be held in private, the Tribunal may determine who is permitted to attend the hearing or part of it.*
>
> *(4) The Tribunal may give a direction excluding from any hearing, or part of it—*
>
> *(a) any person whose conduct the Tribunal considers is disrupting or is likely to disrupt the hearing;*
>
> *(b) any person whose presence the Tribunal considers is likely to prevent another person from giving evidence or making submissions freely;*

(c) any person where the purpose of the hearing would be defeated by the attendance of that person; or

(d) a person under the age of eighteen years.

...

(6) If the Tribunal publishes a report of a decision resulting from a hearing which was held wholly or partly in private, the Tribunal must, so far as practicable, ensure that the report does not disclose information which was referred to only in a part of the hearing that was held in private (including such information which enables the identification of any person whose affairs were dealt with in the part of the hearing that was held in private) if to do so would undermine the purpose of holding the hearing in private."

<u>*Case law*</u>

9. It is well-established that the principle of open justice is a constitutionally fundamental principle, which includes the right of the media to impart and the public to receive information and that proceedings should only exceptionally be held in private or anonymised: see e.g. *R(Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65 at [176]:

> *"...the court should administer justice in public, which means that all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary. This principle is so important not merely because it helps to ensure that judges do not, and do not appear to, abuse their positions, but also because it enables information to become available to the public. What goes on in the courts, like what goes on in Parliament or in local authority meetings or in public inquiries, is inherently of legitimate interest, indeed of real importance, to the public. Of course, many cases, debates, and discussions in those forums are of little general significance or interest, but it is not for the judges or lawyers to pick and choose between what is and what is not of general interest or importance (save where, as in the present instance, it is a factor to be placed in the balance, in a case where it is said that it is in the public interest to have the hearing in private or to redact material from a judgment)."*

10. There is an "*inevitable degree of intrusion*" (as recognised by the High Court in *HMRC v Banerjee* [2009] EWHC 1229 (Ch) at [35]) into a taxpayer's privacy as consequence of the principle of open justice and the fact that the taxpayer has brought an appeal. Exceptional circumstances are required in order to justify any departure from the principle of open justice: see *Banerjee* at [34] and [35]:

"[34] ...However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.

[35] It is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."

11. The principle of open justice was considered by the FTT in similar contexts to that of the present application in the cases of *Moyles v HMRC* [2012] UKFTT 541 (TC) and *Martin Clunes v HMRC* [2017] UKFTT 204. In the latter case, the Tribunal quoted from *Banerjee* and went on to set out the following principles (**emphasis added**):

"[9] In Moyles I quoted that extract from the judgment in Banerjee, and then said this, at [14]:

> *"I respectfully agree. This case is not on all fours with Banerjee, but the issue is similar: whether the taxpayer is entitled to pay less tax because, in that case, she had incurred some expenses and, in this, because he has suffered a loss, whether or not real. There is an obvious public interest in its being clear that the tax system is being operated even-handedly, an interest which would be compromised if hearings before this tribunal were in private save in the most compelling of circumstances.* ***The fact that a taxpayer is rich, or that he is in the public eye, do not seem to me to dictate a different approach; on the contrary, it may be that hearing the appeal of such a person in private would give rise to the suspicion, if no more, that riches or fame can buy anonymity, and protection from the scrutiny which others cannot avoid. That plainly cannot be right.****"*

[10] If Henderson J's observations in Banerjee and mine in Moyles are taken together they make it clear that I cannot properly grant the application. ***Any taxpayer who was not in the public eye but who, for example, would prefer his***

> ***friends or neighbours not to know of his financial affairs, would find it impossible to persuade the tribunal to grant him anonymity****; as Henderson J said, the public interest in the outcome of tax litigation, whether in the High Court or in this tribunal, outweighs the desire of the taxpayer for anonymity, and the inevitable resultant intrusion into matters which might otherwise remain confidential is the price which must be paid for open justice, however unpalatable the individual taxpayer might find it to be. Moreover, the structure of rule 32 makes it quite clear that* ***there is a strong presumption in favour of public hearings, and that the circumstances in which that presumption may be overridden are wholly exceptional****."*

12. Accordingly, the fact that the taxpayer may be in the public eye and may prefer the public not to know about his affairs does not justify the principle of open justice being restricted *(Moyles* at [14] and *Clunes* at [10]). Moreover, a person who initiated proceedings (as is the case with all tax appeals) can reasonably be considered to have accepted the normal incidence of the public nature of court proceedings and, in general, parties have to accept the embarrassment, damage to reputation and possible consequential loss which could be inherent in being involved in litigation (see *R (exp Kaim Todner) v Legal Aid Board* [1999] QB 966). This is all the more pertinent where, as here, the tax avoidance scheme that the Taxpayer entered into has already been shown to fail in *Northwood* (where the arrangements were found to be a sham) as well as other FTT decisions concerning materially the same scheme where the taxpayer was a corporate body. There are also two opinions of the GAAR Panel concerning a similar scheme.[3] There is accordingly a significant amount of material already in the public domain which shows that the scheme fails. If the Taxpayer nevertheless still wants ***his*** day in court, he must accept the publicity that goes with it.

13. The test is whether privacy or anonymity is "necessary" for justice to be done. Cases such as *Mr D v HMRC* [2017] UKFTT 0850 (TC) are examples of the FTT applying the correct approach. See also the summary set out in *JK v HMRC* [2019] UKFTT 411 (TC) esp. at [12]-[18]:

> *"12. The rules of the High Court (CPR) do not bind this Tribunal but they are a guide to how it should exercise its discretion. It seems to me that the rules in*

[3] The Opinion in relation to individuals is here: https://assets.publishing.service.gov.uk/media/5f48e235e90e071c6ae52184/GAAR_Advisory_Panel_opinion_of_7_April_2020_-_Rewards_in_the_form_of_loans_for_employees_including_contributions_to_a_trust_-_Individuals.pdf

the CPR on anonymisation of decisions are a good guide. High Court case law makes clear the importance of open justice:

> *'The hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to parties and to witnesses, ….but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect.'*
>
> *Per Lord Atkinson in Scott v Scott [1913] AC 417*

13. Having said that, the courts have always recognised that that in some circumstances, in order to truly administer justice, anonymity has to be granted. So cases involving the insane or children, or cases where publication of the subject matter would defeat the purpose of the litigation, have been held in private and/or anonymised. The CPR expressly recognise the case law on this by authorising anonymisation where:

> *(d) a private hearing is necessary to protect the interests of any child or protected party; or … (g) the court considers this to be necessary in the interests of justice. (CPR 39.2(3))*

14. The appellant is not the first to suggest that open justice is still served if the decision is published but the claimant's name anonymised. This was considered in In re Guardian News and Media Ltd [2010] 2 AC 697 where Lord Rodger stated (§§63-65) that freedom of the press and open justice required the names of all parties to be public because the public find stories about real individuals more interesting than bland decisions from which identifying information is removed.

15. And, as I have said, this Tribunal has applied a similar test to that in the Courts. In In Re Mr A [2012] UKFTT 541 (TC) – later republished as Moyles), the Tribunal said:

> *There is an obvious public interest in its being clear that the tax system is being operated even-handedly, an interest which would be compromised if hearings before this Tribunal were in private save in the most compelling of circumstances.*

16. Applications have been refused by this Tribunal where a celebrity risked reputational damage (Moyles, above, and Martin Clunes [2017] UKFTT 204 (TC)), and where a professional risked being barred by his professional body (Chan [2014] UKFTT 256 (TC)) and where a doctor wanted to keep her private tax affairs confidential from her patients (In Re Banerjee [2009] EWHC 1229 (Ch)). In that last case, Henderson J said:

> *…[quote from [34] and [35] of Banerjee, those paragraphs are quoted above]…*

17. The appellant referred me to my own decision in The Appellant [2016] UKFTT 839 (TC) where I ordered anonymity as the taxpayer was a paranoid schizophrenic, saying at [16]:

> *.....While it is in the interests of justice being seen to be done that decisions are not ordinarily anonymised, in this case I considered that*

the appellant's illness was an exceptional circumstance. This was because mental illness should not be a bar to challenging HMRC decisions, so it is right to grant anonymization of this decision, so other litigants with mental illness are not discouraged from appealing.

18. On reflection, however, it seems to me that in light of the above binding authorities such as Scott v Scott (above), while my decision to grant anonymity in that case was correct, the reasoning ought to have been better expressed. In particular, it is clear from the citation above from Scott v Scott that the mere fact that holding the hearing in public and/or publishing the decision might deter would-be litigants from litigation is not enough to justify anonymisation. The test is whether anonymisation is necessary for justice to be done. So if the harm from publication is likely to be sufficiently serious such that a litigant would not realistically be able to assert his or her rights then it can be said that anonymisation is necessary for justice. For instance, asylum seekers might be granted anonymity in immigration tribunal hearings where the Tribunal considers there is a real risk of serious reprisals against the asylum seeker or his family back in the country from which the litigant seeks asylum."

14. The relevant legal principles have been considered more recently in *R(On the Application Of Marandi) v Westminster Magistrates' Court* [2023] EWHC 587, where the claimant had a connection with the respondents in forfeiture proceedings and, having learned that prejudicial references to him were likely to be made and fearing the reputational consequences, he applied (before the hearing began) for an anonymity order. The District Judge made such an order, heard the forfeiture proceedings and gave a public judgment in favour of the NCA which referred to the claimant but did not name him. Thereafter, on the application of the BBC the judge discharged his earlier order. The claimant challenged the judge's decision as flawed in law. The High Court (Warby LJ and Mostyn J) dismissed the claim and provided, in particular, set out the relevant principles governing anonymity at [36] (**emphasis added**):

"36… The principles governing anonymity in that context are summarised in the Master of the Rolls' Practice Guidance on Interim Non-Disclosure Orders of 2011, [2012] 1 WLR 1003 (the Practice Guidance) at paras [9] – [14] which say this (citations omitted):

"[9]. Open justice is a fundamental principle …

[10]. Derogations from the general principle can only be justified ***in exceptional circumstances when they are strictly necessary … They are wholly exceptional*** *…*

[12]. … Anonymity will only be granted ***where it is strictly necessary, and then only to that extent****.*

> *[13]. The burden of establishing any derogation from the general principle* ***lies on the person seeking it****.* ***It must be established by clear and cogent evidence****….*
>
> *[14]. When considering the imposition of any derogation from open justice the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings." "*

15. See also the detailed guidance at [43].

D. HMRC's Submissions

(1) The FTT erred in law in making the FTT Direction by directing that "preliminary proceedings" were to be in private without having received any evidence from the taxpayer dealing with the need for such a Direction.

16. The relevant legal principles, which are set out above, are clear. The starting point is that open justice is a fundamental principle and that any derogation, whether by way of privacy or anonymity, must be justified on the basis of strict necessity in "wholly exceptional" circumstances. The burden is on the person seeking privacy or anonymity and cogent evidence is required to show that privacy or anonymity is necessary (and the specific measures that are necessary). If that burden is not discharged, the open justice principle must apply in full.

17. In granting interim privacy on the basis of no evidence supporting the Taxpayer's generalised assertions that inter alia, "[i]n the modern era of social and tabloid media, there is a significant risk that the information discussed could be disingenuously manipulated for entertainment value and profit" the FTT erred in law: as is explained in *Marandi* (above), "*[t]he cases all show that this question is not to be answered on the basis of "rival generalities" but instead by a close examination of the weight to be given to the specific rights that are at stake on the facts of the case. That is why "clear and cogent evidence" is needed.*"

18. Given that there was no evidence to support the interim privacy application, the FTT should have refused the application. The FTT should have insisted upon cogent

grounds, supported by relevant evidence before granting interim anonymity, whereas it only had unsubstantiated assertion.

19. Indeed, it is clear from the FTT's Directions that the FTT failed to apply the relevant test of necessity, asking instead, impermissibly, whether interim privacy should be granted so as not to render an application for substantive privacy "futile". As explained above, that is not the correct test.

20. It is plainly wrong to say that ***not*** granting interim privacy would render the Taxpayer's outstanding application for privacy over the substantive hearing futile. Refusing to grant privacy in respect of (say) a stay application can in no way render a privacy application over some or all of the substantive proceedings "futile". As the Upper Tribunal explained in *HMRC v George Anson* [2011] STC 2126 at [4], the correct approach when determining an application for privacy is to test the "plausibility" of the alleged need for privacy and to scrutinise whether the reasons advanced in support of privacy are also plausible. As already noted, the FTT did not have any evidence before it as to the need for privacy, nor any evidence that the abstract grounds of (1) protection of the Taxpayer's private or family life, (2) the confidentiality of sensitive information and (3) avoiding prejudice to the interests of justice required the FTT Privacy Direction to be made.

21. In those circumstances, the FTT erred in law in making the FTT Privacy Direction.

22. In any event, even the grounds that the Taxpayer relied on ((1) protection of his private or family life, (2) the confidentiality of sensitive information and (3) avoiding prejudice to the interests of justice) did not justify the making of the FTT Privacy Direction – what possible protection of his private or family life can come from knowing that the Taxpayer has made a stay application, for example?

23. Moreover, in cases such as this concerning widely marketed tax avoidance schemes with numerous scheme users appealing, there is a genuine public interest in such interim hearings being held publicly, not least because it may sometimes be convenient to have case management hearings of several taxpayers at a time – e.g. to address matters such as test case selection, the advancement of certain preliminary issues and the stay of

other appeals and/or issues. Although in a different context, the case management of the current VAT grouping appeals involving certain financial institutions is a good example of the advantages to be gained from the open and transparent case management of large-scale litigation concerning overlapping issues.

(2) The FTT erred in law in making the FTT Direction by failing to take into account, or by failing correctly to apply, common law on the principle of open justice which indicated that such proceedings should be in public

24. The FTT erred in law by failing to consider at all and/or properly apply the case law. The Directions are completely silent on all the relevant authority that the parties set out in their Skeleton Arguments and referred to at the hearing, yet they apparently contain the FTT's full reasoning. The case law makes it clear that it would not be appropriate to make any such blanket direction here. Indeed, to do so would give rise to the very suspicion that the Tribunal highlighted in *Moyles v HMRC* [2012] UKFTT 541 (TC) at [14], repeated in *Martin Clunes v HMRC* [2017] UKFTT 204 at [9]:

> *"The fact that a taxpayer is rich, or that he is in the public eye, do not seem to me to dictate a different approach; on the contrary, it may be that hearing the appeal of such a person in private would give rise to the suspicion, if no more, that riches or fame can buy anonymity, and protection from the scrutiny which others cannot avoid. That plainly cannot be right."*

25. Were the Taxpayer not in the public eye, he could not possibly have any hope for privacy over the appeal of his tax avoidance arrangements – the fact that the Taxpayer is in the public eye cannot of itself change the outcome.

26. At paragraph 32 of the Taxpayer's response, the Taxpayer submits that:

> *"The starting point is that it was agreed that the application for anonymity at the substantive hearing would be decided later."*

27. That is the approach which the FTT took and is the wrong approach. The fact that the Taxpayer requested that consideration of his application, so far as it concerned the substantive hearing, be deferred to closer to the substantive hearing and HMRC agreed

says nothing about the merits of the part of the Application that was before the FTT, namely whether the FTT should direct interim privacy.

28. In adopting the Taxpayer's approach, the FTT erred in law because it then failed to take into account and/or failed to correctly apply the principle of open justice. Rather, the FTT appears to have reasoned backwards and assumed that the deferred application for substantive privacy required interim privacy to be granted.

29. That leads to the irrational position, which is erroneous as a matter of law, that a person who makes an application for privacy that is not dealt with by the Tribunal and is deferred, is in a different position as regards the test to be met for obtaining interim privacy to a person who simply makes an application for interim privacy thinking that, in due course, they will make an application for substantive privacy, and that the deferred application means that the principle of open justice can be excluded without any consideration by the court, on the basis of evidence, as to what (if any) derogation from the principle is "necessary" and "proportionate".

30. What appears to have happened here is that the FTT has confused the position in relation to interim privacy with the position in relation to an *appeal* from a decision refusing privacy. In respect of the latter, if the subsequent appeal was heard in public, this could (depending on the circumstances) render the appeal itself futile. But the position in relation to interim privacy is not the same – if a taxpayer wants privacy in relation to interim proceedings, he must satisfy the FTT that it is necessary. The fact that he may or may not make a subsequent application in relation to the substantive hearing is neither here nor there.

(3) The FTT erred in law in making the FTT Direction by failing to consider alternatives to that direction that were more proportionate having regard to the principle of open justice.

31. The FTT erred in law by failing to consider what measures (in terms of privacy and/or anonymity) were both necessary and proportionate and weighing those measures against the principle of open justice.

32. As is made clear in *Marandi*, in deciding whether to interfere with the principle of open justice, both the 'necessity' and the 'proportionality' of the interference must be considered (see [43](5)):

> *(5) The next stage is the balancing exercise. Both the judge's decisions expressly turned on whether it was "necessary and proportionate" to grant anonymity. That language clearly reflects a Convention analysis and the balancing process which the judge was required to undertake. The question implicit in the judge's reasoning process is whether the consequences of disclosure would be so serious an interference with the claimant's rights that it was necessary and proportionate to interfere with the ordinary rule of open justice. It is clear enough, in my view, that he was engaging in a process of evaluating the claimant's case against the weighty imperatives of open justice.*

33. As already noted, the FTT did not have any evidence before it to show that the balance fell in favour of privacy, still less that the measure that was necessary and proportionate was imposing a veil of secrecy over all interim proceedings, whatever their nature.

34. In the unlikely event that confidential and sensitive information were to arise during interim proceedings, the Taxpayer could make an application specifically in relation to how that information should be handled and the FTT could then consider that application on its merits if and when it arises.

35. That is the appropriate approach – not to cast a veil of secrecy over the entirety of any and all interim proceedings, as the FTT Privacy Direction does.

36. The Taxpayer explains, at [29] and [30] of the Taxpayer's Reply **[Core/Tab 9/PDF 67-68]**, that he does not object to something less than dealing with preliminary proceedings in private if his identity can be preserved. For the reasons set out above, the FTT erred in law in accepting that the Taxpayer's identity should be preserved.

37. As the UT Directions themselves show, a blanket privacy direction over the entirety of preliminary proceedings was unnecessary and disproportionate in circumstances where only the identity of the Taxpayer is to be preserved (as it currently is under the UT Directions).

38. Moreover, as to the Taxpayer's submission at [61] to [66] of the Reply **[Core/Tab 9/PDF 74-75]**, to the effect that the application for anonymity itself should be anonymous, HMRC agree that there may be cases in which that is justified on the basis of evidence. However, there was no such evidence in this case.

39. In any event, the FTT Direction was not to the effect that the application for anonymity would be anonymous: the FTT went much further and directed that "*preliminary proceedings*" in this matter should be heard in private. Accordingly, even if anonymity in respect of the anonymity application itself had been justified on the basis of evidence (which it was not) the FTT departed from the principle of open justice to a far greater extent, not justified by any evidence, and in doing so erred in law.

E. Specific responses to the Taxpayer's Reply

40. The Taxpayer's main argument, in his Reply, is to say that the direction for interim anonymity was necessary because it protected (at paragraph 41.2 of the Reply **[Core/Tab 9/PDF 70]**) the "*efficacy of the substantive anonymity application".*

41. That argument is misconceived. The principle of open justice is a fundamental one and, as the cases show, it must be applied in the absence of exceptional circumstances necessitating a less than full application of the principle, and such circumstances must be proved by the person seeking privacy by way of cogent evidence.

42. Nothing was preventing the Taxpayer from providing clear and cogent evidence at the case management hearing. While that hearing was originally convened to deal with a stay application, the Taxpayer made the privacy application shortly before. That application should have been made with supporting evidence; however, none was produced. The Taxpayer was also well aware that HMRC's position was that he should not be granted interim privacy (or indeed any privacy at all, as matters stood). In circumstances where the Taxpayer was not able to establish that he had proper grounds, it is perverse that the FTT nevertheless granted interim privacy.

43. The Taxpayer's other main responses are that open justice is still served without him being identified and that in any event in interim proceedings i.e. at preliminary stages

it will often not be in the public interest for details relating to a taxpayer to be discussed in public. Both points are misconceived.

44. In relation to the first, as the Tribunal noted in *JK* at [14] (above), the argument that open justice is still served if the decision is published but the claimant's name anonymised was considered in *In re Guardian News and Media Ltd* [2010] 2 AC 697 where Lord Rodger stated ([63]-[65]) that freedom of the press and open justice required the names of all parties to be public because the public find stories about real individuals more interesting than bland decisions from which identifying information is removed.

45. As regards the second point, the Taxpayer relies on *Kandore Limited v HMRC* [2021] EWCA Civ 1082. However, the Court of Appeal's decision in that case is dealing with an entirely different issue, namely the statutory scheme concerning information notices which as the Court of Appeal explained is not intended to be an adversarial process at all. It is an entirely different procedure to the adversarial Tribunal or court process [102]:

> *"No one doubts the importance of the principle of open justice but the above authorities and the Practice Guidance were concerned with the typical judicial hearing, in which a court or tribunal adjudicates on a dispute between parties. As I have set out earlier, the nature of the process under Sch.36 to the 2008 Act is entirely different; it consists of the judicial monitoring of a step in an investigation into the affairs of a taxpayer by HMRC."*

46. Accordingly, *Kandore* does not support the Taxpayer's case that interim or preliminary adversarial proceedings are ones in which the open justice principle plays less strongly. Quite the opposite: the Court of Appeal is careful to explain that it was critical so far as concerns the application of the principle of open justice, that the information notice process was entirely different from the adversarial process.

47. Moreover, the 'preliminary stage' referred to by the Court of Appeal in *Kandore* referred to the preliminary stage of an *investigation* by HMRC, not the preliminary stages of an *appeal*, contrary to what the Taxpayer seems to suggest at [58] and [59] of the Reply **[Core/Tab 9]PDF 73]**:

> *[105] In this context it must be recalled that the private affairs of taxpayers will be discussed at this preliminary stage of an investigation. Very often it would not be in the public interest for those to be discussed in public.*
>
> *[106] Furthermore, it must be recalled that sometimes the investigation will end in no further action being taken, for example because the position of the taxpayer is vindicated. There would be a real risk of injustice if in the meantime questions had been raised in public over whether they had, for example, been illegally avoiding or evading tax when they had not in fact been doing so.*

48. *Kandore* is therefore entirely consistent with the proposition that the principle of open justice should apply fully to all stages of the Taxpayer's appeal, unless it is shown on the basis of cogent evidence that some degree of privacy or anonymity is necessary (and then, only to the extent that the interference with the principle of open justice is proportionate).

49. The Taxpayer also seeks to justify the FTT's approach in making the FTT Privacy Direction by relying on (1) the approach taken by the courts in anonymising decisions on anonymity pending any appeal against the decision (see *esp.* [36] to [40] and [45] of the Taxpayer's Reply **[Core/Tab 9/PDF 68-70, 71]**) and (2) the approach taken by HMRC in relation to disclosure of documents in *Cider of Sweden Limited v HMRC* [2022] UKFTT 76 (see *esp.* [66], [71] and [72] of the Reply **[Core/Tab 9/PDF 75, 77]**). Both of those points are bad points and should be rejected.

50. As regards (1), where a court has actually determined an application for anonymity/privacy/publication and there is a prospect that it will be appealed, confidentiality (in a broad sense) needs to be maintained pending the appeal process so that, in the event that anonymity/privacy is finally granted and/or publication of the relevant material is refused, the relief has not been rendered nugatory.

51. The present situation is entirely different because the Taxpayer expressly asked the Tribunal <u>not</u> to address the application for substantive privacy. There is therefore currently no final outcome, so far as concerns the substantive privacy application, to be protected or preserved. That application was simply not dealt with by the Tribunal.

52. As regards (2), the issue in *Cider of Sweden* and the context of the dispute over access to documents was entirely different to the present case. EY sought to obtain copies of

inter alia the Notice of Appeal (with supporting grounds of appeal), HMRC's statement of case and any further pleadings, essentially because the underlying issues in the appeal had much wider relevance to a large number of overseas businesses in the sector, many of whom were clients of EY and detailed knowledge of the arguments being deployed in this appeal would potentially assist EY in advising their clients. There had been no hearing of any type in the main proceedings, nor was any hearing listed or likely in the near future (see [1] to [3] of *Cider of Sweden*).

53. On the facts of *Cider of Sweden*, the Tribunal decided that EY had not shown that provision to it of the pleadings at such an early stage of the proceedings would advance any purpose or purposes of the principle of open justice. That decision, taken on the facts of that particular case, provides no support at all for the FTT Privacy Direction.

F. Conclusion

54. For the reasons set out above, the appeal should be allowed and the FTT Privacy Direction should be set aside. If this appeal succeeds, HMRC will also ask that the UT publishes its decision **unanonymised** in due course (as indicated already to the UT – see the UT's decision of 19 December 2022 at [67]-[69] [**Core/Tab 10/PDF 97**]).

31 October 2023

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IN THE UPPER TRIBUNAL **UT/2022/000070**

(TAX AND CHANCERY)

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

A TAXPAYER

Respondent

RESPONDENT'S SKELETON ARGUMENT

Introduction

1. This is HMRC's appeal against a case management direction issued by the FTT (Judge Sukul) on 15 September 2021, following a hearing on 19 July 2021. The direction in question was that "Preliminary proceedings in this matter shall be heard in private" (Direction 3).

2. The Judge's reason for making this direction was to preserve the position pending the FTT's determination of an application for anonymity in relation to the appeal as a whole ("the full anonymity application"). The parties had agreed that the full anonymity application should be heard and determined closer to the substantive hearing and the Tribunal had directed that:

> "[4] Both parties shall provide to the Tribunal and each other their final representations on the Appellant's application for anonymity not later than 21 days before the substantive hearing." (Direction 4)

3. There is no appeal against that direction (unsurprisingly, given that HMRC agreed – albeit HMRC's new counsel says that "with the benefit of hindsight, it should not have done" (HMRC Skeleton, p.2, fn.2)).

4. On this appeal, therefore, the question is whether it was impermissible for the FTT to make Direction 3 (or some version of it) in circumstances where it was making Direction 4 with the agreement of the parties and against which there is no appeal.

5. The Respondent says 'Direction 3 (or some version of it)' because, as his response to the Grounds of Appeal makes clear (§29), the Respondent is not wedded to any particular version of Direction 3, as long as anonymity is preserved pending Direction 4. That was, obviously, the intention of the FTT and no alternatives were suggested to it.

Background

6. The underlying tax appeals concern contributions to a trust that the Respondent treated (following professional advice) as reducing his taxable profit for the tax years 2012/13 to 2016/17. HMRC deny that these amounts are deductible (applying GAAP, disputing whether the expenses were incurred and disputing whether the amounts were wholly and exclusively for the purposes of the Respondent's trade).

7. An application to stay the Respondent's appeal behind other appeals potentially raising similar issues was made on 23 December 2019 and objected to by HMRC.

8. The application was listed to be heard by Judge Sukul on 19 July 2021 by video hearing.

9. On 13 July 2021, the Respondent made an application for anonymity in relation to the appeal, including in relation to preliminary proceedings (as set out at §14 of the FTT Decision [CB/5]).

10. In light of HMRC's skeleton argument for the hearing on 19 July 2021, the Respondent submitted that the best course would be to defer determination of the full anonymity application until closer to the substantive hearing.

11. This was because HMRC were arguing (as part of their objection) that the substantive appeal turned on the individual characteristics of the taxpayer (HMRC Skeleton §52 [CB/27]) whereas the taxpayer disputed this and noted that the parties and the Tribunal would be in a better position to assess that issue once the final evidence and skeleton arguments had been submitted (TS/4/22 – 31; TS/6/1 – 20).

12. At the hearing, HMRC agreed that determination of the full anonymity application should be deferred until shortly before the full hearing:

> "MISS BELGRANO: Madam, yes, my instructions are that the Revenue are not inclined to object to the application for the substantive hearing to be heard in private to be deferred to a later date shortly before or as part of that substantive hearing; essentially, they are not objecting to that, not being dealt with today." (TS/12/15 - 18)

> "JUDGE SUKUL: To clarify, if we were to keep the matters in the three headings that Mr Firth has suggested, then I think that that maybe helpful because I think we are clear that both parties agree that the application for anonymity in respect of the substantive hearing should be heard closer to the substantive hearing. As I understand it, Miss Belgrano, that is where you began with your submission.
> MISS BELGRANO: Yes." (TS/13/29 - 34)

13. The application for the stay required, as one would expect, consideration of the nature of the tax arrangements and the allegations made by HMRC, to consider their similarity or not to issues arising in other cases.

14. On 15 September 2021, the FTT issued directions:

> "1. This appeal shall be stayed, under rule 5(3) of the Tribunal Rules, until 60 days after the Tribunal disposes of either of the appeals (the 'Lead Appeals') of Mark Northwood (TC/2016/04233) or David Clarke (TC/2016/04016) whether the appeals are disposed of by the Tribunal releasing a decision, the appeals being withdrawn or otherwise.
> 2. Either party may apply at any time for this stay to be lifted.
> 3. Preliminary proceedings in this matter shall be heard in private.
> 4. Both parties shall provide to the Tribunal and each other their final representations on the Appellant's application for anonymity not later than 21 days before the substantive hearing."

15. The reasons for the stay were the similarity of legal issues raised (§11). The reasons for Direction 3 were:

> "[17] HMRC do not however object to the Appellant's proposal that the Tribunal defer consideration of the application to closer to the substantive hearing date (although they do not concede that interim proceedings should remain anonymised if the application is ultimately refused). I agree with that approach and I have therefore directed, in the interest of fairness and justice, that preliminary proceedings in this matter shall be heard in private to prevent the Appellant's outstanding anonymity application being rendered futile."

16. Following the hearing an issue arose as a result of HMRC denying that FTT Decision, §17 was accurate in terms of HMRC agreeing to defer consideration of the application (HMRC email of 30 September 2021). This led to the FTT setting aside directions 3 and 4 (on 21 December 2021) before re-instating them (on 22 March 2022) when the transcript was provided by HMRC to the Respondent and Tribunal (having been received by HMRC on 18 November 2021, but only sent to the Respondent on 11 January 2022).

17. That episode is the subject-matter of a costs application before the FTT and does not appear material to this appeal, which concerns the re-instated Direction 3.

18. At the same time as re-instating Directions 3 and 4, Judge Sukul refused HMRC permission to appeal Direction 3 on the basis that HMRC were, in effect, seeking to undermine their agreement that the full anonymity application should be decided shortly before the hearing:

> "I find HMRC's grounds of appeal against the anonymity Directions amount to a 'second bite of the cherry' on the issue of when the Appellant's anonymity application should be determined. I consider the Tribunal to be entitled to have reached the conclusion it has in respect of that issue and I do not consider the grounds of appeal to be arguable." [CB/21]

19. On 22 April 2022, HMRC applied to the Upper Tribunal to appeal the FTT's directions [CB/23].

20. After a number of exchanges of correspondence, on 16 June 2022 the Upper Tribunal granted HMRC permission to appeal and also required the Respondent to make a formal application in relation to the question of anonymity on this appeal to the UT [CB/57].

21. The Respondent made that application on 29 June 2022, and it was granted following a hearing in private, before Judge Richards (as he then was) on 10 November 2022. The decision was issued on 19 December 2022 [CB/80].

22. That hearing involved a dispute that is very similar to the dispute that HMRC now place before this Tribunal. In essence, HMRC argued that the UT could not and should not make any direction regarding anonymity because to do so required clear and cogent evidence that the Respondent would suffer harm if such a direction was not made, whereas no evidence had been provided. For instance, at §18 [CB/85]:

> "HMRC argue that the threshold of "necessity" is not met. The essence of their position is that properly considered, the FTT Directions would not be rendered nugatory if the UT proceedings are fully public with the Taxpayer being named as a litigant. HMRC also argue that the absence of any evidence from the Taxpayer as to harm that he will suffer if the Application is not granted is fatal to the Application. In fact, HMRC go further, inviting me to infer that the Taxpayer's failure to produce evidence of harm indicates that he would suffer no such harm if the Application is refused."

23. Judge Richards decided:

23.1. There is little support on the face of the UT Rules for the proposition that the application could be granted only if 'necessary' to the administration of justice. In contrast to the CPR rules, it was silent as to the conditions that needed to be met (§25).

23.2. The authorities relied on by HMRC were decided against the backdrop of the specific rules of procedure applicable to those Tribunals/Courts (§26).

23.3. If the taxpayer was relying on his Article 8 rights to justify the application, the UT would need to perform "an intense focus on the comparative importance of the specific rights claimed in the individual case", but that was not the taxpayer's argument (§41).

23.4. There can be other special circumstances where publicity would prejudice the interests of justice (§42(4)).

23.5. Unless some restriction on the taxpayer being named was in place, the taxpayer would lose much of the benefit derived from the FTT Directions, without those directions having been shown to be wrong in law (§§43 - 54).

23.6. The situation of a privacy direction having been made but appealed was a special circumstance (§58).

23.7. Decisions of the Tribunals were to stand unless shown, following an appeal process, to be wrong (§59).

23.8. Accordingly, the taxpayer should not be denied the legal and practical consequences that flowed from the FTT Directions simply because HMRC have chosen to appeal (§60).

23.9. This was not disproportionate, because the matter only concerned the correctness of an interlocutory decision rather than a final determination of the substantive dispute – Judge Richards agreed with the observations in *Burke and Hare* in this respect (§61).

23.10. Given that the decision was not based on the personal or family circumstances of the taxpayer, evidence was not required (§62).

Issues in this appeal

24. HMRC's grounds are as follows [CB/46 onwards]:

24.1. The FTT should have insisted upon "cogent grounds, supported by relevant evidence" before granting interim anonymity, whereas it only had "unsubstantiated assertion" and should have refused (§§44 – 45).

24.2. The FTT erred in failing to consider and apply the case law on anonymity (§46).

24.3. The FTT erred in failing to "properly scrutinise and determine the strength of the Taxpayer's application for privacy" (§48). Refusing privacy in respect of a stay application "can in no way render a privacy application over some or all of the substantive proceedings 'futile'" (§§49 – 52).

25. The UT has interpreted these alleged errors as follows [CB/57]:

(a) by directing that "preliminary proceedings" were to be in private without having received any evidence from the taxpayer dealing with the need for such a Direction.

(b) by failing to take into account, or by failing correctly to apply, common law on the principle of open justice which indicated that such proceedings should be in public; or

(c) by failing to consider alternatives to Direction 3 that were more proportionate having regard to the principle of open justice.

26. HMRC's Skeleton follows the UT formulation.

Summary of Respondent's submissions

27. In summary, the Respondent submits:

27.1. The FTT reached a correct and reasonable conclusion that Direction 3 was justified in order to preserve the efficacy of Direction 4 (against which there is no appeal).

27.2. The FTT's reasoning (the need to preserve the position pending a future determination by the Tribunal) is precisely the same reasoning as is applied when granting privacy pending an appeal against a refusal of privacy.

27.3. Direction 3 only affects preliminary stages of a tax dispute and has a limited effect on the principle of open justice, given that such stages are normally not public in any event. All that Direction 3 means is that the public do not know about a tax dispute at a time when, normally, they would not know (or be able to find out) about the tax dispute anyway.

27.4. Contrary to HMRC's grounds of appeal, which mostly repeat the same argument, evidence might be necessary where the privacy direction is sought on the basis of a risk of harm to a legitimate interest, but it is not necessary where the direction is sought and made on the grounds that it is justified in order to avoid prejudicing the interests of justice.

27.5. To the extent that anonymity can be proportionately preserved by something less than dealing with preliminary proceedings in private, the Respondent has no objection to that on this appeal. No alternatives were canvassed before the FTT, however, and Direction 3 was a simple and effective way of preserving the position pending Direction 4 in circumstances where the events covered would be expected to remain private in any event.

28. These points are developed after setting out the legal background.

Legal background

The legal rules

29. Direction 3 was a direction that preliminary matters would be heard in private. FTT Rules r.32 provides:

> "(1) Subject to the following paragraphs, all hearings must be held in public.
> (2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private if the Tribunal considers that restricting access to the hearing is justified—
> (a) in the interests of public order or national security;
> (b) in order to protect a person's right to respect for their private and family life;
> (c) in order to maintain the confidentiality of sensitive information;
> (d) in order to avoid serious harm to the public interest; or
> (e) because not to do so would prejudice the interests of justice.
> […]
> (6) If the Tribunal publishes a report of a decision resulting from a hearing which was held wholly or partly in private, the Tribunal must, so far as practicable, ensure that the report does not disclose information which was referred to only in a part of the hearing that was held in private (including such information which enables the identification of any person whose affairs were dealt with in the part of the hearing that was held in private) if to do so would undermine the purpose of holding the hearing in private."

30. Accordingly, the FTT has power to direct privacy if it "considers" that doing so "is justified" for one of the specified reasons.

31. It is notable that limb (b) concerns protecting a person's right to respect of their private and family life, whereas limb (e) applied if "not to do so would prejudice the interests of justice".

32. The reason given by the FTT in this case was to preserve the efficacy of the full anonymity application (FTT Decision, §17). That is a limb (e) reason.

33. There is a clear difference between r.32 and the wording of CPR 39.2:

> "(3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice –
> (a) publicity would defeat the object of the hearing;
> […]
> (g) the court for any other reason considers this to be necessary to secure the proper administration of justice."

34. The language of necessity in CPR 39.2 does not appear in r.32(2) and the question is whether the Tribunal considers that not doing so would prejudice the interests of justice.

The CPR approach

35. In relation to the CPR rules, the case law has, essentially, divided the reasons for privacy/anonymity into two categories:

> "[34] Derogations from open justice can be justified as necessary on two principal grounds: maintenance of the administration of justice and harm to other legitimate interests: *Various Claimants -v- Independent Parliamentary Standards Authority* [36]-[40].
>
> i) In the first category (recognised expressly in CPR 39.2(3)(a)) fall the cases – such as claims for breach of confidence – in which, unless some restrictions are imposed, the Court would by its process effectively destroy that which the claimant was seeking to protect. There is no general exception to the principles of open justice in cases involving alleged breach of confidence/misuse of private information. However, it is well recognised that this type of case may well justify some derogation. The challenge is usually to ensure that the measures imposed are properly justified; that they are tailored to the facts of the individual case; and that they are proportionate, i.e. the least restrictive measure(s) necessary to protect the engaged interest: *JIH* [21]. In breach of confidence/privacy cases, where this issue arises frequently, the Court may be confronted with a choice between anonymising the party (which may permit the confidential/private information sought to be protected to be identified in open court) and refusing anonymity (in which case, the confidential/private information would have to be withheld – at least initially – from any public hearing/judgment): see discussion in *Khan -v- Khan* [88]-[89]. The Court must consider whether it can fashion a procedure (for example the use of confidential schedules to witness statements and statements of case) that will properly protect the confidential/private information during the case management and trial phases of the litigation: *Various Claimants -v- Independent Parliamentary Standards Authority* [47]. If it can, then the applicant may fail to demonstrate that further derogations from open justice are necessary.

> ii) The second category consists of cases in which the anonymity order is sought on the grounds that identification of the party (or witness) would interfere with his/her Convention rights. In that case, the Court must assess the engaged rights and, if appropriate, perform the conventional balancing exercise from *In re S*: *RXG* [25]; *XXX* [20]-[21]." (*ECG v. PGF NHS Trust* [2022] EWHC 1908 (QB), Nicklin J)

36. Where a litigant relies on category 2 - i.e. a risk of harm to the legitimate interest (for example a risk of physical harm or interference with the person's article 8 rights – see *ECG*, §37) - evidence put forward by the litigant will be relevant to establishing the risk of harm and allowing the Court to "perform the balancing exercise" (*ECG*, §§36 – 38).

37. Category 1 does not, however, depend upon the litigant establishing a risk of harm to some other legitimate interest but, instead, upon the Court's assessment of what the proper administration of justice requires in that case.

38. A common example of category 1 is where an application for privacy/anonymity has been made and rejected, but the applicant wishes to appeal. At that stage, the Court does not apply, again, the category 2 test (which, ex hypothesi, the applicant has failed to satisfy), but instead acts to preserve the efficacy of the appeal. That is what happened in *ECG*:

> "[2] For reasons that are explained in a judgment handed down in private today, I have refused the Anonymity Application. In the ordinary way, that would lead to the publication of the judgment and the identification of the parties. However, the Claimant has sought permission to appeal. I have refused that application, as I do not consider that the proposed grounds of appeal have a real prospect of success and there is no other compelling reason why permission to appeal ought to be granted. The Claimant can renew his application for permission to appeal to the Court of Appeal. To preserve the position, pending any renewed application, the ring must be held. That means that my judgment refusing the Anonymity Application must remain private until such time as any appeal has been finally resolved. This shortened public judgment is to ensure that the Court explains as much about the Anonymity Application as is possible in the interests of open justice whilst ensuring that position is preserved pending any appeal."

39. See also, *JK v. HMRC* [2019] UKFTT 411 (TC), §§40 – 44; *BCM Cayman LP v. HMRC* [2020] UKFTT 298 (TC), Appendix, §13; *Manchester City Football Club Ltd v. Football Association Premier League Ltd* [2021] EWHC 2077 (Comm), §16; *HFFX LLP v. HMRC* [2023] UKUT 73 (TCC), §155.

40. Judge Richard's decision to grant anonymity in relation to this hearing was another example of a category 1 case. In essence, doing so was necessary to preserve the efficacy of the FTT's decision at a time before there had been any determination that it contained an error of law.

41. In the Respondent's submission, developed below, the FTT's Direction 3 was simply an application of the category 1 case/reasoning to a situation where it had made Direction 4.

Interim privacy in tax appeals

42. HMRC assume that the CPR approach is directly applicable to Tax Tribunal proceedings, even at the preliminary stages. Whilst the Respondent submits that the CPR approach leads to the same outcome in the present case, it is nevertheless worth pausing to assess whether HMRC's assumption is correct. The authorities indicate it is not.

43. As a matter of fact, in the ordinary course, the first time that existence of a dispute between a taxpayer and HMRC becomes potentially public knowledge is when the hearing takes place (or, more recently, when the listings are published on the FTT website the Friday before).

44. The FTT recognised these differences in *Cider of Sweden v. HMRC* [2022] UKFTT 76 (TC) (a case where a non-party was seeking to access to documents filed in relation to an appeal that had yet to reach its substantive hearing):

> "[34] The crucial point here is that the FTT is different from the courts. It is a tribunal of first instance in which tax disputes between the citizen and the state are resolved. The very assertion that CPR 5.4C(1) is an "expression of the principle of open justice" points to the conclusion that the rules of law applicable to that principle are paramount, and should not be sidestepped or subverted by the inappropriate direct "reading across" of CPR 5.4C(1) into the FTT as effectively giving rise to a free-standing right, divorced of any requirement to consider whether its effect in the FTT would be in accordance with the principle of open justice. As Judge Sinfield acknowledged in *Aria*, the most that can be provided by reference to the CPRs is "helpful guidance".
>
> [35] One important difference between the FTT and the courts is that CPR 5.4 provides for a publicly accessible register of all claims issued out of a court, which any member of the public may

search upon payment of the relevant fee. This is significant. Without it, there would be no way for anyone to find out about the existence of a court case or, in practice, exercise their rights under CPR 5.4C. CPR 5.4 is an integral part of the overall scheme. The FTT has no equivalent to CPR 5.4; it does not make information about appeals lodged with it publicly available, and there has been no suggestion that it ought to do so by analogy to CPR 5.4 (though in the absence of such publication, any third party right of access to pleadings in such appeals is useless except where there are special circumstances, such as in the present case where the existence of the appeal became public by the inclusion of reference to it in High Court pleadings). It is easy to see why: citizens rightly consider their tax affairs to be private until they are being formally adjudicated on in public [4]. In passing, it is worth noting that the Upper Tribunal also publishes a list of appeals notified to it; however in relation to tax appeals (as they will almost invariably already have been the subject of a published decision in the FTT) issues of confidentiality do not arise in the same way in the Upper Tribunal as they do in the FTT." (underlining original – see also §14 for HMRC's own submission)

45. Footnote (4) reads:

> "The Respondents are of course under a duty of confidentiality pursuant to s.18 of the Commissioners for Revenue & Customs Act 2005. This duty does not apply to the Tribunal, but it is indicative of the general confidentiality with which Parliament expects a taxpayer's affairs to be treated, quite apart from any rights to privacy arising under the Human Rights Act."

46. In refusing access to documents at a preliminary stage, Judge Poole noted the parties' legitimate interest in wishing to keep matters confidential at such stages:

> "[53] It is quite clear that simply wishing to understand the legal basis of the arguments being advanced (whether out of academic or journalistic interest, or in order to inform one's conduct of a similar dispute) is a perfectly legitimate reason for seeking access to the documents. However, it is equally clear that the parties to the original dispute, at this early stage of the proceedings, also have their own legitimate interests in wishing to keep such matters confidential - whether because of an understandable wish for their confidential tax affairs not to become public knowledge before they are actually adjudicated on by the Tribunal (or, in the case of HMRC, their general duties of taxpayer confidentiality), or (more likely, as the High Court pleadings are already publicly available and are held by EY) because of a wish to preserve the confidentiality of the detailed lines of legal argument being deployed in the appeal.
>
> [54] In striking a balance between the principle of open justice and the countervailing wishes of the Appellant and HMRC to maintain the confidentiality of the documents for their respective reasons, given the stage the proceedings have reached, I would therefore refuse the application in any event, on the basis that I would consider any small advancement of the principle of open justice inherent in disclosure to be outweighed by the wish for confidentiality on the part of the Appellant and

> HMRC at this stage of their dispute, before there has been any judicial involvement in the substance of that dispute or effective hearing of it." (underlining added)

47. This is consistent with the decision in *Kandore Ltd v. HMRC* [2021] EWCA Civ 1082 where CoA held that an information notice approval hearing should be in private, despite the affected taxpayers and third parties asking for it to be in public:

> "[105] In this context it must be recalled that the private affairs of taxpayers will be discussed at this preliminary stage of an investigation. Very often it would not be in the public interest for those to be discussed in public.
> [106] Furthermore, it must be recalled that sometimes the investigation will end in no further action being taken, for example because the position of the taxpayer is vindicated. There would be a real risk of injustice if in the meantime questions had been raised in public over whether they had, for example, been illegally avoiding or evading tax when they had not in fact been doing so."

48. The same reasoning applies to preliminary matters in relation to a tax appeal: allegations concerning a taxpayer may be aired in public at a time when they have not been tested before a Tribunal, are not in the process of being tested by a Tribunal and may, depending on subsequent events, never be tested by a Tribunal.

49. The distinction between preliminary stages of a dispute and the final substantive determination of the dispute was recognised by the Employment Appeals Tribunal in *A v. Burke and Hare* [2022] IRLR 139:

> "[69] The public interest in open justice is at its strongest when it restricts or interferes with reporting or publishing the merits of the case. That will usually be at the point when evidence is led, though it may be when submissions are made on legal issues that are in dispute. At that stage the identities will usually be disclosed and may be published. I am not persuaded that the principle of open justice has the same weight at the stage of a preliminary application designed to establish whether an order under r 50 should be made. In effect the Claimant has asked whether she would be entitled to anonymity if she pressed on with her case. It does not seem proper to publish a judgment in the Claimant's name merely because she has asked for anonymity. As I have indicated I am satisfied that art 8 is engaged. In that situation I consider I should grant an order in relation to the present application." (underlining added)

50. Judge Richards agreed in the instant appeal when determining anonymity:

> "[61]…However, I do not consider that anonymity in this case operates disproportionately. The proceedings in the UT are simply concerned with the correctness or otherwise of an interlocutory decision made by the FTT. They will not represent any final determination of the substantive dispute between HMRC and the Taxpayer. I respectfully agree with the following statement of Lord Summers in Burke and Hare [quoting §69, as set out above]…" [CB/95]

51. Indeed, it is entirely arbitrary whether the FTT happens to deal with preliminary case management issues (such as whether to direct a stay) simply by issuing directions, inviting submissions and/or holding a hearing. There is no apparent reason why the fact that HMRC have (unsuccessfully) sought to oppose a stay should lead to the taxpayer having to forfeit his right to privacy at an early stage.

52. Insofar as there is any interest in the FTT's decision as regards granting or not granting a stay, that does not require the taxpayer to be identified and, indeed, identifying the taxpayer does not advance the principle of open justice in any apparent way. It simply exposes untested allegations about the taxpayer to public consumption.

53. Accordingly, the Respondent submits the principle of open justice does not apply in the same way to the preliminary stages of a tax appeal, which do not involve judicial determination of the underlying legal or factual issues in the dispute but, rather, involve merely procedural matters such as whether there should be a stay (i.e. nothing should happen for a period of time). At those stages, the parties' legitimate interest in keeping the confidential tax affairs of the taxpayer private, prior to any judicial ajudication on those tax affairs, carries significant weight.

The present appeal

54. The Respondent submits that the FTT reached a correct and reasonable conclusion that Direction 3 was justified in order to preserve the efficacy of Direction 4.

55. As noted, there is no appeal against Direction 4, so this Tribunal must proceed on the basis that the Direction is valid (which it is) and needs to be respected. As Judge Richards stated:

> "[59]…An important feature of the system of justice in this country is that decisions of lower courts or tribunals are to stand unless shown, following an appeal process, to be wrong…"

56. There is no appeal against Direction 4, so there is not even the prospect of it being shown to be wrong.

57. Given, therefore, that the FTT had properly decided (with the agreement of both parties) to defer determination of the full anonymity application until shortly before the substantive hearing, the question is: was it open to the FTT to conclude, in exercise of its case management powers, that it was justified for preliminary proceedings to be dealt with in private?

58. The Respondent submits that the answer is that it plainly was open to the FTT to reach that conclusion.

59. The FTT's reasoning (the need to preserve the position pending a future determination by the Tribunal) is precisely the same reasoning as is applied when granting privacy pending an appeal against a refusal of privacy. The Tribunal needs to "hold the ring" so as not to undermine the potential decision that may be taken on appeal (in appeal cases) or at the full anonymity application (the present case).

60. If, for instance, the hearing to determine the stay application was to be regarded as a public hearing and the decision made public, the details of HMRC's case against the Respondent and his identity would be known, thereby undermining the efficacy of any direction made in the full anonymity application.

61. Further, as it only affects preliminary stages of a tax dispute it has a limited effect on the principle of open justice, given that such stages are normally not public in any event. If the full anonymity application was refused (and subject to appeals), the decision in the final substantive trial would be made public and little or nothing lost in terms of open justice.

62. Indeed, all the FTT's Direction 3 means is that the public do not know about a tax dispute at a time when, normally, they would not know about the tax dispute anyway. It is very difficult to see why that is problematic.

63. In light of HMRC's position defending taxpayer confidential at early stages in relation to *Cider of Sweden*, it is somewhat contradictory that HMRC are so determined to make this taxpayer's dispute with HMRC public at a preliminary stage:

> "[14] Mr Peretz QC on behalf of HMRC (who consider this to be a matter of important principle, given the wider issues around taxpayer confidentiality in particular) argued, in outline, that the open justice principle did not apply at this early stage in the proceedings, accordingly the Tribunal had no jurisdiction to provide access to the documents which EY sought. Even if he were wrong in this, EY had not come close to demonstrating that they had a legitimate interest in the material which they sought, and accordingly they had not shown any good reason why they should be provided with access to the material." (underlining added)

HMRC's grounds of appeal

(1) Absence of evidence from the taxpayer

64. HMRC argue that:

> "[16]…The burden is on the person seeking privacy or anonymity and cogent evidence is required to show that privacy or anonymity is necessary (and the specific measures that are necessary). If that burden is not discharged, the open justice principle must apply in full."

65. HMRC have failed to understand the law (even in relation to CPR matters). Evidence might be necessary where the privacy direction is sought on the basis of a risk of harm to a legitimate interest, but it is not necessary where the direction is sought and made on the grounds that it is justified in order to avoid prejudicing the interests of justice.

66. HMRC say that privacy cannot be granted in order to avoid rendering an application for substantive privacy 'futile' (§19) but that is plainly wrong, as the examples given above show (anonymity pending appeal etc.).

67. At Skeleton §51, HMRC seem to argue that although anonymity can be given after a failed anonymity application in order to preserve the position pending appeal, it cannot be given in advance of an application, in order to preserve the position for that application. That does not make sense.

68. Indeed, in *ECG*, anonymity was granted on a temporary basis in order to ensure that the application yet to be determined could be effective (§§10 and 53). That is no different to what Judge Sukul decided to do, it just happened that the parties agreed, and the FTT directed, that the application was best determined shortly before the substantive hearing.

69. At various points HMRC refer to grounds relating to the full anonymity application (§§17, 22), but that misses the mark because those are not the grounds upon which interim privacy was granted.

70. As Judge Sukul noted in refusing permission to appeal, by arguing that interim anonymity could only be granted on the basis of evidence of the risks of harm that underpin the full anonymity application, HMRC are attempting to have a second bite of the cherry as to when the full anonymity application should be determined.

71. HMRC also disingenuously suggest that knowledge about the stay application would not undermine the full anonymity application (§§20, 23). Reading the transcript of the stay hearing and the FTT decision as to why it was granting a stay show this to be incorrect. Judge Richards rejected essentially the same submission at §§51 – 53 [CB/93 – 94]). They are not grounded in reality.

72. The points HMRC make at Skeleton, §23 are hypothetical and could be addressed, whilst preserving anonymity, if they arose, which they did not. Suggesting such hypotheticals identifies no error of law in the FTT's decision.

(2) Failure to take account/apply the case law on the principle of open justice

73. HMRC say:

> "[28] In adopting the Taxpayer's approach, the FTT erred in law because it then failed to take into account and/or failed to correctly apply the principle of open justice. Rather, the FTT appears to have reasoned backwards and assumed that the deferred application for substantive privacy required interim privacy to be granted."

74. HMRC suggest that the FTT "confused the position in relation to interim privacy with the position in relation to an appeal from a decision refusing privacy":

> "[30]…In respect of the latter, if the subsequent appeal was heard in public, this could (depending on the circumstances) render the appeal itself futile. But the position in relation to interim privacy is not the same – if a taxpayer wants privacy in relation to interim proceedings, he must satisfy the FTT that it is necessary. The fact that he may or may not make a subsequent application in relation to the substantive hearing is neither here nor there."

75. This appears to be exactly the same argument as ground 1. For all the reasons given above, the FTT was correct to consider whether, in light of Direction 4, interim privacy was justified to preserve the position in the meantime. HMRC's insistence on satisfying the category 2 test with evidence of a risk of harm to a legitimate interest is wrong.

76. Indeed, HMRC's approach makes no sense. The FTT has validly directed, with the agreement of both parties, that it will determine the category 2 issue (i.e. whether there is a risk of harm to a legitimate interest such that anonymity should be granted) at a later date. HMRC are saying that the only way to preserve the position in the meantime is if the FTT essentially adjudicates upon the issue that it has decided (by agreement) should be decided later. That is simply an attempt to undermine Direction 4.

77. It is the risk to the efficacy of the full anonymity application decision that justifies interim anonymity, not a decision upon whether there is risk of harm to a legitimate interest.

(3) Failure to consider alternatives that were more proportionate

78. The FTT's Direction 3 was a means of preserving the position pending Direction 4 in circumstances where no alternatives were canvassed before it. Given that the preliminary stages of an FTT appeal generally remain private, in any event (see above and as HMRC agreed – see Judge Richards' decision, §47 [CB/92]), it was reasonable for the FTT to preserve the position by confirming that that will be the case for this appeal.

79. HMRC's Ground 3 reiterates their view that the "FTT erred in law in accepting that the Taxpayer's identity should be preserved" (§36), repeating their argument that "the FTT did

not have any evidence before it to show that the balance fell in favour of privacy" (§33). This seems to be the same argument by HMRC, for a third time.

80. The Respondent reiterates that, to the extent that anonymity can be proportionately preserved by something less than dealing with preliminary proceedings in private, the Respondent has no objection to that on this appeal (Reply to Grounds of Appeal, §29).

81. That would cover, as a minimum, the proceedings relating to the stay application being anonymous, documents relating to the substance of the dispute, and the listing and determination of the full anonymity application. It is not apparent what, of any relevance, would not need to be covered.

82. HMRC's submission (§34) appears to be that every time something happens in relation to this appeal, prior to the full anonymity application being determined, there will have to be a fresh application, no doubt an objection from HMRC, and a judicial determination. That hardly seems like a proportionate use of the parties and Tribunal's time and may end up in multiple episodes of satellite litigation.

83. The FTT's Direction 3 was a simple and effective way of preserving the position pending Direction 4 in circumstances where the events covered would be expected to remain private in any event.

(4) Application for anonymity should be anonymous (even if refused)

84. HMRC conclude by saying:

> "[54] For the reasons set out above, the appeal should be allowed and the FTT Privacy Direction should be set aside. If this appeal succeeds, HMRC will also ask that the UT publishes its decision **unanonymised** in due course (as indicated already to the UT…"

85. For the avoidance of doubt, the Respondent's position is that even if anonymity is not granted now, or in the future, the Respondent should have the choice as to whether to continue the proceedings (without anonymity) or discontinue them, without losing his privacy. Taxpayers usually have the opportunity to withdraw, without losing their privacy,

prior to the appeal reaching a substantive hearing. There is no reason why it should be different because the taxpayer has made an application for anonymity.

86. This may well be a point for later, if it arises, but the Respondent's position is, in short, that it would render the right to privacy theoretical or illusory if a taxpayer concerned about their right to privacy and who believes that he/she may have a justification for having it protected (even at a substantive hearing), has to risk their privacy being infringed by the very application made in order to decide whether that privacy should be protected.

87. If the application for anonymity is not itself anonymous, the position in respect of Article 8 ECHR is essentially that if a person with a right to privacy dares to apply for anonymity and is unsuccessful, they will thereby have created their own publicity. It would amount to saying that the applicant must either accept full publicity (because the point is now outside their control) or not exercise the right and that renders the right theoretical or illusory. See *OWD Ltd v. HMRC* [2019] UKSC 30, §58(iii) and §77:

> "Where such a right exists in law it would potentially be a breach of article 6 ECHR (right to a fair trial), read with article 13 (right to an effective remedy) if it were rendered illusory or nugatory by the absence of any power to suspend or stay the adverse decision of HMRC until the appeal can be determined."

88. This is essentially the conclusion that Judge Mosedale reached in *JK*: having decided that the substantive hearing would not be in private/anonymised, the taxpayer was given the choice of proceeding (and losing privacy) or pulling out (and retaining it). The EAT reached the same conclusion in *A v. Burke and Hare* [2022] IRLR 139 (see above).

Conclusion

89. For the reasons given above, the Respondent submits that the appeal should be dismissed.

Michael Firth
Gray's Inn Tax Chambers
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7 November 2023

Neutral Citation: **[2024] UKUT 00012 (TCC)**

Case Number: UT/2022/000070

UPPER TRIBUNAL
(Tax and Chancery Chamber)

The Royal Courts of Justice, Rolls Building, London

INCOME TAX – case management direction that "preliminary proceedings in this matter shall be heard in private" – whether direction justified in order to prevent prejudice to the interests of justice – appeal allowed

Heard on: 21 November 2023
Judgment date: 10 January 2024

Before

MRS JUSTICE BACON
JUDGE THOMAS SCOTT

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

THE TAXPAYER

Respondent

Representation:

For the Appellants: Hui Ling McCarthy KC and Barbara Belgrano, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Michael Firth, instructed by Morr & Co LLP

DECISION

INTRODUCTION

1. Pursuant to directions issued by the Upper Tribunal (Judge Richards) on 19 December 2022, the proceedings in this appeal have been anonymised. While the hearing before us was in public, in accordance with the direction for anonymity the Respondent is referred to in this decision as the "Taxpayer", and we do not provide details in this decision which would enable the Respondent to be identified.

2. The Appellants ("HMRC") appeal against a direction issued by the First-tier Tribunal (Tax Chamber) (the "FTT") on 15 September 2021.That direction was that "preliminary proceedings in this matter shall be heard in private". The reference to "this matter" was to the Taxpayer's substantive appeal against the denial by HMRC of certain tax deductions which he had claimed.

PROCEDURAL BACKGROUND

3. It is helpful to set out the procedural background, both because none of the relevant directions and decisions has been published and because it is material to the issues which we have to determine.

4. The Taxpayer appealed to the FTT against certain decisions which HMRC had made denying him deductions for income tax purposes. The deductions which had been claimed were said to arise in relation to arrangements which had been challenged by HMRC and which were the subject of two other lead cases (the "Lead Appeals").

5. On 23 December 2019, the Taxpayer applied to the FTT for a direction that his appeal be stayed behind the Lead Appeals (the "Stay Application"). HMRC opposed the application.

6. On 13 July 2021, the Taxpayer made an application to the FTT for the following:

   (1) A direction of the Tribunal that the Appeal be heard in private and that the Tribunal's decision be anonymised.

   (2) A direction of the Tribunal that the Appellant is to be anonymised in continuing proceedings.

   (3) A direction of the Tribunal that the hearings will be held in private.

   (4) A direction of the Tribunal that the preliminary proceedings in this matter be heard in private and anonymised.

   (5) A direction that there be a non-reporting restriction in these proceedings.

   (6) An order restricting publication of information.

7. We refer below to this application as "the Privacy and Anonymity Application".

8. Both the Stay Application and the Privacy and Anonymity Application were considered by the FTT (Judge Sukul) at a hearing which took place in private on 19 July 2021. The FTT released its decision on the applications on 15 September 2021 (the "September 2021 Decision").

9. In the September 2021 Decision, the FTT described the reasons given for the directions sought by the Privacy and Anonymity Application as follows:

(1) That they are necessary to protect the taxpayer's private or family life.

(2) It is necessary to maintain the confidentiality of sensitive information.

(3) It will avoid prejudice to the interests of justice.

10. The FTT issued the following directions in the September 2021 Decision:

> 1. This appeal shall be stayed, under Rule 5(3) of the Tribunal Rules, until 60 days after the Tribunal disposes of either of the appeals (the 'Lead Appeals') of [two identified appeals before the FTT] whether the appeals are disposed of by the Tribunal releasing a decision, the appeals being withdrawn or otherwise.
>
> 2. Either party may apply at any time for this stay to be lifted.
>
> 3. Preliminary proceedings in this matter shall be heard in private.
>
> 4. Both parties shall provide to the Tribunal and each other their final representations on the Appellant's application for anonymity not later than 21 days before the substantive hearing.

11. In this decision, we shall refer to the third and fourth directions above as Direction 3 and Direction 4 respectively.

12. The FTT gave its reasons for Directions 3 and 4 as follows:

> 16. HMRC strongly oppose the application, submitting that the application does not provide any good reason for displacing the strong presumption in favour of public hearings or departing from the fundamental principle of open justice.
>
> 17. HMRC do not however object to the Appellant's proposal that the Tribunal defer consideration of the application to closer to the substantive hearing date (although they do not concede that interim proceedings should remain anonymised if the application is ultimately refused). I agree with that approach and I have therefore directed, in the interest of fairness and justice, that preliminary proceedings in this matter shall be heard in private to prevent the Appellant's outstanding anonymity application being rendered futile.

13. Following the September 2021 decision, there were various further applications by the parties, in the course of which the FTT set aside these directions, and then reinstated them.

14. HMRC sought permission to appeal against Direction 3. Permission was refused by the FTT but ultimately granted by the Upper Tribunal (Judge Richards). Permission to appeal was granted on the grounds that the FTT erred in law:

(1) By directing that "preliminary proceedings" were to be in private without having received any evidence from the taxpayer dealing with the need for such a direction.

(2) By failing to take into account, or by failing properly to apply, common law on the principle of "open justice" which indicated that such proceedings should be in public.

(3) By failing to consider alternatives to Direction 3 that were more proportionate having regard to the principle of open justice.

15. By directions released on 19 December 2022, accompanied by detailed and comprehensive reasons, Judge Richards directed that the appeal before this Tribunal should be anonymised, and that all parties and the Tribunal should refer to the Respondent as the Taxpayer.

AN APPEAL AGAINST A CASE MANAGEMENT DECISION

16. An appeal to this Tribunal lies only on a point of law[1]. In addition, the direction under appeal resulted from an exercise by the FTT of its case management powers. In the decision of the Supreme Court in *BPP Holdings v HMRC* [2017] UKSC 55 ("*BPP*") Lord Neuberger, delivering the judgment of the Court, said this, at [33]:

> In the words of Lawrence Collins LJ in *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427, para 33:
>
> > "[A]n appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge."
>
> In other words, before they can interfere, appellate judges must not merely disagree with the decision: they must consider that it is unjustifiable.

17. Earlier in his judgment, at [21], Lord Neuberger said:

> However, it would nonetheless be appropriate for an appellate court to interfere with [the FTT's decision], if it could be shown that irrelevant material was taken into account, relevant material was ignored (unless the appellate court was quite satisfied that the error made no difference to the decision), there had been a failure to apply the right principles, or if the decision was one which no reasonable tribunal could have reached.

18. We have applied this guidance in reaching our decision.

FTT RULES

19. Direction 3 was made by the FTT pursuant to Rule 32 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) (the "FTT Rules"). The relevant parts of Rule 32 state as follows:

> **Public and private hearings**
>
> 32. (1) Subject to the following paragraphs, all hearings must be held in public.
>
> (2) The Tribunal may give a direction that a hearing, or part of it, is to be held in private if the Tribunal considers that restricting access to the hearing is justified—
>
> (a) in the interests of public order or national security;

[1] Section 11(1) Tribunals, Courts and Enforcement Act 2007.

(b) in order to protect a person's right to respect for their private and family life;

(c) in order to maintain the confidentiality of sensitive information;

(d) in order to avoid serious harm to the public interest; or

(e) because not to do so would prejudice the interests of justice.

…

(6) If the Tribunal publishes a report of a decision resulting from a hearing which was held wholly or partly in private, the Tribunal must, so far as practicable, ensure that the report does not disclose information which was referred to only in a part of the hearing that was held in private (including such information which enables the identification of any person whose affairs were dealt with in the part of the hearing that was held in private) if to do so would undermine the purpose of holding the hearing in private.

20. As regards matters relating to anonymity covered by Direction 4, Rule 32(6) concerns the anonymity of published decisions. Wider powers in relation to anonymity exist under Rule 14 of the FTT Rules, which provides as follows:

Use of documents and information

14. The Tribunal may make an order prohibiting the disclosure or publication of—

(a) specified documents or information relating to the proceedings; or

(b) any matter likely to lead members of the public to identify any person whom the Tribunal considers should not be identified.

HEARINGS IN PUBLIC AND THE PRINCIPLE OF OPEN JUSTICE

21. The powers contained in Rules 32 and 14 do not fall to be exercised in a vacuum. The starting point in tax cases is that all hearings must be in public. Article 6 of the Human Rights Convention states that "everyone is entitled to a fair and public hearing" in the determination of their civil rights and obligations. That principle is also reflected in Rule 32(1) of the FTT Rules.

22. In *A v British Broadcasting Corporation (Scotland)* [2014] UKSC 25, Lord Reed, delivering the judgment of the Supreme Court, described the rationale for the common law principle of open justice in this way:

> It is a general principle of our constitutional law that justice is administered by the courts in public, and is therefore open to public scrutiny. The principle is an aspect of the rule of law in a democracy. As Toulson LJ explained in *R (Guardian News & Media Ltd) v City of Westminster Magistrates' Court (Article 19 intervening)* [2012] EWCA Civ 420; [2013] QB 618, para 1, society depends on the courts to act as guardians of the rule of law. *Sed quis custodiet ipsos custodes*? Who is to guard the guardians? In a democracy, where the exercise of public authority depends on the consent of the people governed, the answer must lie in the openness of the courts to public scrutiny.

23. In *Global Torch Ltd v Apex Global Management Ltd* [2013] EWCA Civ 819 ("*Global Torch*"), the Court of Appeal referred to the decision of the House of Lords in *Scott v Scott* [1913] AC 417 as continuing to embody the common law approach, at [13]:

> This year marks the centenary of the decision of the House of Lords in *Scott v Scott* [1913] AC 417. It was and remains a beacon of the common law. Outside three exceptional areas of wardship, lunacy and trade secrets (the third being a precursor of CPR r 39.2(3)(a)), the House of Lords emphasised the paramountcy of open justice. Almost every page of the speeches underwrites that principle…Viscount Haldane LC stated, at p 438:
>
> > "But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with the by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as of turning, not on convenience, but on necessity."

24. Where a taxpayer brings a tax appeal, the principle of open justice will inevitably result in some intrusion into the taxpayer's privacy. However, that is a necessary price in most cases, as explained by Henderson J in *HMRC v Banerjee* [2009] EWHC 1229 (Ch) in the context of an application for anonymisation of a judgment which (as in this appeal) related to the deductibility of payments for income tax, as follows, at [35]:

> …taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat.

25. In relation to hearings before the FTT, in *Moyles v HMRC* [2012] UKFTT 541 (TC) ("*Moyles*"), another case concerning the deductibility of payments, the then president of the FTT, Judge Bishopp, cited with approval the above passage from *Banerjee*. Having described the presumption that hearings would be in public as "nowadays stronger than it might have been perceived even a few years ago", Judge Bishopp emphasised (at [14]):

> …There is an obvious public interest in its being clear that the tax system is being operated even-handedly, an interest which would be compromised if hearings before this tribunal were in private save in the most compelling of circumstances.

DIRECTIONS 3 AND 4

26. It is necessary to determine the precise meaning and scope of Direction 3 and (since the only reason given by the FTT for Direction 3 was Direction 4) Direction 4.

27. As regards Direction 3, we note that it does not provide for anonymity of any preliminary proceedings (although if the FTT published a decision regarding any such proceedings it would

be necessary to comply with Rule 32(6)). Any such proceedings would therefore be listed on the FTT list of forthcoming hearings as taking place in private but showing the taxpayer's identity, absent any successful application for anonymity.

28. Direction 3 applies to "preliminary proceedings". As we discuss below, one of the difficulties with Direction 3 is that it does not allow for any distinction to be drawn between different types of preliminary proceedings. So, an application by HMRC in this case to strike out the taxpayer's appeal, or the determination of a preliminary issue, would be in private pursuant to the direction, even though they would be much more significant, and of greater interest to the public, than (say) a stay application. Mr Firth sought in response to questions from us to suggest that a strike-out or preliminary issue determination would not be regarded as "preliminary proceedings", but that is plainly wrong.

29. As regards the breadth of Direction 4, what is meant by the Appellant's "application for anonymity"? As we have seen, the Privacy and Anonymity Application covered several matters, and, in particular, sought directions relating to both preliminary proceedings and the continuing proceedings more generally (which would include the substantive hearing). Ms McCarthy said that the "application for anonymity" referred to in Direction 4 was only the application regarding the hearing of the substantive appeal. Mr Firth initially suggested that by making Direction 4, the FTT was deciding to defer *any* consideration by it of possible "harm" to the Taxpayer in terms of the justifications listed in Rule 32(2), both in relation to preliminary proceedings and the substantive hearing.

30. Fortunately, a transcript was taken of the hearing before Judge Sukul on 19 July 2021. It is clear from that transcript that Ms McCarthy's interpretation of Direction 4 is to be preferred. Mr Firth (who also represented the Taxpayer before the FTT) presented his application to the FTT as follows (emphasis added):

> Within that application, it is actually a composite of three -- at least three different applications in terms of there are three aspects of the proceedings that will need to be considered in terms of their application. **The first is the final hearing, if and when that happens, so a full hearing, with the substantive issues, with live evidence before the FtT at some point in the future. That is number one**. Number two is the application to lift the stay and number three is the application for anonymity itself. My submission **on the first issue** is that you should defer or the tribunal should defer consideration of whether to grant anonymity and a private hearing in respect of the final substantive hearing until the outset of the final substantive hearing. So the application is there but the appropriate time to consider it, in my submission, will be at the beginning of that hearing.

31. The application so presented was what HMRC responded to in the hearing before Judge Sukul. Judge Sukul referred to "the question of anonymity at the substantive hearing, which we have decided will not be addressed now". The following exchange between Judge Sukul and Ms Belgrano, who appeared for HMRC, makes the position clear:

> JUDGE SUKUL: To clarify, if we were to keep the matters in the three headings that Mr Firth has suggested, then I think that that may be helpful because I think we are clear that both parties agree that the application for anonymity in respect of the substantive hearing should be heard closer to the substantive hearing. As I understand it, Miss Belgrano, that is where you began with your submission
>
> MISS BELGRANO: Yes.

32. We consider it clear that Direction 4, while loosely worded, relates only to the hearing of the Taxpayer's application for anonymity (and possibly privacy) in respect of the hearing of the substantive appeal. The reason given by the FTT for making Direction 3 must therefore be considered by reference to Direction 4 so construed. That is logical, because if Mr Firth's suggested interpretation were correct, that would result in deferral of any consideration of the issues relating to the privacy/anonymity of proceedings which, by the date of the consideration, had already taken place.

33. Indeed, as Ms McCarthy pointed out, Direction 4 not only says nothing about what is to be done in relation to preliminary proceedings, it goes no further than setting a deadline for final representations by the parties on the application in relation to the substantive hearing.

THE TAXPAYER'S SUBMISSIONS

34. Mr Firth raised a number of arguments to support the proposition that the FTT's decision to make Direction 3 was reasonable and involved no error of law. In summary, those arguments were as follows:

(1) The reason for the FTT's decision was that if Direction 3 was not made, Direction 4 would become futile. That reason fell squarely within Rule 32(2)(e), namely that not to order privacy in respect of preliminary proceedings would "prejudice the interests of justice", because it would render Direction 4 futile. Unlike a decision to order privacy on the basis of any of the factors identified by paragraphs (a) to (d) of Rule 32(2), this required no evidence of potential harm to the Taxpayer to be before the FTT or considered by it, because the prejudice to the interests of justice was plain, and followed necessarily from the futility which would otherwise arise.

(2) Direction 3 could not permissibly be argued to be wrong on the basis that Direction 4 was wrong. HMRC had not appealed against Direction 4, so Direction 4 must be assumed to stand and to have been properly made by the FTT.

(3) In applying the principle of open justice, there is a spectrum of hearings in the tax field, with a hearing of the substantive appeal at one end of the spectrum. Open justice carries less weight in relation to hearings further down the spectrum.

(4) In particular, as illustrated by the decision in *Kandore Ltd v HMRC* [2021] EWCA Civ 1082 ("*Kandore*"), open justice does not apply with full force to the preliminary stages of a tax appeal, which involve merely procedural matters. At those stages, the legitimate interest in keeping the confidential tax affairs of a taxpayer private carry significant weight, prior to any judicial adjudication on those tax affairs.

(5) Open justice applies with less force to proceedings in the FTT than in the courts: see *Cider of Sweden v HMRC* [2022] UKFTT 76 (TC) ("*Cider of Sweden*").

(6) The FTT's decision was consistent with a number of decisions regarding anonymity of appeals against privacy or anonymity decisions, and in particular with comments made in *A v Burke and Hare* [2022] IRLR 139 ("*Burke and Hare*").

(7) Direction 3 had a limited effect on the principle of open justice given that the preliminary stages of a tax dispute are normally not public in any event.

DISCUSSION

35. Where an application for privacy is based on the justifications set out at Rule 32(2)(a) to (d), there will in practice be an onus on the applicant to produce cogent evidence. The FTT must consider that evidence and must carry out a balancing exercise between the various Articles of the European Convention on Human Rights which must be respected by the FTT by virtue of section 6 of the Human Rights Act 1988. In particular, there will often be a tension to be resolved in that balancing exercise between Article 6, which in this context provides a right to a public hearing (from which the applicant will in effect be seeking a derogation), and Article 8, which provides a right to respect for private and family life.

36. However, Rule 32(2)(e) also provides the FTT with power to direct that a hearing should be held in private "if the Tribunal considers that…is justified… because not to do so would prejudice the interests of justice". As Ms McCarthy pointed out, the wording referring to prejudice to the interests of justice is also found in Article 6, though we do not accept her submission that this means one should read across to Rule 32(2)(e) the specific qualifications and restrictions in that respect spelt out in Article 6.

37. Where privacy is directed by the FTT in reliance on Rule 32(2)(e), the need for "cogent evidence" in the sense relevant where privacy is sought under paragraphs (a) to (d) is not directly applicable. However, that does not mean that the FTT can properly direct a hearing in private under Rule 32(2)(e) without rational and persuasive reasons for departing from the principle of open justice. It is critical in considering an application under paragraph (e) to keep in mind the presumption, set out in Rule 32(1), that all hearings before the FTT will be in public unless the FTT directs otherwise. Additionally, the FTT may only make a direction under paragraph (e) where it considers that a public hearing *would* (not might, or be likely to) prejudice the interests of justice.

38. In this case, the only reason given by the FTT for making Direction 3 was that "in the interest of fairness and justice…preliminary proceedings in this matter shall be heard in private to prevent the Appellant's outstanding anonymity application being rendered futile". As we have explained, the "outstanding anonymity application" meant the application for the substantive appeal to be anonymised (and possibly heard in private).

39. We consider that in making Direction 3 for this reason the FTT erred in law.

40. The critical error made by the FTT was its conclusion that omitting to make Direction 3 would have rendered the application in relation to the substantive hearing futile. The FTT also erred in failing to consider whether Direction 3 was proportionate, taking into account its practical effect.

41. We deal first with futility. In principle, prejudice to the interests of justice could rationally be found to arise in two categories of futility relevant to this appeal. The first is where the subject-matter of the hearing is itself an application for privacy or anonymity, where a hearing in public would effectively prejudge the application and thereby render that hearing futile. The second is where a public and/or unanonymised hearing of (or decision on) a particular matter would render futile or nugatory an outstanding appeal against an existing decision regarding privacy and/or anonymity.

42. Examples of the first category include *EGC v PGF NHS Trust* [2022] EWHC 1908 (QB) ("*EGC")* and *Burke and Hare*. Examples of the second category include the decisions in *EGC, JK v HMRC* [2019] UKFTT 411 (TC) and (as regards anonymity) the hearing of this appeal.

43. *EGC* merits some discussion. It illustrates both categories, and it was particularly relied on by Mr Firth in justifying the FTT's making of Direction 3. The claimant had applied for anonymisation of the parties in litigation he had brought against his former employer (the "Anonymity Application"). He had sought an injunction against his former employer to prevent the proposed disclosure of certain confidential information, and argued as follows (see [12] of the decision):

> i) Without these orders being granted, the bringing of the proceedings would defeat their purpose; in other words, the litigation process would destroy that which the Claimant seeks to protect. In particular, without appropriate restrictions to access to the Court file, the Confidential Information (or parts of it) would be open to public inspection and the confidentiality that the Claimant is seeking to protect thereby lost.
>
> ii) It would be inevitable that, at any interim and/or final hearing, there would be need to discuss the confidential information in open court which would also threaten to destroy the confidence in the information…
>
> iii) Anonymisation of the Claimant (and the making of associated orders to enforce that anonymity) are necessary to protect the Claimant's Article 2 and Article 8 rights.

44. Nicklin J noted at [29] that orders anonymising parties and directions that a hearing should be in private were "derogations from the principle of open justice that require justification". Relevantly to this appeal, he stated as follows, at [34]:

> Derogations from open justice can be justified as necessary on two principal grounds: maintenance of the administration of justice and harm to other legitimate interests: *Various Claimants -v- Independent Parliamentary Standards Authority* [36]-[40].
>
> > i) In the first category (recognised expressly in CPR 39.2(3)(a)) fall the cases – such as claims for breach of confidence – in which, unless some restrictions are imposed, the Court would by its process effectively destroy that which the claimant was seeking to protect. There is no general exception to the principles of open justice in cases involving alleged breach of confidence/misuse of private information. However, it is well recognised that this type of case may well justify some derogation. The challenge is usually to ensure that the measures imposed are properly justified; that they are tailored to the facts of the individual case; and that they are proportionate, i.e. the least restrictive measure(s) necessary to protect the engaged interest…
> >
> > ii) The second category consists of cases in which the anonymity order is sought on the grounds that identification of the party (or witness) would interfere with his/her Convention rights. In that case, the Court must assess the engaged rights and, if appropriate, perform the conventional balancing exercise…

45. Nicklin J had ordered that the hearing of the application should take place in private, as "a public hearing would have immediately defeated the Anonymity Application": [3]. Although he refused the Anonymity Application and refused permission to appeal, Nicklin J noted that the Claimant could apply for permission to the Court of Appeal. In that regard, his view was that "to preserve the position, pending any renewed application, the ring must be held. That means that my judgment refusing the Anonymity Application must remain private until such time as any appeal has been finally resolved": [2]. The former decision was an

illustration of futility in the first category, and the latter an illustration of futility in the second category.

46. Mr Firth argued that in this case the FTT was adopting the same approach as in *EGC*. We consider that, to the contrary, the material differences between the situation in this case and that in *EGC* highlight how the FTT fell into error. In *EGC*, the holding of a public and/or unanonymised hearing would have rendered futile the very question at issue in the hearing, and the failure to anonymise the decision for a specified period would have rendered nugatory any appeal against that decision. In this case, there had been no decision regarding anonymity or privacy as a result of Direction 4 or otherwise; all that existed was an application for privacy, unsupported by evidence, and which would not be considered or determined by the FTT until some unspecified date close to the substantive hearing, assuming that the substantive hearing took place. A situation within the first category would be scrutinised and decided at the hearing itself, and in the second a decision had already been taken. This case fell within neither category; neither the application unsupported by evidence nor Direction 4 gave rise to a "ring" to hold.

47. The fact that the situation in this case did not fall within either of the categories we have described did not mean that it was necessarily unjustified or irrational for the FTT to have directed open-ended privacy for all preliminary proceedings in reliance on Rule 32(2)(e). However, it did mean that the FTT should have recognised the material difference, and it should as a result have considered carefully whether a failure to make Direction 3 *would* have prejudiced the interests of justice. We do not consider that the FTT could rationally have concluded that it would.

48. The wording of Rule 32(2)(e) means that in order to answer that question the FTT needed to have considered what the position would have been if they did not make Direction 3. Mr Firth's submissions assumed (in large part) that the counterfactual position would have been that the preliminary proceedings would have been in public. But that is not correct. Absent Direction 3, the Taxpayer the Taxpayer would have needed to make an application for privacy/anonymity for the relevant preliminary proceedings, supported by evidence. It is hard to see that such an outcome would have rendered Direction 4 futile, or otherwise prejudice the interests of justice, particularly given that Direction 4 related only to privacy in the substantive appeal.

49. Further, an assessment of privacy for the purposes of preliminary proceedings would not in any event have prejudged the assessment to be made of privacy for the substantive hearing. The two decisions would not inevitably have been the same, as they would call for consideration of different facts at different times, and, therefore, different balancing exercises. Unlike cases such as *EGC*, it would not have been the case that by failing to make Direction 3 the very purpose of Direction 4 would have been defeated.

50. We consider that the FTT also erred in not considering the practical consequences of Direction 3, and whether those consequences were proportionate to any risk to the interests of justice. We endorse the comments of Nicklin J in *EGC*, set out above, that where (as was said to be the case in this case) a derogation from the principle of open justice is justified on the basis of the interests of justice "the challenge is usually to ensure that the measures imposed are properly justified; that they are tailored to the facts of the individual case; and that they are proportionate…".

51. As we have observed, Direction 3 extended to all preliminary proceedings. A direction that a strike-out hearing, for example, be held in private would in our view be a significant derogation from the principle of open justice, and the assumption in Rule 32(1). The FTT should have explained why it thought such a blanket derogation was justified, by Direction 4 or otherwise.

52. We summarised Mr Firth's submissions at paragraph 34 above. We have explained why we reject his central argument that Direction 3 was reasonable and justified for the reason stated by the FTT. As regards Mr Firth's other arguments, our conclusions are as follows:

(1) In reaching our decision, we have proceeded on the basis that there is no challenge to Direction 4. However, the issue in this appeal was not whether Direction 4 was correct, but whether the reason given for Direction 3 was an error of law.

(2) We do not agree that in applying the principle of open justice there is a "spectrum" of tax hearings, with the principle carrying more weight the closer one gets to a substantive appeal hearing and less weight the further one is from that hearing. Rule 32(1) applies to "all hearings", not to certain types of hearing or hearings at certain stages. The exercise which must be carried out by the FTT in considering any application for privacy or anonymity is fact-sensitive, and different considerations will arise in different types of case, but there is no general principle of the sort suggested by Mr Firth. To take only one example, a hearing of an application to strike out an appeal (or debar HMRC) may take place well before the substantive appeal is to be heard, but there is no reason why the principle of open justice should as a result carry less weight at that stage than in relation to the substantive appeal hearing.

(3) The decision of the Court of Appeal in *Kandore* does not support the proposition that open justice applies with less force to preliminary proceedings. That case related to the very particular circumstances of a hearing before the FTT of an application by HMRC seeking approval by the FTT of an information notice under Schedule 36 to the Finance Act 2008. In relation to such applications, a private *ex parte* hearing will usually be appropriate because the application is made in the course of an HMRC investigation, before any appealable decision by HMRC has even been made. At that very preliminary stage, and in the context of the particular statutory scheme, it is easy to see why materially different considerations would apply to the privacy of such a hearing. The decision of the Court of Appeal makes quite clear that the rationale for a different approach to open justice stems not from such a hearing arising at a preliminary stage of an appeal, but from it arising at an investigatory stage before there has been any decision to be appealed. See, for example, the following at [102] and [105]-[106]:

> 102 No one doubts the importance of the principle of open justice but the above authorities…were concerned with the typical judicial hearing, in which a court or tribunal adjudicates on a dispute between parties. As I have set out earlier, the nature of the process under Schedule 36 to the 2008 Act is entirely different; it consists of the judicial monitoring of a step in an investigation into the affairs of a taxpayer by HMRC.
>
> …
>
> 105 In this context it must be recalled that the private affairs of taxpayers will be discussed at this preliminary stage of an investigation. Very often it would not be in the public interest for those to be discussed in public.

> 106 Furthermore, it must be recalled that sometimes the investigation will end in no further action being taken, for example because the position of the taxpayer is vindicated. There would be a real risk of injustice if in the meantime questions had been raised in public over whether they had, for example, been illegally avoiding or evading tax when they had not in fact been doing so.

(4) We firmly reject the submission that the principle of open justice applies with less force in the tribunals than in the courts. In the FTT, Rule 32(1) replicates the common law position that the default position is that proceedings will take place in public. Mr Firth relied on statements made by the FTT in *Cider of Sweden.* That case related to an application by a third party for access to documents filed in an appeal where there had been no hearing of any type in relation to the appeal and no appeal was listed or likely to take place in the near future: see [1] of the decision. While the FTT did balance open justice against the interests of the parties in confidentiality at such an early stage, that was a balancing exercise in the fact-specific context of an application by a third party for disclosure of certain documents, at a stage "before there has been any judicial involvement in the substance of [the] dispute or effective hearing of it": [54]. In the present case, the issue is the extent of confidentiality that is justified at a stage where there *is* a hearing before the FTT. Moreover, the statements to which we were referred go to the uncontroversial proposition that the specific rules of the CPR cannot simply be read across to the FTT, such that in that respect the FTT differs from the courts. Nevertheless, as the FTT correctly stated at [39] of *Cider of Sweden*, " "Open justice" is a constitutional principle which applies to all courts and tribunals exercising the judicial power of the state…This clearly includes the FTT."

(5) Mr Firth relied on paragraph [69] of the decision of the Employment Appeals Tribunal in *Burke and Hare* as demonstrating that the principle of open justice carries less force in the preliminary stages of a dispute than at the final substantive hearing. We do not agree. That case was a "first category" case, in which a preliminary application was made for anonymity by the claimant and the EAT had to decide whether to anonymise its decision on that anonymity application. The comments made by the EAT relate to that situation and were made in that context.

(6) Mr Firth argued that Direction 3 did not really offend against open justice because the preliminary stages of a tax dispute are not usually visible to the public in any event. In fact, while decisions taken on the papers are obviously not in public, the weekly FTT website lists all hearings by taxpayer name (without identifying their subject-matter), which are by default open to the public.

53. In conclusion, if one steps back it is clear that something has gone awry as a result of the FTT's directions. The Taxpayer has obtained the benefit of privacy for all preliminary proceedings, without having produced any evidence of harm or prejudice, for an open-ended period, in a situation where, should he decide to withdraw or settle his appeal and not pursue the Privacy and Anonymity Application, that benefit would not be reversible. That position cannot rationally be justified solely by reference to Direction 4. Nor is it an outcome which should be open to taxpayers, since it results in a blanket derogation from open justice by the backdoor.

DISPOSITION

54. We have found that there were material errors of law in the FTT's decision in relation to Direction 3, and we therefore set that decision aside. We remake the decision so as to set aside Direction 3.

55. We should mention that Mr Firth said that he was "not wedded to any particular form of Direction 3". That has no relevance to the meaning of Direction 3 for the purposes of this appeal, which we discuss above. Insofar as it impliedly invites us to replace Direction 3 with some slightly different formulation which nevertheless achieves the same result, it follows from our decision that that we decline to do so.

56. The Taxpayer may choose to make a further application relating to privacy and/or anonymity in relation to preliminary proceedings. Such an application would fall to be determined by the FTT on its merits, and by reference to the evidence submitted, and could not simply be justified by reference to the fact that an application for privacy and/or anonymity in relation to the substantive appeal hearing remained to be determined by the FTT.

GUIDANCE IN RELATION TO PRIVACY AND ANONYMITY APPLICATIONS

57. This case illustrates the difficulties which can arise where an application by a taxpayer for privacy and/or anonymity is delayed. The practical effect of deferring the substantive application has been that the taxpayer has been able to avoid the open justice principle for all preliminary proceedings for over two years, without any consideration having been given to his reasons for seeking privacy or anonymity.

58. In general, such applications should be dealt with promptly by the FTT when they are made, and should not be deferred.

59. In addition, as Martin Spencer J said in *Zeromska-Smith v United Lincolnshire Hospitals* [2019] EWHC 552 (QB) (at [21]), "an application for anonymity should be made well in advance of the trial". As explained in that case, an applicant may wish to take into account a refusal of anonymity in considering whether to pursue an appeal, and the timetable for hearing the substantive appeal should not be at risk because of an appeal by either party against a decision on an application for privacy or anonymity.

60. The determination of a privacy or anonymity application need not be a protracted affair. In *Global Torch*, the Court of Appeal referred to Lord Steyn's comment[2] that "where the values under [Articles 6 and 8] are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary", and, in the context of the rules of the CPR, observed as follows, at [27]:

> …Lord Steyn's reference to "an intense focus" does not mean that every time a litigant waves an Article 8 flag in support of an application for a private hearing there will have to be a protracted and expensive hearing to determine the issue. Often, indeed usually, experience suggests that the application can be determined very quickly. It also shows that, in most cases falling outside the area of recognized exceptional circumstances…the open justice principle will prevail.

[2] *In re S (a child)* [2005] 1 AC 593, at [17].

61. We respectfully endorse those comments in relation to privacy or anonymity applications made to the FTT.

ANONYMISATION OF THIS DECISION

62. In their skeleton arguments, the parties set out their respective positions as to when and whether we should anonymise this decision, and if so on what terms. In advance of the hearing, we sought comments from counsel for each party on the terms of a draft of our proposed decision in this respect. We have repeated that exercise in sending each party an embargoed draft of this decision. We are grateful to counsel for confirming their agreement to the approach which follows, which we consider is consistent with the case-law discussed above relating to anonymisation of decisions on appeals against privacy or anonymity orders.

63. The appeal by HMRC having been allowed, this decision will initially be published in anonymised form. Thereafter:

(1) The decision will remain in anonymised form if permission to appeal the decision is granted by either this Tribunal or the Court of Appeal, subject to paragraph (2).

(2) If (i) time for applying to the Court of Appeal for permission to appeal expires without any such application having been made, or (ii) both the Tribunal and the Court of Appeal refuse permission to appeal, or (iii) the onward appeal(s) (if any) are finally determined against the Taxpayer, then the decision will be republished in unanonymised form on the expiry of two weeks after the occurrence of (i), (ii) or (iii), as relevant, subject to any further application that may be made to the Tribunal by the parties during that two-week period.

64. The parties have liberty to apply for further directions.

MRS JUSTICE BACON
JUDGE THOMAS SCOTT

Release date:

11 January 2024

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Applicants: The Commissioners for Her Majesty's Revenue and Customs	**Tribunal Ref: UT/2022/000036**
Respondent: A Taxpayer	

APPLICATION FOR PERMISSION TO APPEAL

DIRECTIONS

JUDGE JONATHAN RICHARDS

1. Having received an application for permission to appeal (the "Application") from HMRC against directions (the "Directions") made by the First-tier Tribunal (Tax Chamber) (the "FTT") on 15 September 2021 in FTT cases references TC/2017/00538, TC/2017/06659, TC/2019/00464, it is DIRECTED as follows:

> (1) The Application is, until further order of the Upper Tribunal, to be referred to in the Upper Tribunal's records and, by the parties as "HMRC v A Taxpayer" with Upper Tribunal reference UT/2022/000036.
>
> (2) Both parties must, no later than 4pm on 27 May 2022, provide the Upper Tribunal (copied to each other) with their observations on the suggestions set out below for the case management of the Application.
>
> (3) Both parties must, no later than 4pm on 27 May 2022, indicate to the Upper Tribunal whether they have reached agreement on a possible basis on which the Application could be disposed of (or a variant on that) set out below.

Notes and reasons

Direction 1(1)

2. By the Directions, the FTT made a direction to the effect that "preliminary proceedings" before the FTT were to be in private to address concerns about privacy that the taxpayer raised. In my judgment, it is appropriate to make Direction 1(1) above to "hold the ring" for a period at least so that the very act of HMRC seeking to appeal against the Direction does not deprive

the taxpayer of the privacy which he seeks. I will consider submissions to the contrary when I consider the further case management of the Application.

Direction 1(2)

3. By paragraph 1 of the Directions, the FTT granted a stay of the taxpayer's appeal behind appeals before the FTT in *Northwood v HMRC* and *Clarke v HMRC* which are thought to be "lead cases". By paragraph 3 it directed the "preliminary proceedings" be heard in private. Those directions sit uneasily together since it seems to me that until the stay is lifted, there can be no preliminary proceedings. I would like to consider, therefore, whether the Upper Tribunal should similarly stay its consideration of the Application until the stay of the FTT appeals is lifted. Otherwise, it seems to me that there is some risk of the Upper Tribunal answering a purely academic question: adjudicating on the format of "preliminary proceedings" that may never take place if the taxpayer and HMRC are content to abide by the decision in the lead cases of *Clarke* and *Northwood*.

4. If the Application does need to be addressed now, I would benefit from considering it at an oral hearing, rather than initially on the papers, as I would welcome the opportunity to ask questions of both sides as to the status of proceedings before the FTT which have obviously been somewhat convoluted.

5. Therefore, when making submissions pursuant to Direction 1(2) please could the parties address the following issues (as well as any other case management issues they wish to raise);

> (1) Are the parties content for the Application to be temporarily anonymised as set out in Direction 1(1)?
>
> (2) Should the Upper Tribunal's consideration of the Application be stayed until the stay in the FTT is lifted?
>
> (3) If the Application is to be determined now, are the parties content for me to determine it? I see that I made some earlier directions, when I was a judge in the FTT. At this stage, I do not think I need to recuse myself from hearing the Application but will consider submissions from the parties if they think otherwise.
>
> (4) If the Application is to be determined now, are the parties content for it to proceed straight to an oral hearing without being considered initially on the papers?
>
> (5) If there is to be an oral hearing of the Application, should that application be in private so that the very consideration of the Application does not cause the taxpayer to lose the anonymity he seeks?

Direction 1(3)

6. On reading the Application, I did find myself wondering if the parties and the FTT were somewhat at cross-purposes. It seems to me that the position was as follows:

> (1) The taxpayer wanted the substantive appeal to be heard in private ("substantive privacy"). That hearing was some time away at the time the FTT made the Directions.

(2) HMRC were content for the taxpayer's application for substantive privacy to be deferred until closer to the hearing.

(3) HMRC were not content for the FTT to make a direction that all proceedings prior to the substantive hearing should be in private ("interim privacy") because of their view that no good reason had been shown for such an order (and the taxpayer had put no evidence forward).

(4) But interim privacy would not matter much until the stay in the FTT is lifted as, until then, there could be no "interim proceedings" as the FTT described them.

7. In those circumstances, I did wonder whether the parties might be content with the following approach:

(1) The parties may choose to agree that, if *Northwood* and *Clarke* go on appeal, the stay before the FTT is extended until resolution of the appeal.

(2) On the stay expiring, the taxpayer is given a specified period to make an application to the FTT for all future proceedings before the FTT (both substantive and "interim") to be in private (the "FTT Privacy Application"). The FTT Privacy Application is to be supported by evidence.

(3) If the taxpayer makes no FTT Privacy Application by the deadline, future FTT proceedings are in public in the usual way.

(4) If the taxpayer makes an FTT Privacy Application, that application itself is to be in private and the decision on the FTT Privacy Application will be anonymised.

(5) If the FTT refuses the FTT Privacy Application and the taxpayer chooses not to appeal that refusal then, from the expiry of the deadline for seeking permission to appeal, the FTT proceedings are public in the usual way.

(6) If the FTT grants the FTT Privacy Application and HMRC appeal, then proceedings before the FTT remain private until the Upper Tribunal disposes of that appeal (or refuses permission).

8. That is a suggestion only which I share only because it occurred to me while reading the Application. Neither party should think that I am exerting any pressure to agree to the suggestion as there may be flaws in it that I have not noticed. If, however, the parties can reach agreement on that (or a variant thereof), the Upper Tribunal would consider allowing the Application and disposing of the resulting appeal by consent.

Signed:

Jonathan Richards
Date: 9 May 2022

Issued to the parties on: 09 May 2022

Dear Ms Hutchings,

UT/2022/000036 – HMRC v A Taxpayer

1. This is an "open" letter.
2. We are in receipt of Judge Richards' suggested proposal of 9 May 2022. While HMRC does not agree with certain aspects of the remainder of the document, it seems to us that this is academic if the parties can agree to some version of the approach indicated at [7].
3. HMRC is in principle content to agree to the approach indicated at [7] with the following modifications / provisos:
    a. [7(1)] – HMRC considers that this should read "*if* Northwood ***and/or*** Clarke *go on appeal*" since the current stay is due to expire 60 days after the First-tier Tribunal disposes of either of the appeals.
    b. [7(2)] – HMRC considers that one month from the expiry of the stay is specified as the period during which the taxpayer should make the proposed "FTT Privacy Application" (if so advised).
    c. [7(5)] and [7(6)] – HMRC's position is that the FTT Privacy Application (and any onward appeals) should be finally determined before the substantive hearing. This will give both the parties and the FTT clarity as to the status of that hearing and the decision in due course.
4. To the extent that paragraph 3.c above conflicts with any agreement given by HMRC at the case management hearing before the FTT on 19 July 2021, that agreement is withdrawn. It was made under time pressure during the course of the hearing, without the taxpayer having given HMRC advance notice of it. From the perspective of both parties, finally determining any applications concerning privacy in good time before the substantive hearing would be desirable so that there could be no subsequent confusion over the status of that hearing or the decision in due course.
5. HMRC would also require the taxpayer to withdraw his costs application before the FTT (since the effect of the Upper Tribunal's proposals will be that the FTT's decision is indeed set aside).
6. Assuming that this UT Application is resolved by agreement at this early stage, we suggest that each party bears its own costs of this UT Application.

We look forward to hearing from you at the latest by COB on Monday 23 May, with a view to the parties being able to reach agreement in good time for 4pm on 27 May 2022.

MORR & CO
FORMERLY MORRISONS SOLICITORS

date: 9 June 2022

your ref:

our ref: SLH

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Dear Ms Hunh

UT/2022/000036 – HMRC v A Taxpayer

1. We are writing further to your letter of 18 May 2022.

2. The Appellant has now considered Judge Richards' suggested proposal of 9 May 2022 and HMRC's suggested modifications of 9 May 2022.

3. Whilst the Appellant acknowledges the desirability of determining any applications concerning privacy (the Application) in good time before the substantive hearing, it does not consent to your proposal that the application be made one month after the stay expires.

4. The Appellant considers that the Application should be made 3 months before the Substantive hearing is due to take place, which would ensure that there was no confusion over the status of the substantive hearing.

5. We do not accept that HMRC's position before the FTT on 19 July 2021 was made under time pressure, counsel for HMRC had sufficient time to take instructions from the many HMRC stakeholders in attendance.

6. The Appellant considers that regardless of the outcome of HMRC's appeal to the UT it should pay the costs of the FTT hearing as HMRC consented to the terms of the FTT's directions and has caused the Appellant to incur unnecessary costs due to misstating the facts on which the set aside Directions were made.

We look forward to hearing from you.

Yours sincerely

Morr & Co.

Morr & Co

HM Revenue & Customs

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Date 9 June 2022
Our Ref SLR317038
Your Ref SLH

Dear Ms Hutchings

UT/2022/000036 - HMRC v A Taxpayer

1. Thank you for your response of 9 June 2022.

2. HMRC is unable to accept your counter-proposal on behalf of the Appellant.

3. HMRC considers that 3 months before the Substantive hearing is insufficient time for the privacy application for the following reasons:

    a. Bearing in mind that HMRC will have to respond and that it may be necessary for the privacy application to be considered at a hearing, there is no guarantee that the FtT will have heard and determined the application in good time prior to the substantive hearing.

    b. Even if the FtT has issued a decision, there will be no realistic prospect of any appeal(s) by the losing party having been finally determined.

    c. Accordingly, there will necessarily be a lack of clarity over the status of the substantive hearing (and the status of the subsequent decision).

    d. On any view, each side will have had to incur the majority of the costs of preparing for the Substantive hearing prior to any privacy application being finally determined. In the event that the Appellant is unwilling to proceed

unless he has secured the privacy he seeks, these costs will have been unnecessarily incurred and abortive.

4. HMRC still does not understand your client's reluctance to bring forward the determination of any privacy application he may make – and your letter does not explain his/your reasons.

5. Dealing briefly with your points 5 and 6:

    a. Bearing in mind the proposal was made at the hearing itself, there was not sufficient time to fully consider the proposal and its potential consequences. But in any event, any agreement given by HMRC at that case management hearing has since been withdrawn, as HMRC indicated in its letter of 18 May 2022.

    b. HMRC's application for permission to appeal to the UT has set out clearly and in detail the material circumstances surrounding the FtT's decisions and we do not intend to repeat well-trodden ground. It is incorrect to say that "HMRC consented to the terms of the FTT's directions" since HMRC did not consent to Direction 3, nor does HMRC accept that it has caused the Appellant to incur unnecessary costs.

6. In an effort to reach agreement and avoid further time being taken up with these UT proceedings, HMRC would be willing to extend the time proposed in our letter of 18 May 2022 at paragraph 3.b. from one month from the expiry of the stay to three months from its expiry.

7. Please let us know forthwith if your client would be willing to agree to that counter-proposal. Otherwise, HMRC shall file its response with the UT tomorrow.

Yours sincerely

[redacted]

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Applicants: The Commissioners for Her Majesty's Revenue & Customs	**Tribunal Ref: UT/2022/000036**
Respondent: A Taxpayer	

DECISION ON APPLICATION FOR PERMISSION TO APPEAL AND ASSOCIATED DIRECTIONS

JUDGE JONATHAN RICHARDS

1. Having considered (i) HMRC's application for permission to appeal submitted on 25 April 2022 and (ii) subsequent correspondence from the parties, it is DECIDED and DIRECTED as follows:

(1) I will not recuse myself from considering HMRC's application for permission to appeal or, if selected to be part of the Upper Tribunal panel hearing any appeal, from being part of that panel.

(2) HMRC have permission to appeal against directions (the "September 2021 Directions") made on 15 September 2021 by the First-tier Tribunal (Tax Chamber) (the "FTT") under references TC/2017/00538, 06659 and 00464 on the grounds that it is arguable that the FTT erred in law in making Direction 3 in the following respects:

(a) by directing that "preliminary proceedings" were to be in private without having received any evidence from the taxpayer dealing with the need for such a Direction.

(b) by failing to take into account, or by failing correctly to apply, common law on the principle of open justice which indicated that such proceedings should be in public; or

(c) by failing to consider alternatives to Direction 3 that were more proportionate having regard to the principle of open justice.

(3) No later than 4pm on 30 June 2022, the taxpayer must send a response to HMRC's Notice of Appeal.

(4) Also no later than 4pm on 30 June 2022, the taxpayer may apply to the Upper Tribunal (with a copy to HMRC) for such directions as it requires in respect of the privacy of the Upper Tribunal proceedings (a "Privacy Application"). Any such application must:

(a) Set out expressly what directions are requested. For example, is it requested that the Upper Tribunal proceedings should be in private, or that the proceedings should be in Public, but the identity of the taxpayer should be anonymised?

(b) Set out the grounds on which the directions are requested.

(c) Be supported by evidence in the form of a witness statement(s) accompanied by a statement of truth in the usual form.

(5) No later than 4pm on 2 August 2022, HMRC may serve a Reply to the Response.

(6) Also no later than 4pm on 2 August 2022, HMRC must serve a response to any Privacy Application that the taxpayer has made.

(7) It seems likely from the course of proceedings to date that HMRC will object to any Privacy Application. Even if HMRC do not object, the Upper Tribunal is likely to conclude that privacy cannot be conferred by consent given the importance of the open justice principle. Therefore the Upper Tribunal is likely to list any Privacy Application for oral hearing. At this stage, the Upper Tribunal is minded to direct that any Privacy Application be heard in private. HMRC may submit their observations on this course when complying with Direction (6) above.

(8) Until further direction of the Upper Tribunal, the identity of the taxpayer is to be anonymised (i) in correspondence between the parties; (ii) in correspondence between the parties and the Upper Tribunal or vice versa and (iii) in decisions or directions of the Upper Tribunal.

Notes and reasons

2. Direction (1) is self-explanatory. When I was a judge in the FTT I had some involvement in the case management of the taxpayer's appeal. I do not myself consider that that earlier involvement precludes me from dealing with this application, or the appeal resulting from it, as I was concerned with routine case management issues and not the question of privacy that is now being raised. I asked the parties for their views on this issue. HMRC have said positively that they have no objection to me being involved. The taxpayer provided no positive response but indicated no objection.

3. I have made Direction (2) because I consider those grounds to be arguable. In paragraph 48 of their written application for permission to appeal, HMRC submitted that the FTT "erred in law by failing properly to scrutinise and determine the strength of the taxpayer's application for privacy". It seemed to me that to a material extent, this is covered by grounds (a) and (b) on which I have given permission. However, lest there be any doubt, I have included ground

(c) to address some of the arguments that HMRC made in this regard which I consider to raise arguable questions of law.

4. HMRC fairly noted that the FTT appears to have treated their application for permission to appeal as something other than an application to appeal against Direction 3 of the September 2021 Directions. Rule 21(2) of the Upper Tribunal Rules provides that a person can only approach the Upper Tribunal for permission to appeal if that person has first applied to the FTT and that application has been refused, not admitted, or granted on limited grounds. On a literal reading of Rule 21(2), some questions might arise if the FTT refuses permission to appeal on grounds different from those that the applicant put forward. However, I do not consider that it is necessary for this Tribunal to consider whether the FTT was right to treat HMRC's application in the way it did. HMRC have clearly approached the FTT for permission to appeal and have not had the answer they wanted. It is appropriate for the Upper Tribunal now to consider HMRC's application. I doubt that any waiver of Rule 21(2) is needed but, to the extent it is, I grant HMRC that waiver.

5. Although I find it somewhat regrettable that the Upper Tribunal is being called upon to deal with an appeal against a privacy direction in respect of proceedings which are stayed in the FTT, I agree with HMRC that it would not be appropriate for this Tribunal to defer its consideration of HMRC's application for permission to appeal. Even though the proceedings in the FTT are stayed, it is possible that there might be disputed "interim proceedings" (for example a contested application to lift the stay) and it is appropriate for the parties to know where they stand on privacy matters in advance of any such proceedings.

6. On a related point, the taxpayer requested more time to respond to the Upper Tribunal's suggestion of a basis on which an appeal to the Upper Tribunal might be rendered unnecessary. Given that the parties have not reached agreement in over a month since the Upper Tribunal made its suggestion, and there is no indication that they are close to agreement, I see no need to extend time. The parties are free to continue any discussions between themselves and, if agreement is reached, the Upper Tribunal could be invited to endorse a consent order under which the Upper Tribunal proceedings are vacated.

7. Direction (3) is self-explanatory. Given that there seems to be a difference of opinion as to precisely what was said at the hearing before the FTT, and precisely what was meant by what was said, it is appropriate to require the taxpayer to give a Response. I have extended the usual deadline of one month because I am also requiring the taxpayer to make any Privacy Application at the same time.

8. HMRC argue that the taxpayer has already made a Privacy Application (in his solicitors' email of 13 June 2022). I disagree. On the date of that email, there were no proceedings before the Upper Tribunal because I had not yet granted HMRC permission to appeal. I do, however, agree with HMRC that the taxpayer should not assume that the privacy he obtained in the FTT for "interim proceedings" automatically translates over to the Upper Tribunal proceedings. It is appropriate to require the taxpayer, by Direction (4), to make a considered Privacy Application in respect of the Upper Tribunal proceedings.

9. I have emphasised, in Direction (4), that any Privacy Application must be in respect of the Upper Tribunal proceedings. This is a logically separate question from the question whether

the FTT was entitled to make the case-management decision it did in relation to the FTT proceedings.

10. Directions (5), (6) and (7) are self-explanatory. I require a response to any Privacy Application because I do not consider that it can be determined by consent and so the Upper Tribunal will be assisted by any observations that HMRC may wish to make, whether or not they oppose that application.

11. Given that any Privacy Application will now have to be determined at an oral hearing, I do not consider that I need to address the points that the taxpayer and HMRC made as to the mechanism by which each is to respond to the other's arguments. Assuming that a Privacy Application is made and listed for oral hearing, I would expect to make standard case-management directions associated with that oral hearing to include:

(1) The provision of listing information

(2) The provision of a hearing and authorities bundle.

(3) The provision of skeleton arguments. I would expect the taxpayer's skeleton to be served 7 days before the hearing, with HMRC's to be served 3 days before.

12. Direction (8) is made to "hold the ring" until the Upper Tribunal can consider any Privacy Application that the taxpayer chooses to make.

Signed: Jonathan Richards
Date: 15 June 2022

Issued to the parties on: 16 June 2022

IN THE UPPER TRIBUNAL **UT/2022/000036**

(TAX AND CHANCERY)

BETWEEN:

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

A TAXPAYER

Respondent

RESPONDENT'S APPLICATION FOR ANONYMITY

Application

1. The Respondent hereby applies for a direction that, in relation to this appeal:

    1.1. These proceedings be anonymised.
    1.2. That no details that would or would potentially lead to the identification of the Respondent should be made public.
    1.3. If and insofar as it is necessary to give effect to §1.1 and/or §1.2, hearings in these proceedings should be in private.

Reasons

2. This is HMRC's appeal against the FTT's decision to grant interim anonymity in the FTT appeal proceedings with the question of anonymity at the substantive hearing of the appeal to be determined later.

3. As matters stand, therefore, the FTT has made a direction granting such interim anonymity.

4. It would be absurd if HMRC could override or undermine the FTT's direction not by successfully appealing the direction but merely by obtaining permission to appeal it.

5. HMRC's objection to these proceedings being anonymised is unprincipled and inconsistent with what they repeatedly said to the FTT:

> "…I can immediately say that there would not be an objection. Even if the Revenue were to win as a result of today, and to win on the anonymity point, so you, madam, decide there should not be anonymity and the privacy proceedings sought by the appellant, there would not be an objection pending any appeal from that decision for the decision to be reported anonymously. That actually happened, I believe, it was -- there is a case relating to Mr Moyles and pending the appeal, he did not get his order for anonymity, but pending the appeal, it was reported as A, so that, if there had been an appeal and the order had been reversed, then in the interim there has not been a published decision with his name on it. We would not object to that." (TS/12/24 – 32)
>
> "The Revenue do not object to the initial decision pending an appeal being anonymous…" (TS/16/14).
>
> "HMRC do not object to the decision that the tribunal will hand down after today, that initially being anonymised, if, as I say, the appellant loses the anonymity application, pending an appeal because HMRC can quite see that, if the appellant were to then go on and succeed in an appeal, that the stay application and the anonymity application should be anonymised. If this tribunal has already published a decision on those matters, the appeal -- the purpose of the appeal would be in some ways be defeated -- the appeal mechanism. But, if the appellant were to appeal and loses finally, then HMRC do not concede that everything that went before should continue nonetheless to remain anonymous and in private, precisely because at that point, in my hypothesis, a higher tribunal or court would have said "There was no basis for anonymity and private proceedings in the first place" and, therefore, HMRC would say that there should not be continuing anonymity in respect of everything that has gone before." (TS/16/24 – 17/2)
>
> "…the anonymity application for the final substantive hearing is parked and that is a matter of agreement, so what is before you today is whether any interim proceedings should remain anonymous. That is not agreed because, as I say, we are saying, yes, today, and yes pending any appeal, but not yet irrespective of the outcome of today and of any appeal." (TS/17/5 – 9)
>
> "HMRC agreed that the Tribunal's initial case management decision should be anonymised pending any appeal from that (case management) decision" (HMRC 30 September 2021 email)

6. HMRC should explain why they repeatedly told the FTT (and the Respondent) something that they now seek to deny.

7. To be clear, HMRC's attempt (now) to suggest that they object because the FTT application was not "properly particularised" (§8 of their 10 June 2022 submission) is without foundation – they were fully aware of how particularised the application was before the FTT hearing where they made the above representations. Similarly, to object because HMRC disagree with the eventual reasoning and conclusion of the FTT would make little sense: if the FTT had applied HMRC's approach and refused anonymity, HMRC would have agreed to anonymity on appeal, but because it granted anonymity (for reasons HMRC dislike), HMRC object.

8. HMRC rely upon the cases of *Pink Floyd Music Limited v EMI* [2011] 1 WLR 770 and *HMRC v George Anson* [2011] UKUT 318 (TCC) in support of their assertion that the the appeal should not be anonymised by the UT. Neither of these cases involved appeals against the grant of anonymity orders and, further, in neither case was the identity of the party itself the matter at which anonymisation was directed (rather, it was financial figures). In both cases those financial figures continued to be anonymised on appeal (Anson, §3, Pink Floyd, §63).

9. As HMRC themselves noted before the FTT, even though anonymity was rejected in the *Moyles* case [2012] UKFTT 541 (TC), the decision refusing anonymity was initially anonymised to preserve the efficacy of the taxpayer's right to appeal.

10. There is a wider principle that a Court or Tribunal will grant interim relief of this kind where not doing so will undermine an appeal. For instance:

> "[16] The Club has sought a stay pending the outcome of the appellate proceedings. I accept that a stay is required on the basis that publication would render such an appeal nugatory. The Club has said that it would file any application for permission to appeal within seven days. I am prepared to order a stay for a period of seven days. If an application for permission to appeal is lodged within that period, the stay will then continue until further order of the Court of Appeal." (*Manchester City Football Club Ltd v. Football Association Premier League Ltd* [2021] EWHC 2077 (Comm))

11. Judge Mosedale said as follows in *JK v. HMRC* [2019] UKFTT 411 (TC):

> "[40] I refuse the application for anonymity. I do not consider it justified on any grounds put forward by the appellant. It seems to me that the appellant now has the choice referred to by Lord Atkinson in *Scott v Scott.* He may pursue his appeal in public with the consequent risk of reputational damage if in his appeal he relies on his diagnosis, or he may choose not to pursue the appeal. (If he goes ahead with the proceedings, I would make the order to keep his contact details private as set out in §38.)
> [41] Nevertheless, I am anonymising this decision on the anonymisation application. That is for two reasons.
> [42] Firstly, I have said that the appellant should be given the choice: pursue his appeal in public, or withdraw it. It is for him to make that decision. I am not going to make that an empty choice by publishing this decision under his name.
> [43] Secondly, in any event, he may (as explained below) seek permission to appeal this decision: I will not prejudge any application for permission to appeal nor render it nugatory by publishing his name at this point.
> [44] The best way of implementing this limited anonymity seems to me to be as follows: this decision will be anonymised. If the appellant pursues his application for permission to make a late appeal and does not successfully apply to appeal my refusal of anonymisation, the Tribunal's hearing of his late appeal application will take place in public and the resulting decision, if published, will be published without anonymity."

12. See also *BCM Cayman LP v. HMRC* [2020] UKFTT 298 (TC), Appendix:

> "[13] However, notwithstanding my decision, like *Judge Mosedale in JK v HMRC* [2019] UKFTT 411 (TC) who anonymised her decision despite dismissing the appellant's application, I have redacted the figures in case of any application for permission to appeal by the IP Appellants which would be rendered nugatory if the figures were published."

13. More generally, if proceedings relating to an application for anonymity (including an appeal) are not themselves anonymised, the right to privacy (as recognised in Article 8 of ECHR) is undermined because a person with a right to privacy who dares to apply for anonymity and is unsuccessful, will thereby have created their own publicity. Such a position would say that the applicant must either accept full publicity (because the point is now outside their control) or not exercise the right and that renders the right theoretical or illusory. See *OWD Ltd v. HMRC* [2019] UKSC 30, §58(iii) and §77:

> "Where such a right exists in law it would potentially be a breach of article 6 ECHR (right to a fair trial), read with article 13 (right to an effective remedy) if it were rendered illusory or nugatory by

> the absence of any power to suspend or stay the adverse decision of HMRC until the appeal can be determined."

14. See also *R (oao Unison) v. Lord Chancellor* [2017] UKSC 51 – the deterrent effect of employment tribunal fees rendered them an impediment to the constitutional principle of access to justice. Similarly, here, an absence of anonymity in relation to the making of an anonymity application would be a deterrent to persons with legitimate rights to privacy from exercising those rights.

15. This is essentially the conclusion that Judge Mosedale reached in *JK*: having decided that the substantive hearing would not be in private/anonymised, the taxpayer was given the choice of proceeding (and losing privacy) or pulling out (and retaining it).

16. The EAT reached the same conclusion in *A v. Burke and Hare* [2022] IRLR 139:

> "[68] The Claimant indicated that if the price of obtaining payment of her alleged right to arrears of holiday pay was the publication of her name in the merits judgment, she would prefer to drop her claim. In this situation I was asked not to publish her name on this judgment. Ms Lord pointed out that if her name was published on the judgment the Claimant would suffer a loss of privacy merely because she had sought to obtain anonymity as opposed to seeking a remedy for her alleged right to holiday pay. I was advised that the hearing before the EJ took place in private. Ms Lord submitted that it would be unfortunate if the Claimant was forced into the open merely because she wished to challenge the EJ's decision.
>
> [69] The public interest in open justice is at its strongest when it restricts or interferes with reporting or publishing the merits of the case. That will usually be at the point when evidence is led, though it may be when submissions are made on legal issues that are in dispute. At that stage the identities will usually be disclosed and may be published. I am not persuaded that the principle of open justice has the same weight at the stage of a preliminary application designed to establish whether an order under r 50 should be made. In effect the Claimant has asked whether she would be entitled to anonymity if she pressed on with her case. It does not seem proper to publish a judgment in the Claimant's name merely because she has asked for anonymity. As I have indicated I am satisfied that art 8 is engaged. In that situation I consider I should grant an order in relation to the present application."

17. HMRC's position in relation to this appeal is extreme. Unlike in the cases above, this is a case where an interim anonymity direction has been made and it is HMRC who want to

challenge that. Despite that, HMRC say that anonymity should not be granted on appeal. For all the reasons given above, that is wrong and the effect would be to undermine the FTT's decision simply by virtue of HMRC having appealed rather than HMRC showing that the FTT decision was wrong.

18. Further, HMRC's other (and, in fact, first) reason for objecting is that they believe that the FTT was wrong in law to grant interim anonymity in the first place. That, however, is the very appeal that the UT has not yet determined and it is plainly not correct to suggest that the UT should prejudge the merits of HMRC's appeal at a preliminary stage.

19. The consequences of the UT deciding for itself to carry out a substantive exercise to determine whether to grant anonymity in relation to an appeal against an anonymity order that has been granted, rather than granting it as a matter of principle to preserve the efficacy of the existing FTT direction and appeal to the UT, would be highly unsatisfactory.

20. Thus, if the UT were to refuse anonymity at the preliminary stage, before the appeal has been determined, the taxpayer would be forced to appeal that preliminary decision to the Court of Appeal and one ends up with similar issues being considered by multiple levels of the judicial system at the same time in the same overall proceedings.

21. Logically, the Court of Appeal would then also have to decide whether to anonymise the appeal against the UT's refusal to grant anonymity in relation to the UT appeal and if it also did so at a preliminary stage and refused it, the taxpayer will have to appeal that decision to the Supreme Court, without the Upper Tribunal ever actually having heard the appeal against the original direction (or the Court of Appeal having decided the appeal against the UT's refusal to grant anonymity).

22. Conversely, if the UT grants anonymity at a preliminary stage, it may be that HMRC seek to challenge that on appeal to the Court of Appeal, with the same consequences.

23. Such multiplication of litigation is a highly inefficient use of the parties' and the Court's/Tribunal's time and resources.

Witness evidence

24. The Respondent notes that the Upper Tribunal directed that any application for privacy "must…be supported by evidence in the form of a witness statement". The Respondent does not intend any disrespect to the Upper Tribunal but, as can be seen from the above, the Respondent's submission is that anonymity of the UT proceedings should apply as a matter of principle because it is an appeal against an anonymity direction rather than being based on a substantive consideration of evidence etc.

25. Indeed, the UT's direction would logically also apply to cases where a substantive anonymity application has been heard and determined on evidence by the FTT. If the FTT decided against the taxpayer, it could not be right that the UT would then receive evidence (quite possibly the same evidence) and decide for itself the same point that the FTT has already decided. Indeed, the position is even more stark if the FTT has decided in the taxpayer's favour and the UT is now going to consider for itself the merits of an anonymity order before, later, considering whether the FTT's case management decision was invalidated by an error of law.

Procedural next steps

26. If HMRC continue to object to anonymity being granted in relation to these appeal proceedings as a matter of principle, it is respectfully submitted that determination of that issue should be dealt with at the same time as the substantive appeal so that one does not end up with the expansive satellite litigation referred to above. The parties may as well go to the Court of Appeal once (if necessary) to decide both issues (substantive appeal to this UT and anonymity in the UT) rather than twice.

Michael Firth
Gray's Inn Tax Chambers
[redacted]@taxbar.com
29 June 2022

IN THE UPPER TRIBUNAL **REF: UT/2022/000070**
(previously UT/2022/000036)

(TAX & CHANCERY CHAMBER)

BETWEEN:

HM REVENUE & CUSTOMS

Appellant

- and -

A TAXPAYER

Respondent

HMRC'S RESPONSE TO
TAXPAYER'S PRIVACY APPLICATION OF 29 JUNE 2022

INTRODUCTION

1. On 16 June 2022, the Upper Tribunal (the "**UT**") granted HMRC permission to appeal and made certain consequential directions (the "**June Directions**").

2. Per **June Direction 1(5)**, HMRC notifies the UT and the Taxpayer that it chooses not to serve a Reply. HMRC will set out its detailed arguments and respond to the Taxpayer's response in its skeleton argument in due course in the normal way.

3. Per **June Direction 1(6)**, HMRC's response to the Taxpayer's privacy application of 29 June 2022 (the "**UT Privacy Application**") is set out below. Paragraph references are to paragraphs in that application unless otherwise indicated.

4. At **para.1**, the Taxpayer has made an application that:

> "*1.1. These proceedings be anonymised.*
>
> *1.2. That no details that would or would potentially lead to the identification of the Respondent should be made public.*
>
> *1.3. If and insofar as it is necessary to give effect to §1.1 and/or §1.2, hearings in these proceedings should be in private.*"

HMRC'S POSITION

5. For the reasons expanded on below, HMRC opposes the UT Privacy Application in its entirety.

6. Despite the clear requirements of **June Direction 1(4)**, the Taxpayer has not supported his application with evidence (as the UT mandated) and has failed to identify any grounds relating to his personal circumstances to justify privacy. Exceptional circumstances are required before there should be any departure from the principle of open justice – and the Taxpayer has failed to establish these. For completeness, HMRC has included its submissions on the case law concerning

privacy of individuals in the public eye in tax appeals in an **Appendix** to this response.

7. The Taxpayer's position that the UT should grant his UT Privacy Application merely because the FtT made a direction for interim privacy is misconceived.

8. In view of the Taxpayer's non-compliance with **June Direction 1(4)**, HMRC infers that the Taxpayer has no cogent grounds to support any privacy application. HMRC's position on **June Direction 1(7)** is that the Taxpayer has given the UT no basis to direct that even his UT Privacy Application should be heard in private. It would be one thing if the Taxpayer had submitted grounds and evidence relating to his personal circumstances with the result that the hearing would be occupied with testing and determining the sufficiency of those grounds and evidence (and so it might be said that such a discussion should be kept from public view until such time as it has been ruled insufficient to be kept private). But since the Taxpayer has submitted no such grounds or evidence, there is nothing to be kept private, other than the Taxpayer's name (and he has not even attempted to justify what special circumstances mean that the public cannot be allowed to know he is involved in a tax appeal against HMRC). Accordingly, it should be heard in public.

9. HMRC further objects to the Taxpayer's suggestion at **para.26** that his UT Privacy Application should be heard and determined at the same time as HMRC's UT appeal. The Taxpayer's UT Privacy Application (and any onward appeal from the UT) should be determined first (and separately) so that the parties and the UT know where they stand in relation to the UT appeal itself. This will be the quickest, least costly way to bring this entire litigation to a close if, as appears to be the case, the Taxpayer does not wish to pursue his tax appeal in public. If the UT and Court of Appeal (the "**CA**") agree with HMRC that there is no substance to the Taxpayer's quest for privacy, the end point will likely be a refusal of permission on the papers by the CA in relation to the Taxpayer's UT Privacy Appeal. The sooner that all concerned know where they stand, the better.

HMRC RESPONSE SUBMISSIONS

10. The submissions below (i) expand upon HMRC's position above, where necessary; and (ii) set out HMRC's response to the paragraphs in the Taxpayer's UT Privacy Application.

The position before the FtT

11. At **paras.3-4**, the Taxpayer argues that he should be entitled to privacy before the UT because he obtained interim privacy before the FtT. This is misconceived:

    a. Directions in the FtT cannot bind the UT.

    b. The Taxpayer obtained interim privacy without identifying cogent grounds or leading evidence before the FtT. Accordingly, this is not a case where the UT is looking at the same grounds and evidence before the FtT and being asked by HMRC to form a different view on that material at the permission stage.

    c. The UT is therefore entitled to (and indeed should) come to its own view as to whether a proper basis exists for the Taxpayer to be granted privacy in the

proceedings before it. The UT is quite right not to exacerbate matters by adopting the FtT's misconceived position as its own.

d. HMRC is not overriding the FtT's decision "*merely by obtaining permission to appeal it*". The UT has not (yet) determined that this appeal should be heard in public. Rather, the UT has made provision for the Taxpayer to apply for whatever privacy directions he seeks. If the Taxpayer fails to secure them, it is because he has refused to engage and comply with the UT's Directions – and there is no injustice in that result.

HMRC's position before the FtT

12. At **para.5**, the Taxpayer quotes four passages from the transcript of the FtT proceedings and one extract from an email sent by HMRC. The Taxpayer seems to be suggesting that HMRC should not be allowed to argue that this UT appeal should be in public. But there is nothing in this submission:

    a. First, three of the four quoted passages concern the status of the FtT's own written decision on the privacy application – not the status of any appeal from that decision.

    b. Secondly, HMRC's position cannot in any event bind the UT – as the UT observes at **June Direction 1(7)**, privacy cannot be conferred by consent, given the importance of the open justice principle.

    c. Thirdly, whatever HMRC's position may have been before the FtT, matters below have been overtaken by events – principally, the Taxpayer's refusal to comply with **June Directions 1(4)(b)[1] and (c)**. HMRC infers that Taxpayer has no cogent grounds / evidence to support any privacy application. Accordingly, any accommodation that HMRC might have been willing to give the Taxpayer below is withdrawn.

13. For these reasons, there is nothing in the Taxpayer's submissions at **paras.6-7** requiring a response.

Pink Floyd and *Anson*

14. HMRC relied on ***Pink Floyd*** and ***Anson*** in its submissions of 10 June 2022 because they establish that any direction or order for privacy below is not automatically carried over on appeal. If privacy / anonymity is required by a party on appeal, the appellate court or tribunal must satisfy itself that such a direction or order is merited. The UT was therefore quite right to make the June Directions requesting that if the Taxpayer wished to make an application, it must be supported by grounds and evidence.

15. If the Taxpayer wished to challenge the June Directions, he should have appealed them (see ***Clear PLC (in liquidation) v Director of Border Revenue*** [2014] UKUT B5 (TCC) at [43]-[45]). Choosing not to comply with mandatory requirements on the grounds that the Directions should not have been made in the first place is not an acceptable approach.

[1] Insofar as this relates to grounds pertaining to the Taxpayer's personal circumstances.

The Taxpayer's reliance on cases concerning anonymisation of first instance decisions

16. At **paras.9-12**, the Taxpayer relies on four first instance decisions where the first instance decision itself was anonymised, pending appeal. This is a different point. These cases all concern applications for a stay of execution of the decision / order pending an appeal. The principles used to determine such applications derive from a separate and distinct line of cases.

17. In contrast, the UT is presently engaged with determining how to regulate and manage its own procedure on this appeal.

18. Critically, the time for the Taxpayer to persuade the UT that he is automatically entitled to privacy for the purposes of HMRC's appeal has passed:

    a. In its Directions of 9 May 2022 (the "**May Directions**"), the UT asked each party for their submissions as to how HMRC's UT appeal should be case managed – including in relation to the status (private or public) of the UT proceedings (**para.5** of the May Directions). The UT set out a timetable for these submissions (extended to 10 June by the UT on 31 May 2022, by consent at the Taxpayer's request).

    b. HMRC filed detailed written submissions in time on 10 June 2022, comprehensively addressing its position on the status of the UT proceedings with full reasoning and reference to authority (including ***Pink Floyd*** and ***Anson***).

    c. In contrast, the Taxpayer chose to send a short, unreasoned email on 13 June 2022 (out of time), without reference to authority.

    d. Having considered the parties' positions, the UT made the June Directions, broadly in line with HMRC's submissions and implicitly rejecting the Taxpayer's unreasoned requests.

    e. If the Taxpayer objected to the UT's approach in the June Directions, his recourse was to appeal. It is well established that it is not open to a party who did not like a particular direction to challenge it by asking the Tribunal to think again, rather than taking the course of appealing the direction (see ***Clear PLC (in liquidation) v Director of Border Revenue*** [2014] UKUT B5 (TCC) at [43]-[45]).

19. By refusing to submit evidence in support of his UT Privacy Application (and accordingly failing to comply with **June Direction 1(4)(c)**) on the grounds that the UT should not have made that direction in the first place, the Taxpayer is not properly making the privacy application facilitated by June Directions at all. Instead, he is arguing that he should not have to comply with the directions because the UT should not have made them – and the UT should not entertain these submissions now.

ECHR etc etc

20. At **paras.13-14**, the Taxpayer invokes the ECHR, the principle of access to justice etc. and refers to two authorities of the higher courts – ***OWD*** and ***Unison***. Neither case, however, concerns privacy nor do they otherwise support his application:

a. ***OWD*** concerned the regulatory scheme requiring wholesalers supplying duty-paid alcohol to be approved by HMRC. If HMRC refused an application for approval, there was no provision for HMRC, the FtT or the High Court to preserve the trader's ability to trade pending appeal – and this risked "*otherwise good grounds of appeal being rendered nugatory*" if the trader was permanently put out of business in the time it took for an appeal to be determined. The Supreme Court ruled that the absence of a power to impose a stay pending appeal was potentially incompatible with the ECHR. But this is very different to saying that where a power exists, a stay of execution must be granted in every case. Here, the UT has the power to direct that a hearing or part of it may be in private at r.37(2) of the UT Rules. It issued the June Directions in order to receive arguments from the parties as to whether or not to exercise this power. Nothing in ***OWD*** can be interpreted as mandating the UT to do so. Indeed, in [77], the Supreme Court's concern was that "*otherwise **good** grounds of appeal would be rendered nugatory if the power did not exist*" (**emphasis added**) and at [78], the Supreme Court made it clear that "*a **limited** power to impose a stay pending appeal **in defined circumstances***" (**emphasis added**) would be sufficient to achieve ECHR compliance.

b. The Taxpayer's attempt to align its position with ***Unison*** is similarly inapt. There can be no expectation of privacy before either the FtT or the UT since the Rules provide as their starting point that all hearings must be in public. That remains the case before the UT, regardless of what occurred below. If the intention had been for any privacy direction secured before the FtT to be carried forward on appeal (at least to the UT) the Rules would have said so. But it is clear from r.37(1) of the UT Rules that the default position before the UT is a clean slate – "*all hearings must be held in public*". The Taxpayer has indicated its desire for a privacy direction from the UT – and the UT has made the June Directions in order to facilitate that process. But rather than engage properly with the Directions and the process, the Taxpayer has declined to comply. He has no entitlement or expectation of privacy – if he now fails to secure it, this is not because of some ECHR non-compliance or access to justice impediment, it is because of his own choices.

Continuing in public or pulling out

21. At **paras.15-16**, the Taxpayer complains that he should have the choice between continuing in public or pulling out and retaining privacy.

22. This submission is misconceived. As matters currently stand, the Taxpayer retains that choice. **Direction 1(8)** provides:

> *"(8) Until further direction of the Upper Tribunal, the identity of the taxpayer is to be anonymised (i) in correspondence between the parties; (ii) in correspondence between the parties and the Upper Tribunal or vice versa and (iii) in decisions or directions of the Upper Tribunal."*

23. This continues the position from the May Directions. So as matters stand, the UT proceedings are currently anonymised. The UT made the rest of the June Directions

to set out a process for it to determine whether the proceedings should stay that way. Despite the UT's June Directions, the Taxpayer has given the UT no good reason to preserve **Direction 1(8)**. Should the UT now determine the Taxpayer's UT Privacy Application against him (which, in the absence of grounds and evidence HMRC would contend is the only outcome that the UT properly directing itself in law can reach), the Taxpayer's choice will be to pull out and maintain his privacy or continue and lose it.

Criticism of HMRC's position / undermining the FtT

24. At **para.17**, the Taxpayer repeats his criticism of HMRC's position – to which HMRC's response is as above: HMRC infers from the Taxpayer's approach to this application and non-compliance with the UT's directions that he has no cogent grounds / evidence to merit privacy. In the light of this inference, HMRC's position is not extraordinary – it is pragmatic and only to be expected.

25. The FtT decision granting interim privacy is not being undermined. The practical effect of that decision was to afford the Taxpayer privacy until such time as he submits a properly particularised and evidenced application which will then be determined on its merits. That time is now – and the fact that it is the UT (rather than the FtT) requesting grounds and evidence is neither here nor there.

26. The Taxpayer is also wrong at **para.18** to suggest that this exercise prejudges the merits of HMRC's appeal at a preliminary stage. In determining whether or not *these UT proceedings* should be in public or private, the UT has decided (by issuing the June Directions) that it wants to consider whether the Taxpayer's personal circumstances warrant it. The UT is well within its case management discretion to do so. In contrast, HMRC's UT appeal concerns a short point of principle over the FtT's case management of the applications before it (including whether the FtT was wrong to make a privacy direction absent evidence). The mere fact that the UT has asked to see evidence in order to manage its own procedure does not prejudge the appeal against the FtT's different case management actions.

Purported inefficiencies arising from the June Directions

27. At **paras.19-23**, the Taxpayer makes submissions on so-called unsatisfactory consequences of the June Directions. But this is nothing more than an attempt to ask the Tribunal to think again – whereas he should have appealed (***Clear PLC***, [43]-[45]).

28. In any event, the Taxpayer is wrong about efficiency. The absence of evidence gives the UT no basis for granting his UT Privacy Application. Were the UT to refuse it, and the UT and CA to refuse any appeal from the Taxpayer on the papers, this process will be terminated in short order.

Absence of witness evidence

29. At **paras.24-25**, the Taxpayer attempts to explain away his non-compliance with **Direction 1(4)(c)**, requiring him to submit witness evidence. This is misconceived:

a. First, as already noted, it is too late for the Taxpayer to run his "in principle" arguments. The June Directions have already been made; the proper recourse was to appeal.

b. Secondly and in any event, there is no reason why the Taxpayer could not have done both – i.e. make his "in principle" arguments and make arguments based on his personal circumstances supported by evidence in the alternative. The only reasonable inference to be drawn from his non-compliance is that he has no substantive grounds to warrant privacy.

Procedural next steps

30. HMRC's position is that:

a. It is reasonable for the UT to infer from the Taxpayer's non-compliance that there is no evidence to justify the privacy directions he seeks.

b. That being so, the Taxpayer has not made out any proper basis for his Privacy Application (or indeed that any UT hearing of that application takes place in private). His "in principle" arguments should have been made by way of appeal and not to excuse his non-compliance with the June Directions.

c. Given the absence of evidence, there will be no submissions about the Taxpayer's personal circumstances at the UT hearing of the Taxpayer's UT Privacy Application – hence it is hard to see what about this case merits any privacy at all.

d. **In no circumstances should the Taxpayer's UT Privacy Application be heard at the same time as HMRC's UT appeal**. The parties and the UT need to be clear of the status of these proceedings before carrying on with the UT appeal. The Taxpayer's UT Privacy Appeal thus needs to be heard and finally determined first. The UT should not accede to the Taxpayer's strategy of seeking to join privacy applications to substantive appeals in the hope that he will, *de facto*, secure a private hearing and anonymised decision in respect of the latter. In addition, the duplication of proceedings the Taxpayer identifies in **para.26** is unlikely to arise. If the Taxpayer's UT Privacy Application is ultimately unsuccessful, HMRC infers from the Taxpayer's conduct to date that he has no interest in participating in this litigation any further. If that is to be the end point in all of this, the sooner that is reached, the better.

HMRC Solicitor's Office

2 August 2022

APPENDIX – OPEN JUSTICE

1. The Taxpayer has not identified any personal circumstances which justify an exception being imposed by the UT to the principle of open justice.

2. It is well-established that the principle of open justice is a constitutionally fundamental principle, which includes the right of the media to impart and the public to receive information and that proceedings should only exceptionally be held in private or anonymised: see e.g. ***R(Mohamed) v Secretary of State for Foreign & Commonwealth Affairs*** [2010] EWCA Civ 65 at [176]:

> *"In my judgment, these three initial points are not persuasive, and, in any event, they should not detract attention from what is, in the present connection, the central point, namely that the court should administer justice in public, which means that all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary. This principle is so important not merely because it helps to ensure that judges do not, and do not appear to, abuse their positions, but also because it enables information to become available to the public. What goes on in the courts, like what goes on in Parliament or in local authority meetings or in public inquiries, is inherently of legitimate interest, indeed of real importance, to the public. Of course, many cases, debates, and discussions in those forums are of little general significance or interest, but it is not for the judges or lawyers to pick and choose between what is and what is not of general interest or importance (save where, as in the present instance, it is a factor to be placed in the balance, in a case where it is said that it is in the public interest to have the hearing in private or to redact material from a judgment)."*

3. Exceptional circumstances are required in order to justify any departure from the principle of open justice: see ***HMRC v Banerjee*** [2009] EWHC 1229 (Ch) at [34]-[35]:

> *"[34] In agreement with the Revenue's general approach to the question, I think it is helpful to begin by considering whether an application for anonymity and/or a hearing in private would have succeeded, had such an application been made before the hearing on 5 December. The court would clearly have had jurisdiction to entertain such an application: see CPR 39.2(3), which provides that a hearing, or any part of it, may be in private if ... "(c) it involves confidential information (including information relating to personal financial matters) and publicity will damage that confidentiality". Nevertheless, in my judgment any such application would have been firmly rejected, on the basis that the fundamental principle of public justice enshrined in Article 6(1) of the Convention, and long established in the English common law, would have decisively outweighed the very limited interference with Dr Banerjee's right to respect for her private life, and the very limited disclosure of information relating to her personal financial affairs, that a public hearing would entail. I will assume in Dr Banerjee's favour at this point that her relevant rights of privacy and confidentiality had not already*

been irretrievably lost by reason of the public hearing of her previous appeal to the Commissioners. Making that assumption, I would accept that her Article 8(1) rights were engaged. In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.

[35] It is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."

4. The principle of open justice was considered by the FtT in ***Moyles v HMRC*** [2012] UKFTT 541 (TC) and ***Martin Clunes v HMRC*** [2017] UKFTT 204. In the latter case, the Tribunal quoted the above extract from ***Banerjee*** and went on to set out the following principles:

> *"[9] In Moyles I quoted that extract from the judgment in Banerjee, and then said this, at [14]:*
>
> > *"I respectfully agree. This case is not on all fours with Banerjee, but the issue is similar: whether the taxpayer is entitled to pay less tax because, in that case, she had incurred some expenses and, in this, because he has suffered a loss, whether or not real. There is an obvious public interest in its being clear that the tax system is being operated even-handedly, an interest which would be compromised if hearings before this tribunal were in private save in the most compelling of circumstances. The fact that a taxpayer is rich, or that he is in the public eye, do not seem to me to dictate a different approach; on the contrary, it may be that hearing the appeal of such a person in private would give rise to the suspicion, if no more, that riches or fame can buy anonymity,*

and protection from the scrutiny which others cannot avoid. That plainly cannot be right."

[10] If Henderson J's observations in Banerjee and mine in Moyles are taken together they make it clear that I cannot properly grant the application. Any taxpayer who was not in the public eye but who, for example, would prefer his friends or neighbours not to know of his financial affairs, would find it impossible to persuade the tribunal to grant him anonymity; as Henderson J said, the public interest in the outcome of tax litigation, whether in the High Court or in this tribunal, outweighs the desire of the taxpayer for anonymity, and the inevitable resultant intrusion into matters which might otherwise remain confidential is the price which must be paid for open justice, however unpalatable the individual taxpayer might find it to be. Moreover, the structure of rule 32 makes it quite clear that there is a strong presumption in favour of public hearings, and that the circumstances in which that presumption may be overridden are wholly exceptional.

[11] I have some sympathy with Mr Clunes in that I recognise that the revelation of his identity does have the potential to cause him some collateral embarrassment of a different character from the reputational damage which was feared in Moyles. However, and even disregarding what I have already said about the presumption in favour of public hearings, it seems to me that the reasons on which Mr Clunes relies to support his application are the very reasons why it would not be sufficient to identify him, in the decision released after the hearing of his appeal, simply as an actor. The question in the appeal will not be whether male actors, as a group, can legitimately claim relief for expense of the kind in issue, but whether, in Mr Clunes' case, the expense was incurred wholly and exclusively for the purposes of his trade. It is entirely possible that expense of the kind in issue here might be incurred by actor A for undeniable qualifying reasons, while the same expense incurred by actor B could be described only as a vain indulgence, and there are plainly many possible positions between those extremes. I do not see how the tribunal will be able to determine where on the scale Mr Clunes falls without reference to him as an individual, and by reference to his personal characteristics; and I do not see how the public interest in the fair administration of tax can be satisfied by the release of a decision which, by concealing those characteristics, makes it impossible for the reader to reach a full understanding of the reasons why the appeal has been determined as it has."

5. The above reasoning is directly applicable in the present case.

6. The fact that the Taxpayer is in the public eye and may prefer the public not to know that he is in dispute with HMRC does not justify a different approach to the principle of open justice being taken in his case *(**Moyles*** at [14] and ***Clunes*** at [10]).

7. In the absence of grounds relating to the Taxpayer's personal circumstances supported by evidence, there is no good reason for displacing the strong presumption in favour of public hearings (see ***Clunes*** at [10]) or departing from the fundamental principle of open justice.

From: [redacted] (SOLS A1)

Sent: 30 August 2022 16:16
To: [redacted]
Subject: RE: UT-2022-000070 The Commissioners for HM Revenue and Customs v Taxpayer

Dear Mr [redacted]

UT-2022-000070 The Commissioners for HM Revenue and Customs v A Taxpayer

Thank you for your email setting out Judge Richards's directions in the above matter. I adopt the same numbering below and respond as follows.

Point 4a:
HMRC submits that the Tribunal should determine the privacy/anonymity issue on the papers.

HMRC notes that Judge Richards' email hints at a what might on one view be seen as some sort of compromise - hearing in public but taxpayer to be anonymised at the hearing (and, HMRC assumes, in any subsequent published decision). HMRC's position is that such a direction should not be permissible in this case as a matter of principle in the absence of the taxpayer providing any details of his personal circumstances which might warrant privacy either to the UT or to the FtT.

HMRC contends that anonymisation is not truly a compromise given that for most taxpayers,

anonymity on this basis is often the ultimate aim for an individual - no risk of seeing their name in print.

Accordingly, HMRC contends that there should be no lower legal standard for the taxpayer to pass in order to secure such an order than for a hearing in private. It would be a dangerous precedent to set to suggest that anonymity required something less.

Indeed (although the UT Rules do not replicate the position), HMRC notes that for the purposes of the FtT, anonymity is consequential on having secured a private hearing (see r.32.6 FtT rules). This suggests that anonymity does not attract a watered-down test, but requires the taxpayer to establish sufficient grounds for a private hearing first.

As HMRC has already noted, the UT should infer from the lack of particulars and evidence that the taxpayer in fact has no grounds to warrant privacy / anonymity of any sort. Once it is appreciated that anonymity is not truly a compromise and that the standard for a taxpayer to achieve it should be the same as for a private hearing, then it is clear that any anonymity granted here would in fact be a more extreme direction that the FtT's direction under appeal:

- The FtT granted privacy over an aspect of the appeal before it in case grounds to establish privacy emerged later.
- Here, the UT would be granting anonymity over the entire appeal without ever considering particulars and evidence, notwithstanding it previously directed that they be provided.

To be clear, HMRC's position is that the circumstances of the application are such that to grant any type of privacy or anonymity would fall outside the UT's discretion, owing to the importance of the open justice principle and the absence of any particulars or evidence in this case.

Point 4b

If an oral hearing is deemed to be necessary, I confirm that the parties have liaised and identified that the sole mutually available date for Counsel for an oral hearing within the listing window specified would be 10 November 2022.

I confirm that the Taxpayer's representatives have been copied into this correspondence.

Thanks and kind regards,

[redacted]

HM Revenue & Customs

[redacted]

From: [redacted] Andrew <[redacted]@justice.gov.uk> **On Behalf Of** uttc
Sent: 16 August 2022 12:49

[redacted]

Dear Ms [redacted] / Mr [redacted]

Judge Richards has asked me to write as follows:

1. I am grateful for the parties' written submissions on the privacy/anonymity issue. HMRC's response arrived while I was on holiday, so please excuse the delayed response.
2. I had initially thought that the application would need to be dealt with at an oral hearing. However, having read the parties' written submissions, I suspect that I might be able to deal with it on the papers. That said, I appreciate that both sides prepared their written submissions with a strong steer from the Tribunal that the matter would be dealt with at an oral hearing, so if either party feels that an oral hearing is necessary, I will reflect on that. If the matter is to be decided on the papers, it would be appropriate for the taxpayer to be entitled to provide written observations in reply.
3. To help the parties to form a view on whether they would like the matter determined on the papers, I will share the following initial thoughts:
    a. HMRC suggest that what they describe as "non-compliance" with the June Directions consisting of the taxpayer's failure to serve a witness statement in support of his application of itself dooms the application to failure. However, the taxpayer has explained why he considers that his application can succeed without evidence. I will consider the application on that basis. The June Directions did not state that any application would not be considered in the absence of evidence. Moreover, as paragraph 4 of the "Reasons" section of the June Directions notes, the purpose of Direction 1(4) was simply to require the taxpayer to make a "considered Privacy Application in respect of the Upper Tribunal proceedings" which he has now done.
    b. It seems to me that the taxpayer is not necessarily requesting that the Upper Tribunal proceedings be heard in private. Paragraphs 1.1 and 1.2 of the application seem to me to focus on anonymity (leaving open the prospect of a public hearing at which the taxpayer is simply referred to as "the taxpayer" and at which care is taken to not to give any other information that would identify him). Paragraph 1.3 requests that hearings be in private "if and insofar as it is necessary" to give effect to the requested anonymity. The taxpayer, however, says relatively little about whether a private hearing is "necessary". At this stage, I do not see why it should be necessary. After all, there is no evidence either before the Upper Tribunal or the FTT as to the taxpayer's precise factual circumstances. Therefore, conceptually, it would seem to me to be practicable for a hearing to be in public, even if the taxpayer is referred to in those proceedings generically. The taxpayer may wish to clarify the precise extent to which he seeks a private hearing as distinct from anonymity.
4. I am not attracted to the idea of determining the privacy/anonymity issue at the

substantive Upper Tribunal appeal. The parties need to know where they stand now not least so that submissions and bundles for the substantive appeal can be prepared appropriately. Therefore, the choice is between a determination on privacy/anonymity now, either on the papers or following an oral hearing. To that end, please could the parties liaise and reply to the Tribunal on the following issues:

a. Should the Tribunal determine the privacy/anonymity issue on the papers or following an oral hearing?
b. If at an oral hearing, what is their availability for a hearing? I have good availability in September and October and am also completely free in the week beginning 14 November. If the application cannot be dealt with at an oral hearing before then, my feeling would be that it should be dealt with on the papers.
c. If the determination is to be on the papers, what is the timetable for the taxpayer to serve a written reply? How about 2 September or 9 September?

Yours sincerely

[redacted]
Tribunal Clerk
Upper Tribunal (Tax and Chancery) | HMCTS | 5th Floor, Rolls Building, Fetter Lane | London | EC4A 1NL
Phone: [redacted]

Web: www.gov.uk/hmcts

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From: [redacted]@hmrc.gov.uk [redacted]
Sent: 02 August 2022 14:36
To: uttc [redacted]
Subject: UT-2022-000070 The Commissioners for HM Revenue and Customs v Taxpayer

Dear Sir/Madam,

UT-2022-000070 The Commissioners for HM Revenue and Customs v Taxpayer

Please find attached HMRC's response to the Taxpayer's application for privacy pursuant to Direction 6 of Judge Richards's Directions issued on 16 June 2022 in the above-mentioned matter in both Word and PDF formats.

I confirm that the Taxpayer's representatives have been copied into this correspondence.

Thanks in advance and kind regards,

[redacted]

[redacted] (she/her)**| Lawyer**

HM Revenue & Customs

[redacted]

OFFICIAL-SENSITIVE

REF: UT/2022/000070
(previously UT/2022/000036)

IN THE UPPER TRIBUNAL
(TAX & CHANCERY CHAMBER)

BETWEEN:

A TAXPAYER

Applicant/
Respondent in the appeal

- and –

HM REVENUE AND CUSTOMS

Respondent to the application/
Appellant in the appeal

HMRC'S SKELETON ARGUMENT FOR HEARING ON 10 NOVEMBER 2022

INTRODUCTION

1. This is HMRC's skeleton argument for the hearing listed to determine the Taxpayer's application dated 29 June 2022:

> *"1. The Respondent hereby applies for a direction that, in relation to this appeal:*
>
> *1.1. These proceedings be anonymised.*
>
> *1.2. That no details that would or would potentially lead to the identification of the Respondent should be made public.*
>
> *1.3. If and insofar as it is necessary to give effect to §1.1 and/or §1.2, hearings in these proceedings should be in private."* ("**Application**")

2. The reference to "these proceedings" is understood to be a reference to HMRC's appeal ("**Appeal**") against Direction 3 issued by the First-tier Tribunal (Judge Sukul) ("**FTT**") on 15 September 2021 (the "**FTT Direction**") that:

> "*3. Preliminary proceedings in this matter shall be heard in private.*"

3. HMRC's position is that the Application should be refused.

BACKGROUND

4. Permission to appeal against the FTT Direction (above) was granted by this Tribunal in a decision issued to the parties on 16 June 2022 ("**PTA Decision**"). In the PTA Decision, the UT made *inter alia* the following directions:

> *"… (4) Also no later than 4pm on 30 June 2022, the taxpayer may apply to the Upper Tribunal (with a copy to HMRC) for such directions as it requires in respect of the privacy of the Upper Tribunal proceedings (a "Privacy Application"). Any such application must:*
>
> > *(a) Set out expressly what directions are requested. For example, is it requested that the Upper Tribunal proceedings should be in private, or that the proceedings should be in Public, but the identity of the taxpayer should be anonymised?*
> >
> > *(b) Set out the grounds on which the directions are requested.*
> >
> > *(c) Be supported by evidence in the form of a witness statement(s) accompanied by a statement of truth in the usual form.*
>
> *…*
>
> *(6) Also no later than 4pm on 2 August 2022, HMRC must serve a response to any Privacy Application that the taxpayer has made.*
>
> *(7) It seems likely from the course of proceedings to date that HMRC will object to any Privacy Application. Even if HMRC do not object, the Upper Tribunal is likely to conclude that privacy cannot be conferred by consent given the importance of the open justice principle. Therefore the Upper Tribunal is likely to list any Privacy Application for oral hearing. At this stage, the Upper Tribunal is minded to direct that any Privacy Application be heard in private. HMRC may submit their observations on this course when complying with Direction (6) above."*

5. This Tribunal provided *inter alia* the following explanation in relation to the above directions:

> *"8. HMRC argue that the taxpayer has already made a Privacy Application (in his solicitors' email of 13 June 2022). I disagree. On the date of that email, there were no proceedings before the Upper Tribunal because I had not yet granted HMRC permission to appeal. I do, however, agree with HMRC that the taxpayer should not assume that the privacy he obtained in the FTT for "interim proceedings" automatically translates over to the Upper Tribunal proceedings. It is appropriate to require the taxpayer, by Direction (4), to make a considered Privacy Application in respect of the Upper Tribunal proceedings.*
>
> *9. I have emphasised, in Direction (4), that any Privacy Application must be in respect of the Upper Tribunal proceedings. This is a logically separate question*

from the question whether the FTT was entitled to make the case-management decision it did in relation to the FTT proceedings.

10. Directions (5), (6) and (7) are self-explanatory. I require a response to any Privacy Application because I do not consider that it can be determined by consent and so the Upper Tribunal will be assisted by any observations that HMRC may wish to make, whether or not they oppose that application."

LAW

Rules

6. Rule 37 of the Tribunal procedure (Upper Tribunal) Rules 2008 provides, so far as is relevant:

> "***37 Public and private hearings***
>
> *(1) Subject to the following paragraphs, all hearings must be held in public.*
>
> *(2) The Upper Tribunal may give a direction that a hearing, or part of it, is to be held in private.*
>
> *...*
>
> *(3) Where a hearing, or part of it, is to be held in private, the Upper Tribunal may determine who is to be permitted to attend the hearing or part of it."*
>
> *...*

7. Since the UT's discretion to make such a direction is a general one, it should be exercised consistently with English common law principles derived from the authorities.

Case law

8. It is well-established that the principle of open justice is a constitutionally fundamental principle, which includes the right of the media to impart and the public to receive information and that proceedings should only exceptionally be held in private or anonymised: see for example paragraph 176 of the decision of the Court of Appeal in *R(Mohamed) v Secretary of State for Foreign & Commonwealth Affairs* [2010] EWCA Civ 65:

"In my judgment, these three initial points are not persuasive, and, in any event, they should not detract attention from what is, in the present connection, the central point, namely that the court should administer justice in public, which means that all parts of a judgment should be publicly available, unless there is a very powerful reason to the contrary. This principle is so important not merely because it helps to ensure that judges do not, and do not appear to, abuse their positions, but also because it enables information to become available to the public. What goes on in the courts, like what goes on in Parliament or in local authority meetings or in public inquiries, is inherently of legitimate interest, indeed of real importance, to the public. Of course, many cases, debates, and discussions in those forums are of little general significance or interest, but it is not for the judges or lawyers to pick and choose between what is and what is not of general interest or importance (save where, as in the present instance, it is a factor to be placed in the balance, in a case where it is said that it is in the public interest to have the hearing in private or to redact material from a judgment)."

9. Exceptional circumstances are required in order to justify any departure from the principle of open justice: see *HMRC v Banerjee* [2009] EWHC 1229 (Ch) at paragraphs 34 and 35 (**emphasis added**):

"[34] In agreement with the Revenue's general approach to the question, I think it is helpful to begin by considering whether an application for anonymity and/or a hearing in private would have succeeded, had such an application been made before the hearing on 5 December. The court would clearly have had jurisdiction to entertain such an application: see CPR 39.2(3), which provides that a hearing, or any part of it, may be in private if ... "(c) it involves confidential information (including information relating to personal financial matters) and publicity will damage that confidentiality". Nevertheless, in my judgment any such application would have been firmly rejected, on the basis that the fundamental principle of public justice enshrined in Article 6(1) of the Convention, and long established in the English common law, would have decisively outweighed the very limited interference with Dr Banerjee's right to respect for her private life, and the very limited disclosure of information relating to her personal financial affairs, that a public hearing would entail. I will assume in Dr Banerjee's favour at this point that her relevant rights of privacy and confidentiality had not already been irretrievably lost by reason of the public hearing of her previous appeal to the Commissioners. Making that assumption, I would accept that her Article 8(1) rights were engaged. In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. However, ***the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform***.

[35] It is relevant to bear in mind, I think, that taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane-seeming tax dispute. Nowhere is that more true, in my judgment, than in relation to the rules governing the deductibility of expenses for income tax. Those rules directly affect the vast majority of taxpayers, and any High Court judgment on the subject is likely to be of wide significance, quite possibly in ways which may not be immediately apparent when it is delivered. These considerations serve to reinforce the point that in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."

10. The principle of open justice was considered by the First-tier Tribunal in similar contexts to that of the present application in the cases of *Moyles v HMRC* [2012] UKFTT 541 (TC) and *Martin Clunes v HMRC* [2017] UKFTT 204. In the latter case, the Tribunal quoted the above extract from *Banerjee* and went on to set out the following principles:

"[9] In Moyles I quoted that extract from the judgment in Banerjee, and then said this, at [14]:

> *"I respectfully agree. This case is not on all fours with Banerjee, but the issue is similar: whether the taxpayer is entitled to pay less tax because, in that case, she had incurred some expenses and, in this, because he has suffered a loss, whether or not real. There is an obvious public interest in its being clear that the tax system is being operated even-handedly, an interest which would be compromised if hearings before this tribunal were in private save in the most compelling of circumstances. The fact that a taxpayer is rich, or that he is in the public eye, do not seem to me to dictate a different approach; on the contrary, it may be that hearing the appeal of such a person in private would give rise to the suspicion, if no more, that riches or fame can buy anonymity, and protection from the scrutiny which others cannot avoid. That plainly cannot be right."*

[10] If Henderson J's observations in Banerjee and mine in Moyles are taken together they make it clear that I cannot properly grant the application. Any taxpayer who was not in the public eye but who, for example, would prefer his friends or neighbours not to know of his financial affairs, would find it impossible to persuade the tribunal to grant him anonymity; as Henderson J said, the public interest in the outcome of tax litigation, whether in the High

Court or in this tribunal, outweighs the desire of the taxpayer for anonymity, and the inevitable resultant intrusion into matters which might otherwise remain confidential is the price which must be paid for open justice, however unpalatable the individual taxpayer might find it to be. Moreover, the structure of rule 32 makes it quite clear that there is a strong presumption in favour of public hearings, and that the circumstances in which that presumption may be overridden are wholly exceptional.

[11] I have some sympathy with Mr Clunes in that I recognise that the revelation of his identity does have the potential to cause him some collateral embarrassment of a different character from the reputational damage which was feared in Moyles. However, and even disregarding what I have already said about the presumption in favour of public hearings, it seems to me that the reasons on which Mr Clunes relies to support his application are the very reasons why it would not be sufficient to identify him, in the decision released after the hearing of his appeal, simply as an actor. The question in the appeal will not be whether male actors, as a group, can legitimately claim relief for expense of the kind in issue, but whether, in Mr Clunes' case, the expense was incurred wholly and exclusively for the purposes of his trade. It is entirely possible that expense of the kind in issue here might be incurred by actor A for undeniable qualifying reasons, while the same expense incurred by actor B could be described only as a vain indulgence, and there are plainly many possible positions between those extremes. I do not see how the tribunal will be able to determine where on the scale Mr Clunes falls without reference to him as an individual, and by reference to his personal characteristics; and I do not see how the public interest in the fair administration of tax can be satisfied by the release of a decision which, by concealing those characteristics, makes it impossible for the reader to reach a full understanding of the reasons why the appeal has been determined as it has."

11. Accordingly, the "*inevitable degree of intrusion*" (*Banerjee* at paragraph 34) into a taxpayer appellant's privacy is simply the consequence of the principle of open justice and the fact that the taxpayer has brought an appeal. The fact that the taxpayer may be in the public eye and may prefer the public not to know about his affairs does not justify the principle of open justice being restricted *(Moyles* at paragraph 14 and *Clunes* at paragraph 10).

12. There should be no lower legal standard for the taxpayer to pass in order to secure an order for anonymity than for a hearing in private. It would be a dangerous precedent to set to suggest that anonymity required something less. Indeed (although the Upper Tribunal Rules do not replicate the position), HMRC notes that for the purposes of the FTT anonymity is consequential on having secured a private hearing (see rule 32.6 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009). This suggests

that anonymity does not attract a watered-down test, but requires the taxpayer to establish sufficient grounds for a private hearing first.

13. Rather, the test is whether privacy or anonymity is "*necessary*" for justice to be done: see the decision of the FTT in *JK v The Commissioners for Her Majesty's Revenue & Customs* [2019] UKFTT 411 (TC) esp. at paragraph 12 to paragraph 18:

> *"12. The rules of the High Court (CPR) do not bind this Tribunal but they are a guide to how it should exercise its discretion. It seems to me that the rules in the CPR on anonymisation of decisions are a good guide. High Court case law makes clear the importance of open justice:*
>
> > *'The hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to parties and to witnesses, ….but all this is tolerated and endured, because it is felt that in public trial is to found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect.'*
> >
> > *Per Lord Atkinson in Scott v Scott [1913] AC 417*
>
> *13. Having said that, the courts have always recognised that that in some circumstances, in order to truly administer justice, anonymity has to be granted. So cases involving the insane or children, or cases where publication of the subject matter would defeat the purpose of the litigation, have been held in private and/or anonymised. The CPR expressly recognise the case law on this by authorising anonymisation where:*
>
> > *(d) a private hearing is necessary to protect the interests of any child or protected party; or … (g) the court considers this to be necessary in the interests of justice. (CPR 39.2(3))*
>
> *14. The appellant is not the first to suggest that open justice is still served if the decision is published but the claimant's name anonymised. This was considered in In re Guardian News and Media Ltd [2010] 2 AC 697 where Lord Rodger stated (§§63-65) that freedom of the press and open justice required the names of all parties to be public because the public find stories about real individuals more interesting than bland decisions from which identifying information is removed.*
>
> *15. And, as I have said, this Tribunal has applied a similar test to that in the Courts. In In Re Mr A [2012] UKFTT 541 (TC) – later republished as Moyles), the Tribunal said:*
>
> > *There is an obvious public interest in its being clear that the tax system is being operated even-handedly, an interest which would be compromised if hearings before this Tribunal were in private save in the most compelling of circumstances.*
>
> *16. Applications have been refused by this Tribunal where a celebrity risked reputational damage (Moyles, above, and Martin Clunes [2017] UKFTT 204*

(TC)), and where a professional risked being barred by his professional body (Chan [2014] UKFTT 256 (TC)) and where a doctor wanted to keep her private tax affairs confidential from her patients (In Re Banerjee [2009] EWHC 1229 (Ch)). In that last case, Henderson J said:

> *"[34] ... In my opinion any taxpayer has a reasonable expectation of privacy in relation to his or her financial and fiscal affairs, and it is important that this basic principle should not be whittled away. However, the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.*
>
> *[35] ...taxation always has been, and probably always will be, a subject of particular sensitivity both for the citizen and for the executive arm of government. It is an area where public and private interests intersect, if not collide; and for that reason there is nearly always a wider public interest potentially involved in even the most mundane seeming tax dispute. .... in tax cases the public interest generally requires the precise facts relevant to the decision to be a matter of public record, and not to be more or less heavily veiled by a process of redaction or anonymisation. The inevitable degree of intrusion into the taxpayer's privacy which this involves is, in all normal circumstances, the price which has to be paid for the resolution of tax disputes through a system of open justice rather than by administrative fiat."*

17. The appellant referred me to my own decision in The Appellant [2016] UKFTT 839 (TC) where I ordered anonymity as the taxpayer was a paranoid schizophrenic, saying at [16]:

> *.....While it is in the interests of justice being seen to be done that decisions are not ordinarily anonymised, in this case I considered that the appellant's illness was an exceptional circumstance. This was because mental illness should not be a bar to challenging HMRC decisions, so it is right to grant anonymization of this decision, so other litigants with mental illness are not discouraged from appealing.*

18. On reflection, however, it seems to me that in light of the above binding authorities such as Scott v Scott (above), while my decision to grant anonymity in that case was correct, the reasoning ought to have been better expressed. In particular, it is clear from the citation above from Scott v Scott that the mere fact that holding the hearing in public and/or publishing the decision might deter would-be litigants from litigation is not enough to justify anonymisation. The test is whether anonymisation is necessary for justice to be done. So if the harm from publication is likely to be sufficiently serious such that a litigant would not realistically be able to assert his or her rights then it can be said that anonymisation is necessary for justice. For instance, asylum seekers might be granted anonymity in immigration tribunal hearings where the Tribunal considers there is a real risk of serious reprisals against the asylum seeker or his family back in the country from which the litigant seeks asylum."

14. Accordingly, the test is whether privacy and/or anonymisation is necessary for justice to be done (see also the FTT's approach and conclusion in *Mr D v The Commissioners for Her Majesty's Revenue & Customs* [2016] UKFTT 0850 (TC): anonymity should only be granted where it is strictly necessary).

HMRC'S SUBMISSIONS

(1) *The nature of this appeal is not determinative of the Application*

15. As can be seen from Rule 37 quoted above, the general rule is that hearings in this Tribunal should be held in public. Where a party makes an application for a hearing not to be held in public, that party bears the burden of showing why the general rule should be departed from.

16. For the reasons set out below, HMRC contends that in the circumstances of this case, the burden can only be discharged by advancing (i) grounds supported by (ii) evidence which the Taxpayer has failed to provide.

17. Indeed, this Tribunal directed that any application for privacy must set out the grounds on which the directions are requested and must be supported by evidence in the form of a witness statement(s) accompanied by a statement of truth in the usual form (see paragraph 4 above).

18. The Taxpayer did not appeal against Direction 4, above, and despite its terms did not file evidence. However, the Tribunal has held that (see the Tribunal's email dated 16 August 2011 [BD/254]:

> *"a. HMRC suggest that what they describe as "non-compliance" with the June Directions consisting of the taxpayer's failure to serve a witness statement in support of his application of itself dooms the application to failure. However, the taxpayer has explained why he considers that his application can succeed without evidence. I will consider the application on that basis. The June Directions did not state that any application would not be considered in the absence of evidence. Moreover, as paragraph 4 of the "Reasons" section of the June Directions notes, the purpose of Direction 1(4) was simply to require the taxpayer to make a "considered Privacy Application in respect of the Upper Tribunal proceedings" which he has now done…."*

19. The Taxpayer's Application is therefore made on the basis of no evidence. Instead, in his Application, the Taxpayer asserts (at paragraph 4) that:

> *"It would be absurd if HMRC could* ***override or undermine the FTT's direction*** *not by successfully appealing the direction but merely by obtaining permission to appeal it."* (Emphasis added.)

20. In other words, the Taxpayer's position is that the very nature / circumstances of this appeal are such that, without more, the Tribunal must determine this Application in his favour. Put another way, because of the decision below and the nature of this appeal, the Taxpayer is contending that for all practical purposes the UT has no freestanding discretion to exercise and **must** grant his Application.

21. For the reasons which follow, HMRC's position is that this is wrong. The FTT's Direction would not be overridden or undermined if privacy/anonymity is not granted – in particular, if the Application is refused, it would not pre-determine or render futile either the UT Appeal itself or the outstanding privacy application in relation to the substantive FTT hearing before the FTT.

22. It is important to keep in mind the narrow context of the appeal in the UT. Were the Application to be refused, the only facts about the Taxpayer that would be made public are:

    a. His name;

    b. The fact that he has an appeal before the FTT against HMRC; and

    c. The fact that he applied for (and was granted) privacy over those proceedings.

23. The UT appeal itself is legalistic, impersonal and anodyne. It does not require any discussion of the substance of the FTT appeal, the arrangements the Taxpayer entered into, his personal or financial circumstances, HMRC's case against him etc. – all of which would be the subject of close scrutiny in the substantive FTT appeal – and may or may not be relevant in relation to interim proceedings in the FTT, depending on their nature.

24. Once the difference in nature between the UT appeal on the one hand and the interim and substantive proceedings in the FTT is appreciated, it is clear that revealing minimal information in paragraph 22 above in no way *of itself* pre-determines or "renders futile" any subsequent privacy that may or may not in due course be granted in relation to matters in the FTT.

25. Critically, if the Taxpayer had wanted to argue that his personal circumstances are such that the mere fact of his name being made public in the context of some unparticularised tax dispute would cause him irreparable harm, he has had two chances to say so and to provide supporting evidence – first, in his FTT application and secondly, in response to the UT's directions in relation to this UT Application. HMRC assumes that the Appellant's sensitivity stems from his name being tied to the particular subject matter of the substantive FTT appeal. This is what he seems to want to keep from public view (and perhaps also details about his finances and other personal information). But no one will ever be any the wiser about these matters just because this UT Appeal is heard and determined in public.

26. Similarly, the mere fact that the Taxpayer is arguing about privacy/anonymity is a logically different question[1] to his identification / preventing the revelation of sensitive personal and financial information in a later substantive appeal. Knowing that an individual has had a dispute with HMRC concerning privacy/anonymity does not make him identifiable in relation to any later substantive appeal.

27. The same point applies in relation to interim proceedings: the Taxpayer will not be identifiable in those proceedings simply by virtue of the fact that he has had an open dispute about privacy/anonymity with HMRC. Moreover, and in any event, FTT decisions in relation to interim matters are more often than not unpublished in any event. So there will be no means of linking this Taxpayer to any such interim FTT disputes if any hearing is private and the decision is unpublished. The two sets of proceedings are logically distinct.

[1] See, for example, the approach in *Chan v HMRC* [2014] UKFTT 256 (TC) as regards the distinction between interlocutory and final proceedings.

28. Importantly – and the reason why this case is very different to the sorts of cases where a privacy appeal is usually heard in private as a matter of course – to date, the Taxpayer has provided no evidence or grounds that address the Taxpayer's personal circumstances.

29. Had evidence and grounds relating to his personal circumstances been provided, the position may be different because it might, in that case, be necessary to grant privacy/anonymity in relation to an appeal to the UT about privacy to prevent those self-same personal circumstances from being revealed. To spell it out, if the Taxpayer had made a properly particularised and evidenced application before the FTT, the FTT would have been required to evaluate those grounds and that evidence in its decision in order to determine whether those personal circumstances were sufficient:

    a. If the FTT granted such an application, it would have done so on the basis that those personal circumstances should not be in the public domain. In that situation, it goes without saying that an appeal about the sufficiency of those circumstances should also be in private because those personal circumstances would be the subject of argument on appeal.

    b. If on the other hand the FTT had refused such an application but the Taxpayer had obtained permission to appeal, the effect at that point would be that it was arguable that those personal circumstances were sufficient to warrant privacy – and in that situation, a public UT appeal hearing to discuss those personal circumstances would of course undermine the very purpose of the appeal itself.

30. But this is not that type of case. Here, it is not necessary for privacy/anonymity to be granted in respect of the Appeal so as to prevent public discussion of the Taxpayer's personal circumstances that he is looking to keep private. Nor will a public UT Appeal override / undermine / render futile the FTT's Direction under appeal (or any subsequent privacy/anonymity that the FTT might later grant in relation to all or part of the substantive hearing).

31. It is therefore not "necessary" for the UT to grant the Application for the wholly legalistic reasons advanced by the Taxpayer. Instead, the Tribunal must consider the

Application and the circumstances in the normal way to decide whether the Taxpayer has overcome the very high hurdle required for obtaining the anonymity and privacy he seeks. Once it is appreciated that the Taxpayer's legalistic approach is flawed, there is no remaining basis for the UT to grant his Application because of the Taxpayer's choice not to submit grounds and evidence.

32. Indeed, HMRC's position is that the UT can infer, from the lack of particulars and evidence, that the Taxpayer in fact has no grounds to warrant privacy / anonymity of any sort. The standard for a taxpayer to achieve anonymity is no different to that required for a private hearing. Were the UT to grant this Application on the basis of no particularised grounds and no supporting evidence, it would in fact be a more extreme outcome than the FTT's Direction under appeal since:

    a. The FTT granted privacy (wrongly, in HMRC's contention) over an aspect of the appeal before it in case grounds to establish privacy emerged later.

    b. Here, in contrast, the UT would be granting anonymity over the entire appeal without ever considering particulars and evidence, notwithstanding its previously directed that they be provided.

33. In summary, HMRC's position is that:

    a. The Taxpayer's purely legalistic argument is flawed;

    b. That being so, the Application must be refused since he has not put forward any substantive grounds supported by evidence for anonymity/privacy and so has not shown the UT any "*truly exceptional circumstances*" to warrant the direction he seeks.

HMRC'S RESPONSE TO THE TAXPAYER'S SKELETON ARGUMENT

34. By and large, the Taxpayer's Skeleton Argument repeats his previous submissions. The following paragraphs therefore replicate HMRC's previous response.

35. At paragraphs 26 to 28, the Taxpayer argues that he should be entitled to privacy before the UT because he obtained interim privacy before the FTT which would otherwise be overridden or undermined. This is misconceived:

    a. Directions in the FTT cannot bind the UT.

    b. The Taxpayer obtained interim privacy without identifying cogent grounds or leading evidence before the FTT. Accordingly, this is not a case where the UT is looking at the same grounds and evidence before the FTT and being asked by HMRC to form a different view on that material at the permission stage.

    c. The UT is therefore entitled to (and indeed should) come to its own view as to whether a proper basis exists for the Taxpayer to be granted privacy in the proceedings before it. The UT is quite right not to exacerbate matters by adopting the FTT's misconceived position as its own.

    d. HMRC is not overriding the FTT's decision "merely by obtaining permission to appeal it". The UT has not (yet) determined that this appeal should be heard in public. Rather, the UT has made provision for the Taxpayer to apply for whatever privacy directions he seeks. If the Taxpayer fails to secure them, it is because he has failed to provide any grounds and evidence relating to his personal circumstances to support the Application – and there is no injustice in that result.

    e. For the reasons already given, the types of matters which might be kept private and confidential in relation to either FTT interim proceedings or the FTT substantive appeal differ from those that would be made public if no privacy direction was made by the UT. Hearing this UT appeal in public does not undermine subsequent stages (if any) which are directed to be kept from public view.

36. At paragraph 29, the Taxpayer quotes four passages from the transcript of the FTT proceedings and one extract from an email sent by HMRC. The Taxpayer seems to be

suggesting that HMRC should not be allowed to argue that this UT appeal should be in public. But there is nothing in this submission:

a. First, the quoted passages concern the status of the FTT's own written decision on the privacy application – not the status of any appeal from that decision.

b. Secondly, HMRC's position cannot in any event bind the UT – as the UT observes at Direction 1(7) of the PTA Decision, privacy cannot be conferred by consent, given the importance of the open justice principle.

c. Thirdly, whatever HMRC's position may have been before the FTT, matters below have been overtaken by events – principally, the Taxpayer's refusal to comply with the PTA Decision Directions 1(4)(b) and (c). HMRC infers from this lack of compliance that Taxpayer in fact has no cogent grounds / evidence to support any privacy application. This is not the same as the point the Taxpayer seeks to address at paragraph 31 of the Taxpayer's skeleton argument. It is one thing not to particularise properly the FTT application – it is quite another not to comply with specific directions given by the UT.

37. Accordingly, any accommodation that HMRC might have been willing to give the Taxpayer below is withdrawn.

38. As regards paragraph 33 of the Taxpayer's skeleton argument, HMRC relied on *Pink Floyd* and *Anson* in its submissions of 10 June 2022 because they establish that any direction or order for privacy below is not automatically carried over on appeal. If privacy / anonymity is required by a party on appeal, the appellate court or tribunal must satisfy itself that such a direction or order is merited. The UT was therefore quite right to make the Directions requesting that if the Taxpayer wished to make an application, it must be supported by grounds and evidence.

39. As regards paragraphs 34 to 37 the Taxpayer's reliance on cases concerning anonymisation of first instance decisions is misplaced. The cases concern applications

for a stay of execution of the decision / order pending an appeal. The principles used to determine such applications derive from a separate and distinct line of cases. In contrast, the UT is presently engaged with determining how to regulate and manage its own procedure on this Appeal.

40. At paragraphs 38 and 39, the Taxpayer refers to two authorities of the higher courts – *OWD* and *Unison*. Neither case, however, concerns privacy nor do they otherwise support his Application:

    a. *OWD* concerned the regulatory scheme requiring wholesalers supplying duty paid alcohol to be approved by HMRC. If HMRC refused an application for approval, there was no provision for HMRC, the FTT or the High Court to preserve the trader's ability to trade pending appeal – and this risked "otherwise good grounds of appeal being rendered nugatory" if the trader was permanently put out of business in the time it took for an appeal to be determined. The Supreme Court ruled that the absence of a power to impose a stay pending appeal was potentially incompatible with the ECHR. But this is very different to saying that where a power exists, a stay of execution must be granted in every case. Here, the UT has the power to direct that a hearing or part of it may be in private at r.37(2) of the UT Rules. It issued the Directions in the PTA Decision in order to receive arguments from the parties as to whether or not to exercise this power. Nothing in *OWD* can be interpreted as mandating the UT to do so. Indeed, in [77], the Supreme Court's concern was that "*otherwise **good** grounds of appeal would be rendered nugatory if the power did not exist*"(emphasis added) and at [78], the Supreme Court made it clear that "*a limited power to impose a stay pending appeal **in defined circumstances***" (emphasis added) would be sufficient to achieve ECHR compliance.

    b. The Taxpayer's attempt to align its position with *Unison* is similarly inapt. There can be no expectation of privacy before either the FTT or the UT since the Rules provide as their starting point that all hearings must be in public. That remains the case before the UT, regardless of what occurred below. If the intention had been for any privacy direction secured before the FTT to be carried forward on appeal (at least to the UT) the Rules would have said so. But it is

clear from r.37(1) of the UT Rules that the default position before the UT is a clean slate – "*all hearings **must** be held in public*". The Taxpayer has indicated its desire for a privacy direction from the UT – and the UT has made the Directions in the PTA Decision in order to facilitate that process. But rather than engage properly with the Directions and the process, the Taxpayer has declined to provide any grounds relating to his particular circumstances or any evidence to support such grounds. He has no entitlement or expectation of privacy – if he now fails to secure it, this is not because of some ECHR non-compliance or access to justice impediment, it is because of his own choices.

41. As regards paragraphs 40 and 41, proceeding or pulling out, as matters currently stand, the Taxpayer retains that choice. The UT proceedings are currently anonymised and in private. The UT made the rest of the Directions in the PTA Decision to set out a process for it to determine whether the proceedings should stay that way.

42. Should the UT now determine the Taxpayer's Application against him (which, in the absence of grounds and evidence HMRC would contend is the only outcome that the UT properly directing itself in law can reach), the Taxpayer's choice will be to pull out and maintain his privacy or continue and lose it.

43. At paragraph 42, the Taxpayer repeats his criticism of HMRC's position – to which HMRC's response is as above: HMRC infers from the Taxpayer's approach to this application and non-compliance with the UT's directions that he has no cogent grounds / evidence to merit privacy. In the light of this inference, HMRC's position is not extraordinary – it is pragmatic and only to be expected.

44. As regards the points made at paragraphs 43 to 49, they are not apt to apply to this Application because (like the original application for privacy) it is made on the basis of no evidence. There is therefore no evidence which could be considered by separate appeal courts with a risk of them coming to different conclusions – but even if there was, given the difference between this UT Appeal, potential FTT interim proceedings and the substantive FTT appeal in due course, just because the UT might consider that there is no merit in a privacy application for this UT Appeal, it does not automatically

follow that the same conclusion will follow in relation to FTT matters which may well involve far greater disclosure of personal information.

45. As regards paragraphs 50 to 53, as the High Court held in, *Justyna Zeromska-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 (QB) at [21] that:

> *"Finally, I wish to say something about the timing of any application for anonymity in cases which are not approval hearings for protected parties or children. Here, the application was made at the start of the trial, without any notice having been given to The Press Association in advance. This put the court reporter in an awkward position, and did not allow for full consideration of the issues or properly prepared submissions on behalf of the Press. Mr Feeny, for the Defendant, understandably took a neutral stance, although, when I adjourned the application, he helpfully provided to the court some additional authorities, for which I was very grateful. But, in general, it seems to me that such an application should be made and heard in advance of the trial, and should be served on the Press Association. There are two reasons for this. First, and most obviously, it gives the Press Association a proper opportunity to make representations, whether orally at the application or in writing in advance. Secondly, the outcome of the application may inform any decision taken by a Claimant in relation to settlement. Thus, if a Claimant in a sensitive case such as the present knows that, if the matter goes to trial, her name will be published in the press, she may consider that to be an important factor in deciding whether or not to accept an offer of settlement – in some cases it could tip the balance. For these reasons, an application for anonymity should be made well in advance of the trial and Claimants (and their advisers) should not assume that the application will be entertained at the start of the trial (because of the disruption to the trial which may ensue, if the application needs to be adjourned to enable the Press Association time to prepare submissions), nor that it will be "nodded through" by the judge, where the Defendant takes a neutral stance and there is only a court reporter to represent the interests of the press.."*

46. Thus, applying the above approach, the issue of privacy/anonymity of the Appeal should be decided in advance of the substantive hearing of the Appeal, so that the parties can make proper representations and know where they stand and so that the outcome on privacy/anonymity can inform any considerations about settlement.

CONCLUSION

47. For the reasons set out above HMRC respectfully invites the Tribunal to dismiss the Application.

HUI LING McCARTHY KC

11 New Square

[redacted]11newsquare.com

BARBARA BELGRANO

Pump Court Tax Chambers

[redacted]@pumptax.com

7 November 2022

[redacted]

From: [redacted]@morrlaw.com>
Sent: 14 December 2022 10:59
To: [redacted]@Justice.gov.uk; [redacted]

Dear Mr [redacted]

We apologise for the delay in our substantive response to your correspondence dated 9 December 2022.

The Taxpayer's representatives agree with HMRC's suggestions for amendments at point (1) of their email to the Tribunal dated 13 December 2022.

Further to point (4) of the submissions made by HMRC, the Taxpayer, wholly disagrees with HMRC's request.

A Taxpayer should be able to apply for anonymity without thereby necessarily and immediately forgoing anonymity if the application is not successful, this point was endorsed by the UT in its decision in *A (appellant) v Burke and Hare (respondent) [2022] IRLR 139.*

If we can assist the UT further, please let us know.

I can confirm that HMRC's representatives are copied into this correspondence.

Thanks and kind regards

[redacted]

From: [redacted]y@morrlaw.com>
Sent: 13 December 2022 18:13
To: [redacted]
Subject: RE: UT-2022-000070 The Commissioners for HM Revenue and Customs v Taxpayer

Dear Mr [redacted]

Sincere apologies for our delay in responding to you.

The Taxpayer's representatives have been unexpectedly engaged in court proceedings.

We would be extremely grateful if the tribunal would grant us a short extension until 1pm tomorrow for us to provide our substantive response to your email.

We do not believe this extension will in anyway prejudice HMRC, who's representatives are copied into this correspondence.

We apologies for any inconvenience caused.

Thanks and kind regards

[redacted]

Season's Greetings FROM ALL AT MORR & CO

Our offices will close for the festive period at 1pm on Friday 23rd December and re-open on Tuesday 3rd January. For anything urgent you can contact us by phone on our main switchboard number.

MORR & CO **The law firm for business and life**

The Legal 500 United Kingdom Leading Firm 2021 | Lexcel Practice Management Standard Law Society Consultant | INVESTORS IN PEOPLE We invest in people Gold

From: [redacted]
Sent: 13 December 2022 16:25
To: [redacted]
Subject: RE: UT-2022-000070 The Commissioners for HM Revenue and Customs v Taxpayer

Dear Mr [redacted]

UT-2022-000070 The Commissioners for HM Revenue and Customs v Taxpayer

Thank you for your email of 9 December. HMRC responds as follows.

1. Typographical errors in the draft decision – suggestions for amendments

- Para. 7(2), line 3: remove space and move full stop to line directly above.
- Para. 13, line 5: change “today’s” to “that day’s”.
- Para 16(3), line 7: change “grant refuse” to “refuse”.
- Para 16(3), line 8: insert missing word “do”, with the following effect: “for the UT then to [do] anything other than…”
- Para 30, line 5: add full stop at the end of the paragraph.
- Para 34, line 1: change “were” to “where.”
- Para 37, line 3: change “ins” to “in”.
- Para 50, line 10: remove additional space next to the word “dots.”

2. Directions

Mr Northwood’s appeal was heard by the FtT last January. We have not had any update from the FtT as to the timing of the decision, but we would expect it to be reasonably soon. Accordingly, listing of this appeal reasonably soon would be welcome.

To HMRC’s knowledge, the UT has not issued case management directions yet for the appeal (beyond the case management directions for the hearing on 10 November 2022). On 29 June 2022, the Taxpayer submitted his response to HMRC’s Grounds of Appeal and on 2 August 2022, HMRC indicated that it did not intend to serve a reply.

3. Extension of time for appeal

HMRC applies for an extension of time to appeal these directions to the same date as the date for any appeal against the UT’s decision in the UT appeal. While HMRC considers that the decision (currently in draft) and its reasons are wrong, HMRC equally wishes to adopt a pragmatic approach. Depending on the outcome of the UT appeal and on the UT’s response to item 4 below, HMRC may not need to exercise its appeal rights in relation to these directions in due course. On the other hand, it may be that HMRC does need to pursue an appeal, if only to avoid any argument from the taxpayer to the effect that (say) HMRC is somehow estopped from adopting a particular position because it has not appealed. HMRC is also wary of the scheme promoter advising its other clients to adopt the same route as this taxpayer, were HMRC not to appeal.

HMRC does not want to waste the Court of Appeal’s time with unnecessary appeals and considers the extension of time approach to be the most pragmatic (so that any appeals to the Court of Appeal on this privacy issue can be heard together).

4. Duration of anonymity

Bearing in mind the UT’s reasons, please can the UT make it clear in the final decision how long the anonymity order is to last. It would follow from the reasons that it should last up to the UT’s decision in the UT appeal itself, whereupon the UT would either direct for it to be continued (if HMRC loses the appeal) or lifted (if HMRC wins the appeal, perhaps subject to any onward appeal).

HMRC’s position is that it should not require a further, contested application for the anonymity order to be lifted if HMRC succeeds in the UT appeal, which the UT’s draft directions currently seem to require.

HMRC’s position is that the decision is wrong. If HMRC wins the appeal, it will be asking the UT to publish the appeal decision on an unanonymised basis (at the very least, once that decision has become final). HMRC would therefore welcome clarity from the UT now as to the duration of the anonymity order because (a) it is relevant to any onward appeal and (b) it is important, in particular for the Taxpayer to be aware of the position.

So that the Taxpayer can be in no doubt as to the status of the UT appeal decision should HMRC win its appeal, HMRC will say that (irrespective of what happens with the publication of these directions and reasons, and irrespective of whether the UT appeal takes place on a “watch what you say” basis) the final appeal decision should be unanonymised and published in the usual way if HMRC’s appeal is successful (at least from the point that the appeal and any onward appeals have been finally determined, if not before).

If we can assist the UT further at this stage, please let us know.

I confirm that the Taxpayer's representatives have been copied to this email.

Thanks and kind regards,

[redacted]

[redacted]

OFFICIAL-SENSITIVE

From: [redacted]@justice.gov.uk> **On Behalf Of** uttc
Sent: 09 December 2022 11:50
To: [redacted]
Subject: RE: UT-2022-000070 The Commissioners for HM Revenue and Customs v Taxpayer

Dear [redacted]

Attached is a draft decision notice following the interlocutory hearing, in private, on 10 November 2022. Please could the parties provide their typographical and other suggested amendments by 5pm on 13 December.

Judge Richards has asked me to mention the following points:

"1. As matters stand, I do not propose to publish the interlocutory decision on the Upper Tribunal's website, at least for the time being. The normal procedure is that interlocutory decisions are not published in the Upper Tribunal (Tax and Chancery). Many interlocutory decisions in the courts are similarly not published. Ms McCarthy KC is correct to point out that the UT does make exceptions for interlocutory decisions that raise important issues. My decision might be said to deal with an important issue. However, even if the point is important, I do not consider publication is urgent. This is the first time the UT has had to consider whether an appeal against a grant of anonymity should itself be anonymised. The point does not crop up frequently. Therefore, immediate publication would not, in my judgment, help resolve issues of pressing importance. By contrast, immediate publication could result in speculation about the identity of the Taxpayer and the details of the underlying dispute. I have no means of telling how significant that speculation would be or the consequences it might have.

2. Therefore, on balance, I am inclined not to publish the decision immediately. Rather, I would suggest that either party can apply for it to be published at a suitable point in the future. Without specifying in advance what a "suitable point" would be, I would obviously consider publishing it after the UT publishes its decision on HMRC's appeal. I would also consider it publishing if there is an appeal to the Court of Appeal against my directions in which the Court of Appeal sits in public.

3. My suggestion in paragraphs 1 and 2 represent a preliminary indication. If the parties wish to suggest a different course they may provide brief submissions when providing their typographical and other suggestions.

4. I do not want to lose track of the case management of the appeal. It is not clear to me whether there has been a Response or a Reply to HMRC's Notice of Appeal. If it is thought that an FTT decision in the two lead cases (behind which the Taxpayer's appeal is stayed) is imminent, then I would not be averse to recommending to the Upper Tribunal Listing team that this appeal be listed reasonably soon so that the parties know where they stand as

regards “preliminary proceedings” in the UT. That is why I have inserted a placeholder in paragraph 5 of the Directions I have made.”

Yours sincerely

[redacted]

Web: www.gov.uk/hmcts

Pursuant to FPR PD 41C from the 17 May 2021, you can submit, track your Appeal digitally using CE-File.
To register and to access CE-File, please click here

For guidance, support or more information about CE-File, please click here

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Reference: UT/2022/000070

UPPER TRIBUNAL

(TAX AND CHANCERY CHAMBER)
BETWEEN:

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS **Appellants**

--and

A TAXPAYER **Respondent**

DIRECTIONS

JUDGE: JONATHAN RICHARDS

Sitting in private by video hearing on 10 November 2022 and having considered post-hearing written submissions

Having heard Ms Hui Ling McCarthy KC of counsel for HMRC and Mr Michael Firth of counsel for the Taxpayer IT IS DIRECTED as follows:

1. These proceedings be anonymised. All parties and the Upper Tribunal (the "UT") will, until further direction, refer to the Respondent as the "Taxpayer".

2. Subject to Direction 4 below, this appeal will be heard in public.

3. No party may, without the prior direction of the UT, refer in their written or oral submissions to any details that could reasonably be expected to enable the Taxpayer's identity to be discovered.

4. If a direction of the UT is sought pursuant to Direction 3, the Taxpayer may apply for the appeal, or appropriate parts of it, to be heard in private.

5. The deadline for applying for permission to appeal against these Directions is 30 days after the UT disposes of HMRC's substantive appeal, whether by releasing a decision, the appeal being withdrawn or otherwise.

Reasons

1. The above directions are made by way of determination of an application (the "Application") of the Respondent (the "Taxpayer") made on 29 June 2022 for the following directions to which I will refer as "Requests 1, 2 and 3":

> (1) That the proceedings in the UT be anonymised.
>
> (2) That no details that would or would potentially lead to the identification of the Taxpayer should be made public.
>
> (3) If and insofar as it is necessary to give effect to paragraphs (1) and (2) above, hearings in these proceedings should be in private.

2. Mr Firth helpfully provided some further detail on these applications in advance of the hearing:

> (1) Request 1 is self-explanatory.
>
> (2) Request 2 is not a request for reporting restrictions binding on third parties. Rather, the target of Request 2 is the parties themselves and the UT. Its aim is to ensure that Request 1 is not undermined by the parties during hearings, or the UT in decisions it releases, providing details that would enable the Taxpayer to be identified even though he is referred to in anonymous terms.
>
> (3) Provided Requests 1 and 2 can be accommodated, the Taxpayer does not by Request 3 positively seek a hearing in private at this stage. If something transpires that mean that Requests 1 and 2 cannot be accommodated during a hearing (for example if either party considers it necessary to refer to the Taxpayer by name, or to refer to information that might enable him to be identified), the Taxpayer reserves the right to ask the Tribunal to sit in private for all or part of that hearing.

Procedural background to date

3. The Application can only be understood in the context of the procedural background which I now summarise.

4. The Taxpayer appealed to the First-tier Tribunal (Tax Chamber) (the "FTT") against decisions that HMRC had made relating to his tax liabilities. After making those appeals, he made two categories of application to the FTT. The first (the "Stay Application") was that his appeals should be stayed behind two cases that were proceeding as "lead cases". The second (the "FTT Privacy Application") was that hearings relating to his appeal should be in private and that his identity should be anonymised in documentation produced in connection with the FTT proceedings.

5. In the FTT proceedings, the Taxpayer produced no evidence in support of the FTT Privacy Application although in its determination of that application, the FTT reports that it was

submitted on his behalf that the Privacy Application was made (i) to protect the Taxpayer's private or family life; (ii) to maintain the confidentiality of sensitive information; and (iii) to avoid prejudice to the interests of justice.

6. After some twists and turns that involved the FTT setting aside directions it had made and then reinstating them, the FTT made the following directions (the "FTT Directions") following a video hearing on 19 July 2021 (the "FTT Hearing"):

> 1. This appeal shall be stayed, under rule 5(3) of the Tribunal Rules, until 60 days after the Tribunal disposes of either of the appeals (the 'Lead Appeals') [referred to by name and by the FTT case references] whether the appeals are disposed of by the Tribunal releasing a decision, the appeals being withdrawn or otherwise.
>
> 2. Either party may apply at any time for this stay to be lifted.
>
> 3. Preliminary proceedings in this matter shall be heard in private.
>
> 4. Both parties shall provide to the Tribunal and each other their final representations on the Appellant's application for anonymity not later than 21 days before the substantive hearing.

7. The overall effect of these directions was as follows:

> (1) Significantly for the discussion that follows, they were made without having received any evidence from the Taxpayer explaining the harm he might suffer if hearings were conducted in public.
>
> (2) The phrase "preliminary proceedings" was not used in any technical sense. The FTT had not, for example, directed the determination of any preliminary issues. The reference is to interlocutory proceedings prior to the substantive hearing in the FTT.So that my reasoning in this decision can be cross-referenced to the FTT Directions I too will use the expression "preliminary proceedings"
>
> (3) The FTT proceedings were stayed behind two lead cases. To date the FTT has not yet released any decision in those two lead cases. Therefore, as at the date of the FTT Directions, there was unlikely in practice to be any imminent need for any "preliminary proceedings" unless and until either party applied to lift the stay. The FTT had, in effect, directed that "preliminary proceedings" which were not then in contemplation, and which might never be necessary, should be heard in private.
>
> (4) The FTT made no determination as to whether the substantive hearing would be in private. Resolution of that question was to depend on a later application to be made after the stay was lifted.
>
> (5) The FTT made no anonymity direction restraining any party from publishing details of the dispute, or naming the Taxpayer. I do not accept the Taxpayer's submission that such a direction naturally followed from the direction that preliminary proceedings be in private. If the FTT had wished to impose such restrictions, it would have needed to specify what the restrictions were, precisely what information could not be disclosed and permitted exceptions from the restriction (for example if the information had already become public and to permit

disclosure within HMRC to enable HMRC to perform their statutory functions). The detail of such restrictions cannot be inferred from Direction 3.

(6) If there were any "preliminary proceedings", those would take place in private and, even if there were no preliminary proceedings, the FTT maintains no publicly searchable records of cases. Moreover, HMRC are subject to statutory duties of confidentiality in s18 of the Commissioners for Revenue and Customs Act 2005 ("CRCA"). Therefore, even though the FTT Directions do not grant the Taxpayer anonymity, those directions in combination with the FTT's processes and HMRC's statutory duties had the practical effect of cutting down the prospects of anyone knowing about the dispute unless and until the Taxpayer's application for full privacy or anonymity was determined and refused.

8. The FTT thought that both parties agreed that the FTT should defer, until shortly before the substantive hearing, the question of whether that hearing should be in private and whether the Taxpayer's identity should be anonymised. That caused the FTT to conclude that the Taxpayer's future application for privacy at the final hearing might be rendered futile if, before that final hearing, interlocutory proceedings took place in public. In the Decision the FTT explained its Direction 3 as follows:

> HMRC do not however object to the Appellant's proposal that the Tribunal defer consideration of the application to closer to the substantive hearing date (although they do not concede that interim proceedings should remain anonymised if the application is ultimately refused). I agree with that approach and I have therefore directed, in the interest of fairness and justice, that preliminary proceedings in this matter shall be heard in private to prevent the Appellant's outstanding anonymity application being rendered futile.

9. HMRC applied for permission to appeal against Direction 3 and, when the FTT refused permission, renewed its application to the UT. The UT had some concern that this application might be academic, or perhaps premature given the points made in paragraph 7(3) above. The UT invited the parties to consider whether HMRC's application for permission, and any appeal should be deferred until there were actually "preliminary proceedings" in contemplation perhaps on terms that the Taxpayer would make an accelerated application to the FTT for the substantive hearing to be in private. No agreement was reached. HMRC argued that it was conceptually possible that there could be a contested application to lift the stay in which case the parties would need to know whether such an application should be in private and the UT accordingly proceeded to determine HMRC's application for permission.

10. The UT granted HMRC permission to appeal on the grounds that the FTT erred (i) in directing that preliminary hearings were to be in private without having received evidence from the Taxpayer dealing with the need for such a direction; (ii) by failing to take properly into account the common law on the "open justice principle" and (iii) by failing to consider alternatives to its Direction 3 that were more proportionate having regard to the principle of open justice.

11. By directions made on 9 May 2022, the UT directed that, to "hold the ring" until further order, all parties and the UT itself, were to refer to the proceedings as involving "HMRC v A Taxpayer".

12. By directions of 16 June 2022 the UT required the Taxpayer to make an application for privacy and related directions relating to the UT proceedings, on the basis that the FTT Directions related only to the FTT proceedings. Those directions required the Taxpayer to support any such application with evidence in the form of a witness statement. In response to those directions, the Taxpayer has made the Application. He has not, however, provided a witness statement in support. Instead, he has submitted that the Application can succeed without evidence. HMRC objected to what it perceived to be a breach of the UT's directions in this regard, but the UT declined to take any action reasoning that its directions had not stipulated that it would not consider an application unsupported by evidence and that the purpose of its directions was to obtain a considered application for privacy in the UT which the Taxpayer had duly made.

13. I further directed, at commencement of the oral hearing before the UT, that the hearing on 10 November 2022 was to be in private. I did that because I was concerned that if that hearing was in public, that would defeat the very purpose of the hearing (which was to determine the extent to which the UT proceedings are to be in public or in private) and that it was necessary for the proper administration of justice for that day's hearing to be in private.

The parties' respective positions on the Application

14. The parties are agreed on one matter. The making of the FTT Directions does not formally bind the UT to make any direction of its own as to the anonymity or privacy of the UT proceedings. As the Master of the Rolls said in paragraph 67 of *Pink Floyd Music Ltd v EMI Records Ltd* [2011] 1 WLR 770:

> The fact that the first instance judge granted or refused to permit a private hearing or anonymisation cannot be conclusive of such issues in the Court of Appeal (although the judge's refusal of such relief will, in most cases, render any subsequent application on appeal pointless). A first instance judge's decision on such an issue self-evidently does not bind the Court of Appeal, and cannot determine how an appeal in this court proceeds. However, this court would normally pay close regard to the judge's decision, especially if expressed in a reasoned judgment. None the less, in relation to appeals, the Court of Appeal should not depart from the general rule that litigation is to be conducted in public, unless a judge of that court is persuaded that there are cogent grounds for doing so.

15. However, there agreement ended and the parties were not even agreed on the principles I should apply when determining the Application.

16. The Taxpayer argues as follows:

> (1) The UT has a discretion under its general case management powers set out in Rule 5 of the UT's rules of procedure (the "UT Rules") to grant the Application. The exercise of that discretion needs to take into account the importance of the constitutional principle of open justice. However, the principle of open justice can be departed from in appropriate cases and the less significant the departure the less the justification needed for it. The present dispute relates to interlocutory directions made by the FTT in relation to which considerations of open justice are less strong

than they would be in relation to the substantive determination of the Taxpayer's tax liability.

(2) As matters stand, FTT Directions grant the Taxpayer "interim anonymity" in the sense that his identity will not be revealed before the substantive hearing in the FTT. The UT will need to decide whether the FTT Directions were wrongly made in due course. However, until those directions are set aside, the Taxpayer should continue to have the benefit of them. If the UT declined to grant the Application, the Taxpayer's identity would be made public and he would lose the benefit of the FTT Directions simply as a consequence of HMRC appealing against them and without any determination of the UT that those directions were wrong in law. That is a factor that should cause the UT to exercise discretion to grant the Application.

(3) The Taxpayer does not need to produce evidence as to the harm he would suffer if the interim anonymity granted by the FTT is rescinded. Indeed, it would be positively undesirable for the UT to look at such evidence because that might result in it effectively determining the outcome of the substantive appeal. I will not deal with all the permutations that the Taxpayer canvassed since a flavour of the point can be obtained from the Taxpayer's argument that if, having considered evidence, the UT was minded to refuse anonymity it would be very difficult in practical terms for the UT then to do anything other than allow HMRC's appeal against the Privacy Directions since to do otherwise would result in the UT declining to set aside those directions having itself determined that the Taxpayer did not deserve the anonymity he seeks.

17. Thus, in broad summary, the Taxpayer's approach invites the UT to exercise a discretion in his favour so as to enable the Taxpayer to retain what he regards as the benefit of the FTT Directions until the point, if any, at which those directions are shown to be wrong in law. HMRC take issue with the fundamental premise behind that approach. They submit that the UT does not have the broad discretion for which the Taxpayer argues and is permitted to make any sort of anonymity direction only if to do so is necessary for the proper administration of justice. That, HMRC argue, is a threshold condition that must be met even in relation to appeals against interlocutory decisions. If it is not satisfied, the UT cannot properly grant the Application. A consequence of this approach is that even if the UT considers that the Application represents less of an intrusion on the principle of open justice than would a direction that the entirety of the UT proceedings are to take place in private, the UT still has no power to grant the Application unless the threshold condition is satisfied.

18. HMRC argue that the threshold of "necessity" is not met. The essence of their position is that properly considered, the FTT Directions would not be rendered nugatory if the UT proceedings are fully public with the Taxpayer being named as a litigant. HMRC also argue that the absence of any evidence from the Taxpayer as to harm that he will suffer if the Application is not granted is fatal to the Application. In fact, HMRC go further, inviting me to infer that the Taxpayer's failure to produce evidence of harm indicates that he would suffer no such harm if the Application is refused.

19. To determine the Application, having regard to the significantly differing positions of the parties, I consider I must decide the following issues:

(1) What provisions of the Upper Tribunal's rules of procedure (the "UT Rules"), if any, permit me to grant the Application?

(2) Are HMRC correct to argue that those rules, read in the light of the open justice principle, permit the Application to be granted only if that is "necessary" in the interests of justice? If not, what test should the UT apply instead?

(3) Is the absence of evidence as to harm that the Taxpayer would suffer in the absence of a UT direction preserving his anonymity fatal to the Application?

(4) To what extent, if at all, would granting the Application render the FTT's Directions nugatory, predetermine the outcome of any application for privacy in respect of the substantive FTT proceedings that the Taxpayer chooses to make or result in the UT expressing a preliminary conclusion on HMRC's appeal to the UT?

(5) Would granting the Application infringe the right of the Press to receive and impart information?

(6) How, in the light of the answers to the above questions, should the Application be determined?

The relevant provisions of the Upper Tribunal rules, the need or otherwise for evidence and the applicable test

20. Rule 37 of the Upper Tribunal Rules (the "UT Rules") deals with hearings in private and as follows:

> **37 Public and private hearings**
>
> (1) Subject to the following paragraphs, all hearings must be held in public.
>
> (2) The Upper Tribunal may give a direction that a hearing, or part of it, is to be held in private.

21. The Taxpayer's position is that Rule 37 is not engaged since the Application is not for any hearing to be in private. I agree. HMRC argued in passing that, if the Application is granted, any UT hearing might not be a truly "public" hearing since what both parties can say at that hearing would be constrained by UT directions. I do not accept that submission. In my judgment, a hearing is in public if the public are free to attend it and no impediments are placed in the way of an exercise of that freedom. Any hearing will involve a party making a choice as to what to say and what to leave unsaid. The pleadings will regulate what the parties can say at any hearing, whether public or private. What the parties choose to say at hearing, and what they are permitted to say by applicable directions, does not affect whether a hearing can be said to be in public.

22. Rule 14 of the UT Rules contains the following provisions:

> **14 Use of documents and information**
>
> (1) The Upper Tribunal may make an order prohibiting the disclosure or publication of—
>
> (a) specified documents or information relating to the proceedings; or

(b)any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.

(2) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—

(a) the Upper Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and

(b)the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.

23. The relationship or overlap between Rule 14(1) and Rule 14(2) is not, to my mind at least, clear. However, the parties were agreed that Rule 14(2) is not engaged and therefore if any provision of Rule 14 is applicable to the Application, that could only be Rule 14(1). The Taxpayer's primary position was that Rule 14(1) is not engaged by the Application either. HMRC considered that it could be.

24. The Taxpayer argues that Rule 5 of the UT Rules, which contain general case management powers in Rules 5(2) and 5(3), permits the UT to grant the Application. HMRC disagree, arguing that these provisions are too general in nature and that the UT should apply the more specific rules (in Rule 14(1) and Rule 37).

25. Thus, the parties were far from agreed even as to the applicable provisions of the UT Rules, although they did agree that in principle the UT had power to grant the Application. Whether the Application can be granted under Rule 5(2), 5(3) or 14(1), none of those rules on their face makes any mention of a threshold condition that must be satisfied for the Application to succeed. There is therefore little support on the face of the UT Rules for the proposition that the Application can be granted only if "necessary" to the administration of justice. Indeed, there is a clear contrast between the UT Rules that are essentially silent as to whether any conditions need to be met for the Application to succeed and, for example, CPR 39.2 which applies in the courts and spells out in considerable detail the threshold conditions that must be met for any hearing to be held in private or for any litigant's identity to be anonymised.

26. HMRC argue that the threshold of "necessity" and the applicability of the "open justice principle" is a rule of common-law that necessarily applies to UT proceedings. I was referred to a number of authorities in both the courts and the tribunals that were relied upon as setting out that common-law test. However, the difficulty with that argument is that many of the authorities referred to involved the analysis of specific rules of procedure. For example, in oral submissions, Ms McCarthy KC made it clear that HMRC rely heavily on a decision of the FTT in *Mr D v HMRC* [2017] UKFTT 0850 (TC) and of Martin Spencer J in *Zeromska-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 (QB). These decisions were both made against the backdrop of specific rules of procedure in Rule 32 of the FTT Rules and CPR 39.2 respectively.

27. I quite accept that statements in *Scott v Scott* [1913] AC 417 on the open justice principle include statements of common law, that are not tied to specific rules of procedure. However, I do not find it entirely straightforward to determine how such statements of common-law apply in the context of the UT Rules which, as I have explained, have not sought fit to prescribe any requirements that need to be satisfied for the Application to be granted.

28. I do not need to decide, however, on the extent to which common law regulates my power to grant the Application because, in my judgment, relevant constraints are found in the Human Rights Act 1988 ("HRA"). By s6 of the HRA, it is unlawful for a public authority (which includes the UT) to act in a way which is incompatible with the European Convention on Human Rights (the "ECHR"). Three rights set out in the ECHR are of potential relevance.

29. Article 6 provides, so far as relevant, as follows:

> *Right to a fair trial*
>
> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or 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.

30. In *A (appellant) v Burke and Hare (respondent)* [2022] IRLR 139 ("*Burke and Hare*") the Employment Appeal Tribunal explained that the open justice principle as applicable both at common law and for the purposes of Article 6 has three common manifestations. It requires cases to be heard in public, judgment to be given in public and the names of those who contest cases or who give evidence in them to be given to the public.

31. In this case it is the Taxpayer, whose rights Article 6 are designed to protect, who is seeking a derogation from the "usual" position that all aspects of the proceedings are fully public. However, neither party suggested that the fact that the Taxpayer was prepared to waive certain aspects of his rights under Article 6 was dispositive of the Application. I will therefore follow the approach taken by Lord Summers in the Employment Appeal Tribunal in *Burke and Hare* where he said, at [36]:

> As a rule the litigant claims the protection of art 6 but in this case the need for open justice is a matter for the tribunal. … In these circumstances it is for the tribunal to apply the terms of r50(2) [which was the relevant provision of the Employment Appeal Tribunal Rules] and do so with an eye on the benefits the principle [of open justice] offers to the legal system as a whole rather than individual cases.

32. Article 8 of the ECHR provides, so far as material as follows:

> *Right to respect for private and family life*
>
> 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

33. Article 10 of the ECHR deals with, among other matters, freedom of the press as follows:

> *Freedom of expression*
>
> 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

34. Many of the authorities I was shown were concerned with situations where a litigant was asserting a conflict between Article 6 and Article 8. So, for example, in *HMRC v Banerjee* [2009] EWHC 1229 (Ch) ("*Banerjee*"), the taxpayer asserted that her Article 8 rights to privacy and confidentiality in her financial and other affairs would be infringed by publication of an (Article 6 compliant) judgment that set out full details of those matters that had been the focus of her appeal against decisions that HMRC had made on the deductibility of expenses she incurred. In *Burke and Hare,* the argument was that a litigant's Article 8 rights would be infringed by publication of a judgment that revealed that she had worked as a stripper.

35. Both Articles 6 and Article 8 permit derogations to be made. However, where Article 6 and Article 8 rights conflict, it can be difficult to determine whether it is necessary to derogate from Article 6 or, instead to derogate from Article 8. The correct approach to take in cases of such conflict was explained by Lord Steyn in *Re S (a child) (identification: restrictions on publication)* [2004] UKHL 47 at [17]:

> … neither article has as such precedence over the other … where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary … the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each.

36. For understandable reasons, HMRC placed heavy emphasis in their submissions on the importance of the principle of open justice. A flavour of that emphasis can be seen from HMRC's reliance on the following words of Henderson J at [34] of *Banerjee*:

> …the principle of public justice is a very potent one, for reasons which are too obvious to need recitation, and in my judgment it will only be in truly exceptional circumstances that a taxpayer's rights to privacy and confidentiality could properly prevail in the balancing exercise that the court has to perform.

37. There is no doubt that the principle of open justice is potent. It is a constitutional principle of high importance that has for a long time been right at the heart of this country's legal tradition. It is enshrined in statute law in the HRA. However, Henderson J's words in *Banerjee*, and similar statements in other authorities to which I was referred dealing with conflicts

between Article 6 and Article 8, need to be understood in their proper context. *Banerjee* was not decided as it was simply because the principle of open justice is "potent". As Lord Steyn made clear in *Re S*, the principle of respect for private and family life enshrined in Article 8 is just as potent. Article 6 considerations do not inevitably outweigh Article 8 considerations in cases of conflict. It follows that, when Henderson J spoke of "truly exceptional circumstances" being necessary for Article 8 considerations to prevail, he was referring to the kind of circumstances that, having been subjected to the balancing exercise summarised in *Re S*, justify an exception from the usual principle of open justice; he was not suggesting that Article 6 was somehow a more "important" Convention right that Article 8.

38. However, the presence of a conflict between Article 6 and Article 8 is not the only basis on which Article 6 can be derogated from. That is apparent from the tailpiece to Article 6 itself which permits derogations "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice".

39. Finally, I turn to the question of evidence. HMRC refer to practice in the courts set out in *Practice Guidance (Interim Non-Disclosure Orders)* [2012] 1 WLR 1003, from which the FTT in *Mr D v HMRC* derived assistance. In paragraph 13 of that Practice Guidance, it is said that:

> 13. The burden of establishing any derogation from the general principle [of open justice] lies on the person seeking it. It must be established by clear and cogent evidence.

40. HMRC acknowledge that this guidance applies in the courts where parties are seeking interim non-disclosure orders and that it was not, accordingly, framed with the current Application, which is of a different kind and made in the UT, in mind. However, they submit that the Practice Guidance is reflective of the general law with the result that the Application simply cannot succeed unless supported by evidence.

41. I reject that argument. Of course, if the Taxpayer had been arguing that Article 6 conflicted with his Article 8 rights, the UT would need to perform an "intense focus on the comparative importance of the specific rights claimed in the individual case". Given the requirement for that "intense focus", it is difficult to see how the Application could succeed without evidence in such a case. However, here the Taxpayer is not making his stand by reference to his Article 8 rights. Rather, he argues in essence that if the Application is not granted the FTT Directions would be "undermined" before the point at which they are shown to be wrong in law. It remains to be determined whether this establishes the presence of "special circumstances" referred to in the tailpiece of Article 6. However, I see no reason why "special circumstances" can only be established by reference to evidence.

42. Putting all of that together, in my judgment the correct approach to determining the Application is as follows:

> (1) The principle of open justice is potent and of considerable constitutional significance. That conclusion is only reinforced by the presence of Article 6 of the ECHR.
>
> (2) The Application requests a derogation from the principles set out in Article 6. The fact that the Taxpayer consents to, and positively seeks, that derogation does

not mean it should be granted. Rather, the UT must consider whether a derogation from Article 6 is justified.

(3) I could in principle, having performed the requisite "intense focus on the comparative importance of the specific rights being claimed in the individual case" (in the words of Lord Steyn in *Re S*), derogate from Article 6 in order to give effect to the Taxpayer's Article 8 rights. However, the Taxpayer has produced no evidence as to harm that he will suffer if the Application is not granted. I do not consider that, in the circumstances of this case, a departure from the open justice principle can be justified on the basis of the Taxpayer's Article 8 rights.

(4) Even if there is no conflict with Article 8, Article 6 permits a derogation "to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice". That is self-evidently a high threshold, but there is no rule of law to the effect that it can be made good only by reference to evidence. However, it does carry with it considerations of proportionality: if I do derogate from Article 6, the derogation must be no more than is necessary to achieve the above outcome.

(5) Paragraphs (1) to (4) above deal with Article 6 and derogations from it. Separately it is necessary to consider whether the Application involves a derogation from Article 10 and, if it does, whether that derogation is justified.

Effect on the FTT Directions

43. I have come to the conclusion that unless there is some restriction on the Taxpayer being named as a litigant in a dispute with HMRC in the UT Proceedings, the Taxpayer would lose much of the benefit he derived from the FTT Directions without those directions having been shown to be wrong in law.

44. HMRC's argument to the contrary was based on the following propositions:

(1) The FTT Directions were made without hearing any evidence and therefore the UT proceedings will be "legalistic, impersonal and anodyne". They will not involve any consideration of the Taxpayer's specific factual situation and will be concerned largely with the pure legal question of whether the FTT could properly make those directions without evidence. The only facts (the "Three Facts") that will be revealed by the UT proceeding fully in public are (i) the Taxpayer's name; (ii) the fact that he has some kind of dispute with HMRC that is the subject of an appeal to the FTT and (iii) the fact that the FTT made the FTT Directions granting some aspect of privacy in those proceedings. Public knowledge of the Three Facts alone would not of themselves prevent the Taxpayer from benefiting from the FTT Directions. Nor would the Three Facts render nugatory any application for privacy in relation to the substantive proceedings before the FTT as the FTT would retain its power to make privacy and other directions that took into account the Three Facts being in the public domain.

(2) Therefore, the Taxpayer's "legalistic" argument that the Application had to be granted in order to preserve the benefit of the existing FTT Directions, or the prospect of making a successful application for privacy in the FTT proceedings,

must be rejected. It follows that the UT could only properly grant the Application if satisfied that public awareness of the Three Facts will itself necessarily cause the Taxpayer harm. However, since the Taxpayer has not put in evidence the UT cannot be satisfied of this.

(3) HMRC go further. They argue that the Taxpayer's failure to produce evidence of harm that he would suffer if the Three Facts are revealed (despite the UT's directions referred to in paragraph 12) leads inexorably to the conclusion that he would suffer no such harm. It follows that it the UT would be falling into an even greater error than the FTT had if it granted the Application. The FTT only granted privacy in relation to "interim proceedings" without evidence. By contrast, if it granted the Application, the FTT would be granting anonymity in respect of the entire UT proceedings in circumstances where there was a clear inference that the Taxpayer would suffer no harm if those proceedings took place on a fully named basis as is the norm.

45. The FTT Directions were not made because the FTT reached any conclusions about the nature of the underlying dispute or of the Taxpayer's personal circumstances. The FTT made those directions because it considered that they followed naturally from the parties' agreed position that a decision on the privacy or otherwise of the substantive hearing should be deferred (see paragraph 8 above). The UT proceedings will therefore focus on whether the FTT was entitled to take that approach rather than on the details of the Taxpayer's position. I therefore agree with HMRC that in practice the UT proceedings need not involve any material discussion of the Taxpayer's situation going beyond the Three Facts summarised in paragraph 44(1). In his oral submissions, Mr Firth canvassed some examples of situations in which he considered that he might need to provide some details of the underlying dispute to defend HMRC's appeal. However, I agree with HMRC that these situations are unlikely to arise in practice and, even if they did, I am satisfied that Mr Firth could choose his words sufficiently carefully to avoid having to go much beyond the Three Facts in his own submissions.

46. Therefore, the question is what, if any, relevant adverse consequences would flow from the Three Facts becoming known as a consequence of the UT proceedings not being anonymised. If HMRC's appeal to the UT succeeds, then there would no such adverse consequences since in that scenario, the FTT Directions would be shown to have been wrongly made. Therefore, the scenario to be considered, and accordingly the focus of the next paragraphs, is if HMRC's appeal fails and so the FTT Directions stand.

47. Even in that scenario, HMRC argue that there would be no adverse consequences for the Taxpayer. Any "interim proceedings" could still be in private as ordered in the FTT Directions and since interlocutory decisions of the FTT tend not to be published, there would be no question of the public being able to piece together information from a combination of the Three Facts and an (anonymised) interlocutory decision. Moreover, argue HMRC, the Taxpayer could still sensibly apply for the substantive FTT hearing to be in private. If the FTT acceded to that request it would already need to answer difficult questions about the nature of the decision, if any that it publishes. That substantive decision, since it concerns whether expenses were incurred wholly and exclusively for the purposes of the Taxpayer's trade will necessarily involve an examination of the Taxpayer's trade raising the question that publication of an anonymised decision following a private hearing might enable the Taxpayer to be identified. If publication of the Three Facts made that risk more acute, the Taxpayer could argue as much

before the FTT and the FTT could, in an appropriate case, decide not to publish an anonymised decision if it agreed to sit in private at the substantive hearing.

48. HMRC's arguments that I have summarised in paragraph 47 focus on what might happen in the future course of the FTT proceedings. In my judgment, they focus insufficiently on what will happen now if the Application is not allowed. As matters stand, the practical effect of the FTT Directions combined with HMRC's obligations under CRCA and the FTT's processes (including the absence of a published index of cases) is that the public are unlikely to be alerted to the fact that the Taxpayer is party to any dispute with HMRC or that he has obtained any measure of privacy or anonymity in relation to that dispute. However, if the Taxpayer's Request 1 is not granted, his identity as a litigant in a tax dispute with HMRC will become known, not least because the UT maintains a public register of cases in which his name would appear. In my judgment, it is by no means fanciful to suggest that someone equipped with the Taxpayer's name from the UT's register of cases could make enquiries of the FTT with a view to obtaining details of the underlying tax dispute going beyond the Three Facts. True it is that the Taxpayer might successfully argue that details of the FTT dispute should not be made available at this stage. He might choose, in response, to accelerate the making of a full privacy application in the FTT. However, a refusal of Request 1 would, in my judgment remove much of the practical effect of the FTT Directions (which for the purposes of this part of the analysis are assumed to have been validly made) by making public matters which are currently not in the public domain.

49. In my judgment, HMRC's arguments also understate the implications for the future if (i) the FTT Directions are shown to have been properly made but (ii) the UT proceedings are not anonymised. Since January this year, there has been just one anonymised decision of the FTT published on BAILII. Therefore, if there were "preliminary proceedings" in the FTT in private and the FTT chose to publish an anonymised decision following those preliminary proceedings, a member of the public or a journalist would have a good chance of "joining the dots" to work out the identity of the taxpayer whose affairs are dealt with in those preliminary proceedings. If the preliminary proceedings needed to refer to details of the underlying dispute, this process of joining the dots could result in much more than the Three Facts becoming public.

50. Of course, as I have noted, there may be no preliminary proceedings. The FTT may choose not to publish a decision following such proceedings as take place. However, the future cannot be predicted. With anonymised proceedings in the UT, the Taxpayer could be confident that the practical effect of the FTT Directions combined with HMRC's duties under CRCA and FTT processes would continue. Even if there are future preliminary proceedings in the FTT, the public will not be alerted even to the fact that he has a dispute with HMRC, still less the detail of that dispute. However, if the UT proceedings are not anonymised, then to preserve the status quo, the Taxpayer may have to persuade the FTT not to publish any (even anonymised) decision in interim proceedings and, if the FTT refuses, face the possibility of the public joining the dots so as to discover that he was the litigant behind an anonymised FTT decision.

51. A similar point can be made in relation to a future privacy application in the FTT. The FTT expressly made its decision so as to preserve (as the FTT saw it) the Taxpayer's ability to make a full privacy application in relation to the substantive FTT proceedings in the future. The correctness or otherwise of that decision is yet to be determined. HMRC are no doubt correct to say that, whether or not the UT anonymises the Taxpayer's identity, the FTT will have to

answer difficult questions about the form of decision it publishes if it sits in private. The subject matter of the dispute suggests a possibility that the Taxpayer's identity and trade will be relevant to the question whether payments he made were deductible raising the possibility that even an anonymised decision might reveal his identity. However, I do not agree that the anonymisation or otherwise of the UT proceedings has no bearing on a privacy application in the FTT. If the UT proceedings are not anonymised, if and when the Taxpayer comes to make that privacy application in the FTT, he will have to meet the objection that his identity as a litigant in a dispute with HMRC is already public knowledge even if HMRC's appeal against the FTT Directions fails. No such objection could be made if the UT proceedings are anonymised.

52. There is also, in my judgment, an obvious consequence for the Taxpayer in the second of the Three Facts being made public, namely that the Taxpayer sought some privacy in relation to the FTT dispute. Publication of that fact obviously invites speculation as to what precisely about the dispute is so sensitive that the Taxpayer wishes to keep it confidential. The Taxpayer could have no complaint if questions such as these are asked after a point at which it has been determined that the FTT Directions were wrong in law. However, if the FTT Directions are correct in law, the Taxpayer could come under some pressure to explain himself simply because HMRC made a failed legal challenge to those directions.

53. It follows that, while I broadly accept the premise of HMRC's argument set out in paragraph 44(1), that only the Three Facts are likely to be discussed during the UT proceedings, I do not accept the conclusion that HMRC draw from that premise.

54. I do not accept HMRC's argument summarised in paragraph 44(2). There is force in what HMRC describe as the Taxpayer's "legalistic" argument since, as I have explained, he will suffer consequences that might fairly be described as adverse before a point in time at which the FTT Directions are shown to have been wrong in law. As I have explained in paragraph 41, evidence is not a legal pre-requisite for the Application to succeed. The Taxpayer succeeded in obtaining the FTT Directions even though he placed no evidence as to harm before the FTT. Since (rightly or wrongly) the Taxpayer succeeded in obtaining the FTT Directions without producing evidence to the FTT, I do not consider it inherently objectionable for him to retain the practical effect of those directions, without any need to produce evidence to the UT, until the FTT Directions are shown to be wrong in law.

55. I also agree with Mr Firth that the Taxpayer risked putting himself in a difficult position if, having obtained the FTT Directions without putting forward evidence of his personal circumstances, he now puts forward evidence to the UT in support of the Application. HMRC are of course correct to point out that the UT proceedings are not concerned with the detail of the Taxpayer's personal circumstances, but rather with whether the FTT's decision was available to it as a matter of law. However, I can quite understand the Taxpayer's reluctance to have the UT appeal proceeding against a backdrop of the UT having analysed evidence that the FTT did not find it necessary to consider.

56. Nor do I accept that evidence is needed to underpin the analysis I have set out in paragraphs 45 to 54 above. The UT needs no evidence as to its own procedures and those of the FTT which are dealt within in paragraphs 45 to 51. No evidence needs to be given, or indeed could be given, as to how the public or journalists might react if they knew that the Taxpayer had

requested privacy as regards aspects of the FTT proceedings (see paragraph 52). That is a matter on which the UT is entitled to make its own evaluative judgment.

57. I will not make the inference for which HMRC argue summarised in paragraph 44(3). The Taxpayer has chosen to put forward no evidence of harm because he argues that no evidence is needed for the Application to succeed. That represented a gamble on his part since, if evidence is needed, his Application would necessarily fail. HMRC's approach effectively invites me to conclude that, even if the Taxpayer is right, and evidence of harm is not needed, I should still infer a positive absence of harm if the Three Facts are published.

Whether a derogation from the open justice principle is necessary

58. I have been referred to a number of authorities dealing with a conflict between Article 6 and Article 8. Neither party was able to show me any authority dealing with a situation where an inferior court or tribunal grants privacy or anonymity, there is an appeal against that decision and the question arises whether the appeal proceedings should be in private or anonymous. In my judgment, the reason for the absence of authority is because the situation arises infrequently. There are special circumstances present in this case.

59. I have concluded that, in those special circumstances, some derogation from the open justice principle is necessary because publicity in the appeal proceedings would prejudice the interests of justice. An important feature of the system of justice in this country is that decisions of lower courts or tribunals are to stand unless shown, following an appeal process, to be wrong. HMRC are sharply critical of the fact that the FTT Directions were made without any evidence as to the harm that the Taxpayer would suffer if his name, or details of his dispute with HMRC are made public. They will have the opportunity to make those arguments before the UT in due course. However, as matters stand, the FTT Directions have not been shown to be wrong in law.

60. That means, in my judgment, that the Taxpayer should not be denied the legal and practical consequences that flowed from the FTT Directions simply because HMRC have chosen to make an appeal against the FTT Directions whose success or failure is yet to be determined. I have explained why, in my judgment, a failure to make some sort of anonymity direction in the UT would deny him some of the practical and legal consequences of those directions.

61. I recognise that directions that have the effect of concealing the Taxpayer's identity represent a significant interference with the principle of open justice even if the UT appeal is otherwise in public. HMRC are correct to submit that providing the Taxpayer with anonymity following a public hearing is not a "halfway house". As Lord Rodger observed at [63] to [65] of *In re Guardian News and Media Ltd* [2010] 2 AC 697, freedom of the press and open justice typically requires the names of all parties to be made public because the public find stories about real individuals more interesting that bland decisions from which identifying information is removed. However, I do not consider that anonymity in this case operates disproportionately. The proceedings in the UT are simply concerned with the correctness or otherwise of an interlocutory decision made by the FTT. They will not represent any final determination of the substantive dispute between HMRC and the Taxpayer. I respectfully agree with the following statement of Lord Summers in *Burke and Hare*:

> The public interest in open justice is at its strongest when it restricts or interferes with reporting or publishing the merits of the case. That will usually be at the point when evidence is led, though it may be when submissions are made on legal issues that are in dispute. At that stage the identities will usually be disclosed and may be published. I am not persuaded that the principle of open justice has the same weight at the stage of a preliminary application designed to establish whether an [anonymity order] should be made.

62. Since I am not basing the need for a derogation from Article 6 on the countervailing need to respect the Taxpayer's Article 8 rights, but rather on the presence of other "special circumstances" set out in paragraphs 59 and 60 which, in my opinion, make it strictly necessary to depart from the principle of open justice, I do not need evidence as to the Taxpayer's personal or family circumstances.

An infringement of Article 10 of the ECHR?

63. I have considered whether the directions I propose to make involve any infringement of Article 10. Article 10 would obviously be engaged if I made a "reporting restriction" that precluded the press from reporting details about this case or the Taxpayer. The direction I am proposing to make does not do this. The UT appeal will be in public and, unless the UT orders otherwise, the press will be free to report anything that takes place during that public hearing. However, in practice, the press will not learn the identity of the Taxpayer or any information that will identify him if they attend that public hearing and in part that will be because of the UT's direction.

64. Without deciding the point, it seems to me possible that this results in some infringement of Article 10. Article 10 sets out a freedom to receive and impart information without interference by a public authority. Had I not made the directions I have, it is reasonable to assume that the press, and their readers, could have "received" information consisting of the Taxpayer's identity. My directions are designed to prevent that happening. I will, therefore, proceed on the basis that there is some infringement of Article 10.

65. Ms McCarthy KC helpfully suggested to me the possibility of seeking submissions from the Press Association. On balance, I have decided not to seek those submissions. That is because, even if the directions I propose to make do infringe Article 10, Article 10 permits derogations "for the protection of the reputation or rights of others, …or for maintaining the authority … of the judiciary" to the extent such derogations are authorised by law and necessary in a democratic society. The reasons I have set out above why a derogation from Article 6 is necessary have satisfied me that a derogation from Article 10 would also be necessary.

Conclusion

66. For all those reasons, in principle, I am prepared to grant the Application. In some respects, I considered the directions the Taxpayer proposed had the potential to operate disproportionately by tying HMRC's hands for all time as to the submissions they could, or could not, make at the hearing. Therefore, when I circulated this decision in draft to the parties, I invited their comments on a slightly amended form of direction designed to make the directions more proportionate. Having considered those comments, I have decided to make the directions set out at the beginning of this decision notice.

67. HMRC invited me to specify a clear end date by when the anonymity granted by Direction 1 will come to an end. They suggested that, if HMRC win their substantive appeal before the UT, the anonymity should come to an end and the UT should publish its decision, in the usual way, so as to name the Taxpayer.

68. I am sympathetic to that request. I have made the directions I have largely because of my conclusion that to do otherwise would deny the Taxpayer the practical and legal effect of the FTT Directions before the point (if any) at which those directions are shown to be wrong in law. There is therefore an obvious force to the proposition that anonymity in the UT should cease if the FTT Directions are shown to be wrong in law.

69. I have nevertheless concluded that the anonymity provided by Direction 1 should be expressed to continue "until further direction" of the UT. In my judgment, there are some details that would need to be finalised as to the terms on which the anonymity order is lifted should HMRC's appeal succeed. For example, it might be appropriate for the lifting of anonymity to await the outcome of an application for permission to appeal to the Court of Appeal. Even if there is no appeal to the Court of Appeal, it may be appropriate for the Taxpayer to have a final opportunity to consent to the UT allowing HMRC's appeal to avoid a publicised decision. I raise these points of detail, not to decide them, but to explain why I consider it premature to determine now how the anonymity direction should be lifted if HMRC's appeal succeeds. Both parties will have the opportunity to make submissions at the UT hearing on this matter. If there is a change of circumstances prior to the hearing, either party can apply for the directions set out above to be varied or lifted.

UPPER TRIBUNAL JUDGE

Jonathan Richards

RELEASE DATE: 19 December 2022

[redacted]

From: [redacted]
Sent: 18 January 2023 14:37
To: uttc; [redacted]
Subject: RE: UT-2022-000070 The Commissioners for HM Revenue and Customs v Taxpayer MORR:00344000003596

Dear Mr [redacted]

UT-2022-000070 The Commissioners for HM Revenue and Customs v Taxpayer

Thank you for your email of 19 December 2022.

After seeking to find a hearing window within the timeframe specified, the parties have managed to find mutually agreeable dates slightly outside the window for a 1/1.5 day hearing in the above matter from 22nd – 24th November 2023. All parties have these dates held in their diaries until receipt of confirmation from the Upper Tribunal.

Separately, on reviewing the UT's decision of 19 December 2022 (**"the Decision"**), we note that the fourth sentence of paragraph 69 reads:

"Even if there is no appeal to the Court of Appeal, it may be appropriate for the Taxpayer to have a final opportunity to consent to the UT allowing HMRC's appeal to avoid a publicised decision."

We note that the UT goes on to explain that it is not deciding this point at this time. For the avoidance of doubt, there should be no expectation on the Taxpayer's part that HMRC will consent to the course of action suggested in the sentence quoted above.

The fact that HMRC has not commented on other aspects of the Decision at this stage should not be taken as implicit acceptance/agreement.

I confirm that the Taxpayer's representatives have been copied to this email.

Thanks and kind regards,

[redacted]

OFFICIAL-SENSITIVE

From: [redacted]@justice.gov.uk> **On Behalf Of** uttc
Sent: 19 December 2022 09:39
To: [redacted]
Subject: RE: UT-2022-000070 The Commissioners for HM Revenue and Customs v Taxpayer MORR:00344000003596

Dear [redacted]

Please see attached Decision / Directions arising from the Case Management Hearing. I have been asked by Judge Richards to issue both of the above Blackline and Clean. Judge Richards also believes that we should move forward to Listing the Substantive Hearing if possible within the next 6 Months. In that regard I attach a copy of our recently revised Standard Directions without dates for completion filled in at this stage for your information. Please could the parties liaise with a view to providing possible windows for the hearing up to July 2023 noting that it is likely a High Court Judge will be required for the Hearing which will necessitate at least 3 or 4 consecutive days and if the parties estimate for the length of the hearing exceeds 2 Days at least a 5 day period will be required. You may also wish to proceed with the tasks indicated in the first 3 dated directions to save time later on.

If Possible could you either provide the Dates of give an update on the position by 18 January 2023.

Yours sincerely

[redacted]

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From: [redacted]
To: uttc
Cc: [redacted]
Subject: The Commissioners for HMRC v The Taxpayer [2024] UKUT 12 (TCC)
Date: 17 April 2024 15:34:34
Attachments: image001.png

Dear Sir/Madam,

The Commissioners for HMRC v The Taxpayer [2024] UKUT 12 (TCC)

We write in response to the Tribunal's two emails to the parties dated 15 April 2024 and timed at 12:06 and 12:51 respectively.

HMRC has no objection to the Tribunal informing Mr Brown of the stage which proceedings have reached, to the Tribunal providing Mr [redacted] with A Taxpayer's application and (in due course) HMRC's response and the Tribunal's decision, or indeed to the Tribunal responding similarly to any further applications it may receive that are along these lines.

The Appellant's representatives have been copied into this email.

Yours faithfully,

HM Revenue & Customs logo

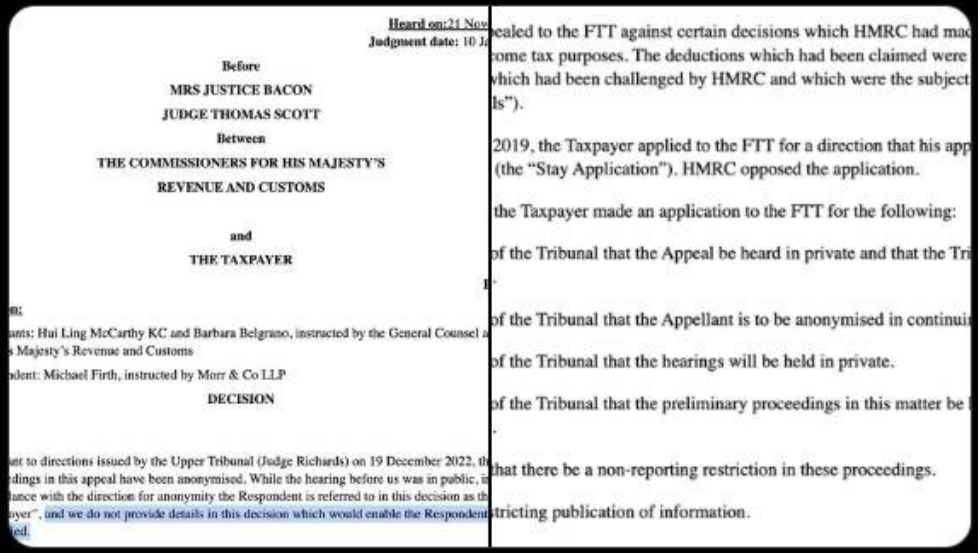
[redacted]

[redacted]

Post

Dan Neidle ✓
@DanNeidle

The big tax mystery of 2024 – who's trying to keep their dispute with HMRC out of the papers?



Heard on:21 Nov
Judgment date: 10 J

Before

MRS JUSTICE BACON

JUDGE THOMAS SCOTT

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

and

THE TAXPAYER

[illegible]:

[illegible]ants: Hui Ling McCarthy KC and Barbara Belgrano, instructed by the General Counsel [illegible]s Majesty's Revenue and Customs

[illegible]ndent: Michael Firth, instructed by Morr & Co LLP

DECISION

[illegible]ant to directions issued by the Upper Tribunal (Judge Richards) on 19 December 2022, th[illegible]dings in this appeal have been anonymised. While the hearing before us was in public, i[illegible]dance with the direction for anonymity the Respondent is referred to in this decision as th[illegible]ayer", and we do not provide details in this decision which would enable the Respondent[illegible]fied.

[illegible]ealed to the FTT against certain decisions which HMRC had mad[illegible]come tax purposes. The deductions which had been claimed were [illegible]which had been challenged by HMRC and which were the subject[illegible]ls").

[illegible]2019, the Taxpayer applied to the FTT for a direction that his app[illegible](the "Stay Application"). HMRC opposed the application.

[illegible]the Taxpayer made an application to the FTT for the following:

[illegible]of the Tribunal that the Appeal be heard in private and that the Tri[illegible]

[illegible]of the Tribunal that the Appellant is to be anonymised in continui[illegible]

[illegible]of the Tribunal that the hearings will be held in private.

[illegible]of the Tribunal that the preliminary proceedings in this matter be [illegible]

[illegible]that there be a non-reporting restriction in these proceedings.

[illegible]stricting publication of information.

2:27 pm · 12 Jan 2024 · **1.8M** Views

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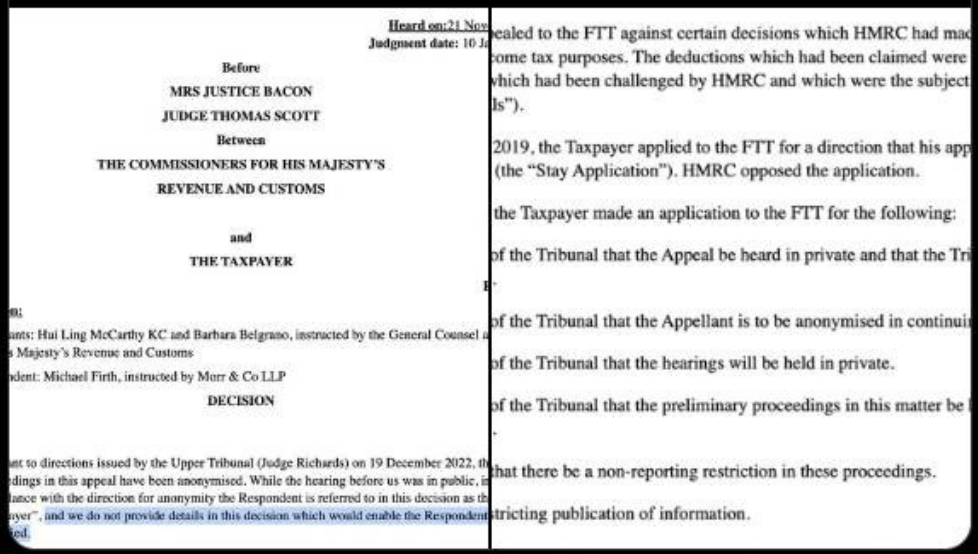
Post

Carol Vorderman ✓
@carolvorders

Who's trying to keep their tax dispute with HMRC out of the papers? @DanNeidle asks ⏬

Hmmmmm.....🤔

> **Dan Neidle** ✓ @DanNeidle · 12 Jan
>
> The big tax mystery of 2024 – who's trying to keep their dispute with HMRC out of the papers?



Before
MRS JUSTICE BACON
JUDGE THOMAS SCOTT
Between
THE COMMISSIONERS FOR HIS MAJESTY'S
REVENUE AND CUSTOMS
and
THE TAXPAYER

DECISION

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...of the Tribunal that the hearings will be held in private.

...of the Tribunal that the preliminary proceedings in this matter be ...

...hat there be a non-reporting restriction in these proceedings.

...stricting publication of information.

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From: [redacted] on behalf of uttc
To: [redacted]
Subject: FW: The Times - lifting of anonymisation
Date: 15 April 2024 12:06:33
Attachments: image001.png
image002.gif
image003.gif
image004.jpg
image005.gif
image006.jpg

Dear Sirs,

The email below from the Times has been referred to Judge Scott. He notes that it is possible that the Tribunal may receive further such requests, and asks whether the parties object to the Tribunal informing Mr Brown of the stage which proceedings have reached?

Yours sincerely

[redacted]
Tribunal Clerk

Upper Tribunal (Tax and Chancery Chamber) | HMCTS | Rolls Building, Fetter Lane | London | EC4A 1NL
[redacted]

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From: [redacted]@thetimes.co.uk>
Sent: 15 April 2024 11:13
To: uttc <[redacted]@Justice.gov.uk>
Subject: The Times - lifting of anonymisation

Dear Sir/Madam

I am a journalist with The Times newspaper.

I would be very grateful for your assistance in finding out who to contact in relation to the anonymisation of a taxpayer in a judgment of the Upper Tribunal (Tax and Chancery Chamber).

The case is UT/2022/000070 before Mrs Justice Bacon and Judge Thomas Scott. If it assists, the judgement, [2024] UKUT 12 (TCC), is here:
https://www.bailii.org/uk/cases/UKUT/TCC/2024/12.html

I understand from the HMRC that the taxpayer applied for permission to appeal against the decision to lift the anonymity, which was denied by the Upper Tribunal.

I am told that the taxpayer may still apply to the Upper Tribunal for anonymisation of their case on a different basis.

I am trying to find out the timescale for the application for anonymisation on a different basis, and if that deadline has passed, when the taxpayer will be identified.

Yours sincerely

[redacted]

The Times

[redacted]

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[redacted]

From: [redacted]@news.co.uk>
Sent: 26 April 2024 15:23
To: [redacted]
Cc: [redacted]
Subject: Urgent: UT/2022/000070
Attachments: TML to Upper Tribunal 26.04.24.pdf

> You don't often get email from [redacted]. Learn why this is important

Dear Sirs,

Please see the attached letter.

Yours faithfully,

Times Media Legal

[redacted]

--
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TIMES MEDIA LIMITED

11th Floor, 1 London Bridge Street, London SE1 9GF.

[redacted]

From the Legal Department ***Our Ref.:*** TT/TAX/24/LL

Date: 26th April 2024 ***Your Ref.:*** UT/2022/000070

Upper Tribunal (Tax and Chancery Chamber)
5th Floor
Rolls Building
Fetter Lane
London
EC4A 1NL
United Kingdom

BY EMAIL:
[redacted]

Dear Tribunal,

Re: Case Number: UT/2022/000070

I am writing on behalf of Times Media Limited in relation to the above case.

Further to the enquiries made by David Brown, Chief News Correspondent of *The Times,* we understand that the taxpayer has made a further application for anonymity which will be decided on the papers, potentially imminently.

Please be advised that our client intends to make submissions on this matter and anticipates being able to do so by Tuesday 30 April 2024.

Please could we ask that we are provided with a copy of the application and grounds by return for the purposes of legal advice. I confirm that I will receive them on a not-for-publication basis.

Yours sincerely,

[redacted]

Senior Legal Advisor

[redacted]

From: Mark [redacted]
Sent: 01 May 2024 14:53
To: uttc
Subject: RE: UTT decision: The Commissioners for HMRC v The Taxpayer [2024] UKUT 12 (TCC)

You don't often get email from [redacted] Learn why this is important

Thank you for sending this to me Andrew, I really appreciate it.

I'd also be grateful it you could pass my thanks to Judge Scott. If possible, could you also pass along my thoughts:

1. I have read the FTT and UT decisions as well as the respondent's current submission as well as HMRC's response.

2. I support open justice, and this includes the reporting of judgements and open legal reasoning. If the UT were to grant anonymity in this case, I believe it would be wrong to do this in private and without publishing the reasoning for doing so.

3. The respondent is trying to hide behind anonymity and, because of my thoughts on open justice, my starting point is that there should be no anonymity unless there are compelling reasons for doing so.

4. An example of where I would accept that there is a compelling reason for privacy is to protect vulnerable individuals. As I noted in my original email, an example of this seems to be *The Commissioners for HMRC v A Tax Payer [2023] UKUT 182 (TCC)* where the taxpayer's sister was ill and the sister's circumstances, including her risk of suicide, went to the heart of the taxpayers unsuccessful appeal, resulting in significant amounts of being tax due. Just because someone is, for example, famous or influential should not be sufficient.

5. Neither of the decisions in this case, nor the respondent's current submission set out any specific personal circumstances that mean that such protection is necessary.

6. Paragraph 9 of the UT's decision mentions that privacy and anonymity is required for three very broad and generic reasons that would seem to be apply equally in almost every single case.

7. If anonymity is granted, for no specific personal reasons, presumably requesting anonymity will become standard practice in similar situations. As the FTT would be bound to follow this decision, it would mean that generic grounds would be sufficient to grant anonymity. I do not believe this is to be in the interests of open justice. For example, it would undermine public trust in the justice system and mean that there is one rule for "us", and one rule for the rich and influential who could afford to apply for anonymity.

8. After reading the UT's decision when it was first published, I looked at the facts set out and speculated on the identity of the individual taxpayer. Using open-sourced information, I believe I have narrowed the respondent's identity down to a handful of people. I don't believe that this should change whether anonymity should be granted but I do think that the ability to do this is something that the FTT and UTT should consider when deciding how to anonymise decisions in the future.

9. I also raise this last point because I see from HMRC's submissions that The Times newspaper is interested the decision as to whether to grant anonymity. If a newspaper (or other organisations) were to do the same as I did then I could see (i) it would be relatively easy to identify a small number of individuals who may be the respondent (by analogy, members of the England football team), but (ii) difficult to identify with any certainty the identity of the respondent (by analogy, the striker in the England football team). If anonymity is granted, one way of whittling down the identity of the respondent would be for journalists to ask all members of the potential group of individuals who may be the respondent (the England football team)

whether they are the respondent (the striker) or not. I therefore believe that any decision to grant anonymity should also be balanced against the potential intrusion to others.

Kind regards

Mark

[redacted]

From: [redacted]@justice.gov.uk> **On Behalf Of** uttc
Sent: Wednesday, May 1, 2024 12:56 PM
To: Mark [redacted]
Subject: RE: UTT decision: The Commissioners for HMRC v The Taxpayer [2024] UKUT 12 (TCC)

Dear [redacted]

Your email of 12April 2024 has been referred to Judge Scott. He has asked us to inform you as follows. The deadlines for appealing the Upper Tribunal's decision have passed and no permission has been granted. The taxpayer has made an application for anonymity to be continued. HMRC have opposed that application. The relevant documents are attached. PLEASE NOTE THAT THESE PAPERS ARE SUPPLIED TO YOU ON A PERSONAL BASIS AND MAY NOT BE PUBLISHED OR REPRODUCED IN WRITTEN OR ELECTRONIC FORM OR TRANSMITTED TO ANY THIRD PARTY. The Upper Tribunal has yet to consider the application. It has not yet been decided whether the application will be considered at a hearing or on the papers. Anonymity will continue until the Tribunal has done so.

Yours sincerely

[redacted]
Tribunal Clerk
Upper Tribunal (Tax and Chancery) | HMCTS | 5th Floor, Rolls Building, Fetter Lane | London | EC4A 1NL
Phone: 020 7612 9730
Team email: [redacted]@justice.gov.uk

Web: www.gov.uk/hmcts

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If a party has appointed a professional representative, all forms and documents submitted on or after 2 November 2023 must be provided by CE-File

From: Mark [redacted]
Sent: 12 April 2024 12:15
To: uttc <[redacted]@Justice.gov.uk>
Subject: UTT decision: The Commissioners for HMRC v The Taxpayer [2024] UKUT 12 (TCC)

Thank you for our two telephone conversations this morning and for agreeing to pass this to the judge who is considering the further application from the taxpayer. I should apologize that I'm writing this on a mobile phone on a crowded train and so there may be some typos.

Kind regards

Mark

I have been looking for signs that the taxpayer in this case has received permission to appeal to the Court of Appeal but have not seen anything about this or an updated decision and so I contacted your offices. It seems that the taxpayer did not apply for permission to appeal but made some other application to maintain anonymity and that this application has not yet been decided.

I would like to attend any further hearing about this new application if possible. Is that possible? If so, could I be given detail of the hearing?

I would also like a copy of the papers relating to the hearing please. I understand that they may need to be redacted to preserve anonymity.

I would like to see the papers and attend the hearing as I have a long-standing interest in tax avoidance and tax abuse. I firmly believe that it is important to trust in the tax system that it is open to public scrutiny unless that are very exceptional reasons for privacy. Everything I have read in this case at the FTT and UTT suggests that there is no such exceptional reason. This is on stark contrast to other decisions, such as [2023] UKUT 00182, where there were strong reasons for granting anonymity.

I have no commercial interest in this.

For completeness, I do have an unpaid role in relation to tax avoidance and tax abuse but this is not linked to my request.

I also help others with tax avoidance situations and writing about tax avoidance but that is ad hoc. For example, there is a lot of furor around how individuals are caught up by the loan schemes and how promoters can hide behind complex structures and get away with selling dodgy schemes. I try to provide insight and balance with this but this is very hard to do when there is a lot of public anger around the perception that there is one rule for us and one rule for them. Similarly, there is also the perception that high profile individuals get away with things and case such as this one reinforces that perception.

I believe that I am required to cite authority as to why I am allowed access to the papers. The case of Cider Of Sweden Limited v HMRC v Ernst & Young LLP [2022] UKFTT 76 sets out in some the right for a third party to see the statement of case (as defined) and set out in Rule 5.4C. I believe that Cape Intermediate Holdings Limited v Dring [2019] UKSC 38 also makes clear that tribunals grant third-parties access to documents.