

TRANSPARENCY

Secret law <<< >>> is bad law

More than 40 years ago, legal scholar Kenneth Davis called it an “abomination,” and for almost as long, Tax Analysts has been fighting to make tax law – and its administration – more transparent.

It’s a fight worth having, especially since tax laws are inherently coercive, requiring the sacrifice of money, privacy, and some degree of freedom. Taxes may be, as Justice Oliver Wendell Holmes once observed, the price we pay for civilization. But taxpayers need to understand the terms of that transaction – and that requires information.

Information, however, also comes at a price. Official transparency often conflicts with another imperative: taxpayer privacy. People have a right to keep their financial lives and business practices under wraps. Indeed, privacy is part of the bargain that Holmes described – taxpayers agree to be honest with authorities in return for a promise that their secrets will remain their own.

Reconciling transparency with privacy is difficult, requiring hard work and nuanced decision-making by tax officials. Unfortunately, the IRS has often tried to simplify its task by choosing privacy over transparency at almost every turn. Sometimes the agency’s preference for privacy is a good thing, shielding taxpayers from prying eyes. Too often, however, the IRS has also used privacy as an excuse to shield itself from public scrutiny.

For a bureaucracy, the safe answer is always the secret one, at least over the short term. Less information means less supervision, and unfettered freedom is great for bureaucrats.

But it’s terrible for citizens. And ultimately, it’s bad for the bureaucrats, too. In recent decades, secrecy has made the IRS politically vulnerable, contributing to its popular image as an overpowerful, unaccountable federal agency.

For the most part, we rely on Congress to keep an eye on the IRS. And for almost a century, lawmakers have taken that job seriously. As one committee observed back in 1926: “Congress, in imposing a system of taxation the administration of which necessarily involves the exercise of so much discretion, assumes some duty to the public to see that such discretion is not abused.”

But Congress is only part of the answer. Real transparency requires that the IRS release information not just to elected officials, but to the general public as well. If sunshine is the best disinfectant, then the brightest light comes from the American people.

Congress, moreover, can also be part of the problem when it comes to transparency. In a well-intentioned effort to protect taxpayer privacy, lawmakers have given the IRS a broad legislative excuse to resist disclosure. They have also failed to lead by example, shrouding the tax legislative process in their own version of official secrecy. If tax administration would benefit from greater transparency, so, too, would tax legislation.

TRANSPARENCY (continued)

Tax Analysts has been fighting for tax transparency — at every stage of the taxing process — since its founding in 1970. Using the Freedom of Information Act, we have battled for access to key documents in policy and administration. In 1972 the organization sued the Internal Revenue Service for access to private letter rulings (PLRs) and technical advice memoranda (TAMs) — crucial guidance documents providing legal advice to specific taxpayers and IRS field agents. Over the years, this guidance had become a sort of “secret law” whereby the IRS cut private deals with particular taxpayers and then refused to make the terms public. This practice left other taxpayers at a disadvantage, since the IRS relied on existing guidance when deciding subsequent cases. At the same time, it gave an unfair advantage to a few large law and accounting firms that had joined forces to create a private library of these undisclosed materials.

The courts gave Tax Analysts access to PLRs, and Congress soon required public disclosure of TAMs as well. Those victories were vital, providing the foundation for 30 years of subsequent litigation in defense of disclosure and tax transparency. In the years since, Tax Analysts successfully argued (and sued) for the release of even more administrative documents. The IRS still harbors a certain reluctance to embrace full transparency, but it’s more open today than it was four decades ago.

The need for openness, however, does not end with the federal government. State tax authorities must be held to the same standards of transparency and accountability. At the state level, many of the most important transparency issues arise when states provide insufficient guidance on how they administer their tax laws.

Fighting for disclosure at the state level is even more complicated than it is in Washington; with more than 50 tax jurisdictions in U.S. states and territories, the battle has to be fought over and over again. Tax Analysts has engaged this fight repeatedly, filing suit in California and Kentucky, with more battles yet to come.

Ultimately, transparency must be a bedrock value of the taxing process, embraced by lawmakers and tax administrators in every jurisdiction and level of government. Open debate and the free flow of information are necessary to the creation, administration, and revision of fiscal systems. And while safeguarding and advancing the cause of transparency is no small task, it’s also the right thing to do. As Tax Analysts President and Publisher Chris Bergin has observed: “Tax systems that are designed, written, and administered in a transparent way are fairer than those that aren’t.”

Information

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