Comment

Statutory reviews: what does the data tell us?

Speed read

Where there is an appeal against an assessment, a statutory review may provide a means of settling the appeal without the need for a tribunal hearing. Recent data shows that, despite a lack of independence, a majority of reviews across a range of issues are decided in favour of the taxpayer. A review may be of less value for highly technical issues or where HMRC is asserting that tax avoidance is present. In some cases, HMRC may offer a review and this could cause difficulties for clients who are still gathering information to support an appeal or trying to delay settlement of their appeal.

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Since 2009, where there is an appeal, a taxpayer in dispute with HMRC has been able to require HMRC to review its position on the issues involved and HMRC can itself offer such a review. At a time when the balance of power weighs heavily in favour of HMRC, there is inevitably some scepticism as to whether a review, which is not independent of HMRC, would offer taxpayers any real hope of overturning HMRC's position without the need for a tribunal hearing. Despite this, the most recent data set published by HMRC suggests that far from being sceptical, more taxpayers should see a statutory review as an opportunity to successfully pursue an appeal.

The data, published in June 2021 (bit.ly/3DUE41g), covers HMRC's performance in the first quarter of 2021 and includes annualised outcomes for 2019/20 and 2020/2021. Those outcomes do not reflect well on HMRC and it needs to look carefully at its enquiry management processes as the data would suggest that HMRC is unnecessarily pursuing tax and penalties that is not due and there is little justification for keeping many enquiries open, sometimes for years.

HMRC claims to follow a 'risk led approach' in allocating its compliance resources, although this is disputed by some who point to enquiries that involve no obvious tax risk or in some cases no risk HMRC is willing or able to properly articulate. As has been discussed widely, since around 2006, when the litigation and settlement strategy (LSS) was published, HMRC has also pursued a 'no deals' policy and, in line with that, where HMRC has a strong case, it will not compromise on the tax it considers is due. Of course, tax that is due should be paid and HMRC should have robust processes for ensuring its collection. However, in the same way that the LSS is intended to send a strong message to taxpayers, it was also intended to result in behavioural change in HMRC. Now HMRC officers are required to make sense of where and how you draw the line, and one possible conclusion from the data is that the LSS is encouraging HMRC to take positions that are not compliant with the law. It also raises concerns as to whether HMRC has sufficiently robust processes to ensure that enquiries are closed where there is no tax risk, or where the level of any risk is not worth pursuit.

Only very exceptionally could criticism be levelled at HMRC for opening an enquiry, regardless of how unjustified this may seem at the time. But, in my view, HMRC does not do enough to ensure that enquiries are closed when there is nothing to be gained or provide substantive justification for keeping the enquiry open. I suspect that for too many HMRC officers, keeping an enquiry going is easier to justify than closing it and, from experience, endless requests for information with little or no explanation seems an obvious giveaway. HMRC has tried to explain the 'no deals' approach through guidance, but the latest data on the outcome of statutory reviews shows that more needs to be done. I have heard suggestions that HMRC has a 'win at all costs and in any way' agenda but, whilst I have seen situations where HMRC seemed prepared to go to extraordinary lengths to 'win', I don't think this is widespread.

> Despite all the limitations and the lack of independence, the published data makes it clear that it is well worth pursuing a statutory review in many cases

An unexpected balance?

That said and despite the shift in the balance of power as between HMRC and the taxpayer, the statutory right to require HMRC to review its position seems to be providing a perhaps unexpected degree of balance, even though the provisions are drafted in a way as to favour HMRC. TMA 1970 ss 49A–49I provide the statutory framework. Whilst the scheme is conceptionally straightforward and, so far as the appeal phase is concerned, intended to bring matters to a head, there are complexities and traps for those who are unfamiliar with them and for unrepresented taxpayers who may miss the provision entirely.

In outline, there must be an appeal that has not yet been notified to the tribunal. The taxpayer at that stage can require HMRC to review its position on the issues in dispute. Similarly, HMRC can take the initiative and offer the taxpayer a review. It is critical to recognise that in either case, a process intended to bring matters to a head is set in motion and this will result in either the taxpayer agreeing HMRC's position, HMRC conceding in full or part or the dispute being notified to the tribunal. It is here that the dangers lie, since where HMRC offer a review, the taxpayer is given a strict 30-day deadline to decide whether to agree HMRC's position, accept the review or decline the offer and instead ask the tribunal to consider the appeal. Whilst in many cases there may be few reasons, tactical or otherwise, for refusing an offer from HMRC, doing so requires the taxpayer to notify the appeal to the tribunal since failing to do that effectively decides the issue in favour of HMRC. The HMRC offer may also cause timing issues to a taxpayer, for example where evidence needed to pursue the appeal is still being gathered. In offering a review, HMRC must however provide the taxpayer with its full view of the matter, and this can be valuable in establishing more precise reasons why HMRC is disputing the taxpayers filing position so allowing the taxpayer to evaluate their chances of success.

In contrast, where the taxpayer requests a review, HMRC is given huge flexibility in the timing of its response, so much so that it is not actually obliged to respond and even if HMRC ignored the request, the review would nevertheless be effectively decided in HMRC's favour leaving the taxpayer with the same choice as explained above. It is expected that HMRC would, in all cases, conduct a review but it is not known whether HMRC not responding is a common occurrence. Importantly, the review conclusions are binding upon HMRC; however, where the HMRC view is upheld, a further strict time limit starts within which the taxpayer must, as before, concede or notify the appeal to the tribunal. Again, doing nothing effectively decides the matter in favour of HMRC.

The review is not in any way independent of HMRC; instead, an officer who has not previously been involved in the case carries out the review. This is more difficult where highly complex points that require specialist knowledge are involved, or the enquiry has been long running. It is also unlikely that HMRC's view will be overturned where HMRC regard the transaction as tax avoidance. That said, such a review may still be worth pursuing where there are issues in dispute that are not dependent on the tax avoidance aspect, time limits, penalties, and so on. In my experience, review officers are often careful to ensure that the taxpayer is given a fresh and full opportunity to explain their position. However, whilst I have no doubt that the HMRC officers conducting reviews try to be objective, they can still take a very HMRC centric approach. For example, some years ago, a review officer overlooked the fact that the assessments in dispute had been made outside of any credible time limit. This was not addressed at all in the review conclusions and only when the appeal was pressed further did HMRC eventually concede the point after a fatuous post-review attempt to assert that there had been a fraud.

So, to the data...

Despite all these limitations and the lack of independence, the published data makes it clear that it is well worth pursuing a review in many cases. For example, in 2019/20, out of 22,649 reviews, HMRC upheld on average across the whole year only 43.4% of *its decisions* (with 71% being decided in favour of the taxpayer in the first quarter of that year). In 2020/21, the rate of upheld decisions dropped to 34.7% out of 10,026 reviews (the reduced numbers reflecting the reduction in compliance activity due to the pandemic). In all, during the two years, more than 19,000 HMRC decisions were overturned in whole or part, and 16,000 were overturned entirely.

This would suggest that the 'system' is working, but is it? A review is not a substitute or first aid kit for effective enquiry management, and we must keep in mind that a review can be requested only after the taxpayer has appealed against an HMRC assessment – and this may be many months or perhaps years after the enquiry began. There is no data on how much time and cost (to both HMRC and the taxpayer) is involved in HMRC pursuing enquiries that ended up coming to nothing?

We also lack data as to the opportunity cost to HMRC from its officers pursuing enquiries that are found on review to be hopeless or where HMRC itself abandons the enquiry leaving the taxpayer to lament the added compliance burden.

Most concerning of all is the question of how many taxpayers, when faced with an unmoving HMRC waving the LSS at them, simply gave in and paid the tax or penalty HMRC was claiming which, on proper analysis, was not due?

To some extent HMRC already knows much of this from the 'customer experience' research it undertook in 2014. That research identified that over 70% of taxpayers who had gone through the review *and* tribunal process felt that the review was not impartial. It highlighted what was described as a 'fair number' who conceded their appeal on the grounds of cost or time when a review decision went against them even though they still believed that HMRC was wrong. The analysis also showed a clear difference between VAT (where taxpayers fared better in reviews and were more positive overall) and other HMRC taxes. Perhaps as VAT is a business tax, rather than a personal tax, the issues are less emotive. But, in 2014, the research showed that HMRC was doing better than it is now, even though at that time almost half of all HMRC views were overturned on review. And, interestingly, the lack of independence was not seen by very many respondents as important. This perhaps provides some proof of something I have long believed: when it comes to tax disputes involving 'ordinary taxpayers', most will more easily agree with HMRC provided that they are satisfied they have been listened to and treated fairly.

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Where does this leave us?

What we can draw from this data is that, for those taxpayers in dispute with HMRC, it seems clear that the review process is not without hope, although I expect few of the cases included in the data involve the more complex or high value issues that make the headlines. HMRC must be more transparent about how it is trying to reduce the number of disputes, and it must improve its enquiry management. Too often, individual HMRC officers seem reluctant to close enquiries without a 'win' for fear of running into governance issues, so HMRC could start by asking itself why those cases where its view was overturned were under enquiry in the first place and were opportunities lost to settle them before they became disputes? The evidence should be easy to gather; after all, they have 19,000 recent cases to choose from. ■

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