



Mission impossible?

KEVIN SLEVIN hopes that review officers receive a proper training, enabling them to carry out their job impartially.

HMRC's internal guidance to review officers has recently been published in its *Appeals, Reviews and Tribunal Guidance (ARTG)*. Practitioners need to become familiar with the new system if they are to confidently handle disputes with HMRC.

Although the guidance covers indirect as well as direct tax disputes, this article focuses solely upon the direct tax position. In the area of direct tax, the role of case reviewer was created on 1 April 2009.

Richard Mannion's article 'Reviews reviewed', *Taxation*, 2 April 2009, page 318, explains the nuts and bolts of how taxpayers now have a legal right to have an otherwise appealable tax decision (or assessment) reviewed internally within HMRC by another HMRC officer: the review officer.

KEY POINTS

- The internal review system is broadly welcome.
- Review officers must be independent.
- More guidance is needed on being objective.
- No artificial time limit should be imposed on the review.
- Advisers must put their side of the story.

This article explores some of the potential practical aspects which may arise from the new review process.

Good and bad

It is true that one can see good in the new system if one is looking for good points and bad if one is looking for bad points. Internal reviews are not intended to be a substitute for tribunal hearings, rather they will be better used to avoid unnecessary and costly hearings before the new tribunals. In many cases, the internal review will have the effect of the HMRC case worker seeing the error of his ways. In other cases, the tax practitioner's folly may become apparent as a result of a third party taking an objective look at matters.

In many cases I suspect it will not advance matters greatly, but at least this possible approach to dispute resolution will have been given a chance to succeed and the taxpayer will have a better idea as to what he is up against if he wishes to take the matter to the tax tribunal.

I admit that I have been partly won over as a fan of this new system. The review system has many problems, including those I will highlight in this article, but I believe HMRC, working together with tax professionals, can turn the theory into sound practice. The internal review process could then prove to be a good development in the direct tax system.

Indeed, I can see it being used in a number of the tax dispute cases I am called in to advise upon by practitioners. These are often what one might describe as 'nuts and bolt' cases, e.g. about the level of taxable income or capital gains or about the treatment of expenditure or the claiming of tax reliefs.

I do not see challenges to contrived artificial tax avoidance schemes being explored profitably through this route. Here the outcome of the review will seldom be in doubt because the review officer will be required to follow the formal stance of HMRC.

I expect that if HMRC officials do not believe what the taxpayer is saying, the case will seldom be resolved by an internal HMRC review and a hearing before a tribunal may well be the only sensible way ahead.

What does a review comprise?

The primary role of the review officer is to review the decision made by the case worker (or other 'decision maker'); objectively checking whether the disputed decisions are in line with HMRC's legal and technical guidance, policy and current practice (see ARTG4080).

The internal review will establish whether HMRC:

- should stand by the decision reached by the case worker or his superiors, after which the matter can then proceed to a formal hearing if the taxpayer appeals within 30 days of the date of the written notification of the outcome of the review being issued;
- should back down and accept the taxpayer's arguments; or
- should propose a course involving modification of their stance while still rejecting, or rejecting in part, the taxpayer's interpretation of the position; again, the matter can then proceed to a formal hearing if the taxpayer appeals within 30 days of the date of the written notification of the outcome of the review being issued.

I understand that review officers will generally have past experience of the subject matter of the appeal. The review officer will also be independent of the decision maker and the decision-maker's line management (and will be seen to be so). According to ARTG4310, the latter is intended to demonstrate that the review officer can remain as objective as possible throughout the review process.

The published guidance to review officers recognises that in some instances they may wish to discuss a case with case work/decision makers during review. Such communication is not prohibited but the guidance reminds review officers that, not only must they be independent in their approach to the case, but they must be seen to be independent of the case worker/decision maker as far as possible at all times. Accordingly, ARTG4620 states:

'So discussing cases with case workers during the review should generally be avoided. If exceptionally it is necessary to discuss a case with the decision maker in any depth during the review the review officer should tell the customer and offer equivalent telephone or face-to-face contact to the customer and agent, so the customer has an equal opportunity to make representations directly to the review officer.'

The manual states that the review officer does not have discretion to go outside current policy and practice. But he should consider current policy and, as with any other matter, it is possible that as a result of a review HMRC may change their policy or practice. The guidance tells review officers that any departure from the normal policy and practice should only take

place with the prior knowledge and approval of the relevant policy and technical teams.

Arguably, the key guidance given to the review officer is to be found in ARTG4080 and this also demonstrates the possible dilemma facing any review officer. This says that the review officer must consider whether the case is one which HMRC would want to defend at tribunal, particularly considering the following in the light of the published litigation and settlement strategy of HMRC:

- whether the facts have been established, and any disagreement about them;
- the technical and legal merits of the case;
- materiality and proportionality;
- the likelihood of success; and
- any wider implications.

Divided loyalties

Could it be that, despite the assurances from HMRC, the age-old issue of what to do about conflicts of interest will be allowed to cast a shadow over proceedings? There are many in the profession who feel that the outcome of most internal reviews will be shaped by an 'us versus them' mentality which will result in decision after decision being made in support of the case worker's view.

I have to admit that over many years as a tax consultant handling direct tax disputes I have come across officials whose sole purpose seems to have been to say 'no' whatever arguments

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are advanced. (Of course, we dealt with them accordingly!) However, on many more occasions I have encountered true tax professionals who see their job as ensuring that the taxpayer is paying the right amount of tax – no more and no less. They go about their job impartially and with a clarity of purpose that usually can achieve a speedy settlement of the matter.

So, I would like to think that HMRC will be careful in the selection process when it comes to finding a review officer for a particular case, choosing confident and experienced HMRC tax professionals to undertake this important role. Some people's talents will not be suited to the new role.

Objectivity

At first sight, the guidance looks helpful but, on closer examination, I feel it is not clear enough as to the meaning of being 'objective'. It makes little or no effort to help officials start to think along the right lines. It has to be realised that it will be no easy task for an official to go from being a case worker to review officer without special training. Likewise, it is no easy task for someone engaged by HMRC as an experienced staff trainer in technical tax matters, investigation work, etc. suddenly

to become adept at training potential review officers. It is to be hoped that the trainers will receive proper training themselves, as a cynical trainer will only produce inferior review officers.

It is my view that the guidance fails to give a clear line to review officers as to how high the objectivity bar must be set before objectivity is achieved. The rookie review officer is left to his own devices as to the meaning of 'objective'. Are officials to be told to be impartial in their approach or does HMRC regard this as being a step too far? For any review process to be successful, the review officer needs to think matters through impartially, especially if he is to demonstrate he has adopted an objective approach to his analysis of the situation.

Impartiality denotes a lack of prejudice in any direction; it is the essential ingredient for achieving fairness. As anyone who has acted as an expert witness in a matter before a court will know, impartiality does not grow on trees, it is something which has to be carefully developed by constantly thinking through the situation being considered.

Reviewer's dilemma

The following example seeks to demonstrate the basic dilemma for all review officers.

Let's assume that a case worker has concluded that £30,000 expenditure is not eligible for capital allowances, but the

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taxpayer's adviser insists the expenditure relates to qualifying plant. How should the review officer proceed?

- Should he stand back and ask himself 'Can I, reviewing this case objectively, including examining all the facts provided (as well as the relevant statute and case law, HMRC practice and policy generally), see how the case worker has arrived at his conclusion and that at the very least the decision made is based upon a tenable argument? If so, need I do more than support his position?'
- Should the review officer say to himself 'I am going to review this case objectively and impartially, and conclude, taking into account all relevant factors, whether I would have accepted that the expenditure was correctly to be regarded as expenditure on the acquisition of plant for capital allowances purposes?'

It will be seen that both approaches could easily produce different conclusions. What exactly is required of the review officer in such circumstances? Should he uphold his colleague's decision just because he can see his colleague has a tenable argument for the decision taken?

The worry is that review officers will be advised internally to establish first whether their colleague had a tenable argument for

his decision, and only to overturn it if it clearly fails to comply with HMRC practice or policy. The review officer might find himself upholding a decision he personally feels he would not have arrived at. As it is not clear from the guidance, no one knows what the position will be. Indeed, based upon the published guidance, I have some sympathy with the position of the rooky review officers in the early days of the new system.

Refusing review

Before the new system beds in finally, I have a suggestion. We do not know whether the fact that a taxpayer refuses the offer of an internal HMRC review could be taken into account when arriving at a decision concerning costs or indeed penalties. It seems to me that in some cases it might well be appropriate to do so.

However, the converse situation also raises an issue. The internal review is not part of the appeal procedure as such. It is a quite separate matter from the appeal and it amounts to no more than a step in HMRC's dealings with the taxpayer. Nevertheless, let us assume that in a case, a taxpayer agrees to have the matter reviewed by the review officer and the case worker's position is upheld.

As a result, the taxpayer lodges an appeal which proceeds to the First-Tier Tribunal and which he wins convincingly. It is to be hoped that those hearing the case will have been made aware of the internal review and will not miss the opportunity to utter words of admonishment, possibly in the guise of expressions of surprise, if it can be seen that the review officer seems to have fallen down on the job. The mere fact that a review officer supported his colleague's views does not mean that the conduct of review can be said to be faulty, but there will inevitably be cases where the review officer's objectivity is called into question. These will only have repercussions for the review officer and his superiors if they are highlighted in the report of the tribunal decision.

Likewise, should the issue of costs arise in a case where the review officer can be seen to have acted in a buccaneer manner supporting his colleague, it is to be hoped that the tribunal will say that the level of costs awarded has been influenced by the disappointing work of the review officer.

The responsibility rests with the management of HMRC. Despite all the limits imposed by the Treasury, the management of HMRC must allow adequate time for this new review process. Each review, if it is to be carried out properly, should be allowed to take as long as it takes, in terms of man hours. Any attempt by the management of HMRC to impose 'time spent targets' on review officers should be avoided at all cost, not least because it may be that the time pressure on the overworked case worker has been a contributor to the tax dispute.

Your first review

The following comments may seem a little presumptuous as no one has any experience of internal reviews, but I do have experience of HMRC direct tax disputes over many years. I am used to being called in by practitioners either to help with the presentation of the case or to advise, hitherto, on whether

to take matters to a hearing before the General or Special Commissioners. I therefore see the good, the bad and the ugly.

In my article 'Stand and deliver', *Taxation*, 7 July 2005, page 367 I summarised the shortcomings of a case I had been presented with and concluded with the following observation. 'The reality was that all of the information known to both the practitioner and the officer was summarised in the tax return and the subsequent correspondence, yet this information was insufficient for an objective appraiser of the facts to reach a conclusion [about a claim for a relief] one way or the other.' Indeed, I went on to say that 'Proper presentation of the full facts soon resolved the position to the taxpayer's satisfaction, but the impression gained by the writer was that both the officer and the practitioner had reached the conclusions they were each looking for. Objectivity had been lost along the way, if it had ever existed. The officer was right to question the claim, but went about it the wrong way and, in the final analysis, the practitioner had based his claim on no more than a hunch that relief was due. [He had not established the full facts.]'

The reason I take the liberty of repeating these extracts is that such issues are not uncommon. So the advice for the new system remains as it was in 2005, i.e. make sure each client's case is reviewed and then presented fully and accurately, leaving nothing to be assumed. Present the full picture in a clear and concise manner, almost as if the officer is from the planet Mars and so knows nothing of the client's affairs or of the legislation.

The case worker goes first

Presentation is always important but never more so than when an internal review is being arranged. Practitioners need to be aware that ARTG4330 states that the case worker should prepare a report for the review officer. The guidance states that the report should clearly summarise:

- the decision the review officer is required to review;
- the facts;
- the relevant legislation and guidance;
- the decision maker's reasoning;
- the customer's argument and evidence; and
- the decision maker's argument and evidence.

The guidance goes on to say that the case worker should make sure that all information necessary for the review officer to carry out a review is provided. In other words, the case worker presents the case the way he sees it first! The presentation to the review officer by the case worker immediately puts the case worker at an advantage.

While it is to be hoped that such reports will, in time, be copied to the taxpayer as a matter of record, it is important not to overlook the fact that the review officer is encouraged to receive and consider representations made to him during the process (in reality, due to the 45-day time limit in which the review officer is to complete his task, this means at the early stages of the process).

It would therefore seem that there is no reason why practitioners should not present their own report to the review

officer clearly spelling out their view of the matter in dispute. Such a report should first and foremost clearly set out the taxpayer's arguments and the basis for them and then seek to distinguish the taxpayer's case from that previously advanced by the case worker. Time invested in preparing such a report could prove to be well spent. ARTG4630 clearly indicates that HMRC expect to receive additional information in some circumstances. The guidance suggests that it may even be necessary to try to agree to an extension to the 45-day time limit otherwise operational and it may be prudent to consider this aspect at an early stage.

Conclusion

At this stage the only conclusion one can reach on the new system of direct tax internal reviews by HMRC review officers is that it is down to HMRC to make the system work. If practitioners find that officers repeatedly fail to demonstrate objectivity, the integrity of the whole system will be destroyed and it will be seldom used. If it becomes clear that there is less to this process than first meets the eye, I would expect the matter to be drawn to the attention of one of the increasingly powerful House of Commons committees and for members of the tax profession to give details of their experiences.

Problems will arise. Some taxpayers will be disgruntled whatever the treatment they receive, but I am keen to see the system to be held in high regard when it comes to experienced practitioners encountering disputes over everyday tax matters.

I can think of no better way of concluding this article other than to quote from ARTG4060 as follows:

'ARTG4060 Introduction: Aims of the review

'The procedures for dealing with a dispute about a decision or assessment must be transparent, objective and consistent in the way they are applied.

'In carrying out a review we have two main aims:

- *'To take a fresh look at the decision, this may or may not be in the light of new evidence but must be done in an objective and balanced way. The review should identify decisions that are wrong or unsound, and decisions that we would not want to take before a tribunal.*
- *'To help to resolve the dispute, this may not always be possible, but we should consider whether there is scope for negotiations and compromise. Sometimes a dispute can also be resolved by a clearer explanation of our position and the law.'*

Only time will tell if the process proves to be a useful tool or just a blunt instrument. Setting a fully trained and suitably experienced HMRC officer the task of carrying out an impartial review of matters should not amount to giving him a poisoned chalice, or to sending him on mission impossible. ■

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