

## HMRC's revised approach to disputes

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What changes have HMRC made to their guidance on handling tax disputes? How will this affect my disputes (now and going forward)?

HMRC's Litigation and Settlement Strategy (LSS), the Code of Governance for Resolving Tax Disputes ('the Code') and the Commentary on the LSS ('the Commentary') form the framework within which HMRC seeks to resolve tax disputes through civil procedures. This framework was first put in place in 2007 but has been updated a number of times, most recently with effect from October 2017. This refresh is welcome given the changing nature and growing number and value of tax disputes; according to HMRC's annual accounts, over £9bn of tax disputes were referred to the Tax Disputes Review Board (TDRB) in 2016/17, compared to approximately £3bn in 2015/16, and the number of referrals increased by over 50% year on year.

Substantively much of the LSS, Code and Commentary remains the same with the more obvious changes simply reflecting developments in HMRC's governance structure. For instance, to address the introduction of the Diverted Profits Board, changes to the composition of the TDRB or the TDRB's oversight of bank code of conduct issues. Other than reflecting the importance of DPT, which will hardly come as a surprise to anyone working in the corporate tax sphere, the core governance structure for resolving tax disputes remains unchanged.

However, there are a number of more subtle changes that are revealing both about the way HMRC has been conducting many large disputes recently and how taxpayers can be better prepared if or when they have a dispute. In that regard, it's worth remembering that the Commentary is

explicit that HMRC has 'a broader definition' of a dispute than is generally accepted, so 'all areas of non-agreement' with HMRC are potentially within this framework.

The first point that stands out is the way the drafting of the Code and Commentary have been refined to make even clearer that disputes must be resolved 'consistently with the law'. This has always been the case but other objectives, such as 'efficiently determining' the tax due or 'improving the customer experience', have been downgraded further in this refreshed framework.

Linked to this, there is more in the Code on factors that address the importance to HMRC of 'establishing the right tax liability...across all taxpayers'. That's especially clear in the way that 'handling strategies' set by the Contentious Issues Panel or the Anti-Avoidance Board will pre-determine how HMRC handles any particular risk or issue, including progressing to litigation. Likewise, there are additions to the Commentary that allow 'HMRC's approach to mass-marketed anti-avoidance arrangements [to] differ': in effect, HMRC doesn't have to investigate the facts of each one but can apply a sampling approach. That's perhaps not surprising given the scope for embarrassment if HMRC argues for conflicting positions across separate taxpayers and the way in which accelerated payment notices and follower notices have become common. However, taken together, these two points mean that settling a dispute with HMRC will require a clear technical justification for each issue at stake that is possible to read across to the broader pool of taxpayers with similar issues. Challenging, given no individual taxpayer is going to know the position of other taxpayers.

The third area of note is the way judicial review (JR) claims are now firmly within the LSS framework. That's most obvious in the inclusion of 'compensation claims arising from tax-related JR' in the definition of 'tax'. However, more revealing in terms of HMRC's view on this is the presumption in the Code that 'decisions on JR only need to be referred to the TDRB where HMRC is considering not defending the JR'. Given HMRC's (impressive) recent track record in defeating JR claims, whether on DPT (*Glencore* [2017] EWCA Civ 1761) or reliance on HMRC guidance (*R Hely-Hutchinson* [2017] EWCA Civ 1075), this is perhaps expected but, as the Commentary recognises, taxpayers may still run JR claims in the High Court in parallel to FTT proceedings.

More surprising in principle, albeit not as a practical matter for those working on any of the large scale DPT or transfer pricing enquiries to which HMRC has committed resources, are the amendments relating to factual evidence gathering and legal privilege. On the facts, the message is clear that HMRC wants to 'establish' the facts sooner themselves, including requiring large scale email reviews and witness interviews with senior management, and will need this to satisfy the various internal approval panels or boards. That's consistent with the additional £155m of compliance funding given to HMRC in the recent Budget, which is targeted to raise £2.3bn of additional revenue, so taxpayers will need to commit litigation-scale resources sooner than before.

On privilege, the LSS rather innocuously states that: 'HMRC will not normally expect legal professional privilege to be waived'. For something described by the House of Lords as 'a fundamental human right long established in the common law' (*Ex p Morgan Grenfell* [2002] UKHL 21 and *Three Rivers No. 6* [2004] UKHL 48), it is striking that

there is no explanation of when HMRC might expect taxpayers to waive legal privilege nor the potential benefits of doing so. For instance, a more open and constructive discussion on technical issues or reassurance that there's nothing untoward in the original legal advice on a now-contested transaction. Rather, there are new statements in the Commentary putting the taxpayer to proof as to whether they are entitled to rely on legal privilege and confirming that: 'HMRC is not obliged to [waive] legal privilege...and will only exceptionally consider doing so'. While recognising the limits on what HMRC can offer in terms of undertakings to keep privileged material shared by a cooperative taxpayer confidential from other governmental bodies in the UK or overseas, further guidance or ground rules would help mitigate some of the concerns around waiving privilege that commonly arise in tax disputes. Those concerns are most usual where large quantities of factual evidence are sought by HMRC, especially email inboxes of key or senior individuals.

Overall, the LSS and associated documents have not changed substantially and many of the changes reflect the evolution of HMRC's internal structures, rather than changes in practice. However, the effect of the subtler amendments is to toughen up the framework that HMRC and taxpayers must work within when resolving a dispute (very broadly defined). To an extent that reflects the harsher public and political light now cast on tax disputes; something HMRC are aware of and is shown in the way HMRC's reputation is relevant to whether a tax dispute is 'sensitive'. Nonetheless, the changes confirm what many taxpayers have been experiencing in practice: resolving tax disputes now requires not just technical tax expertise, but the fuller range of dispute resolution and investigation tools from the outset.

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