Second opinion

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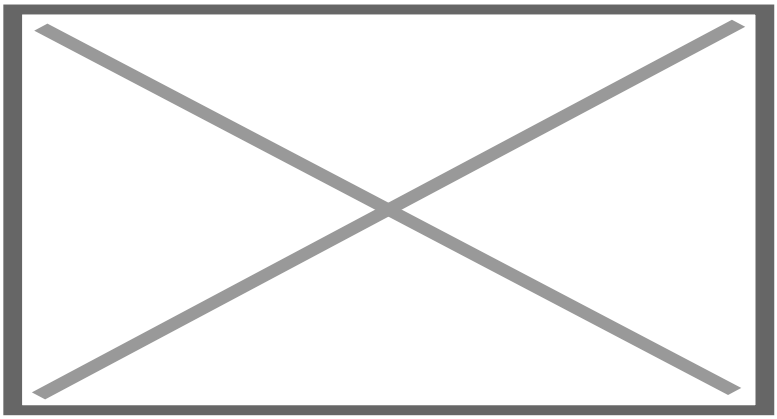
Andy Wells reviews HMRC’s study of the internal review process

HMRC are engaging with the CIOT on the effectiveness of the internal review process and how it might be improved. As part of this engagement, the Institute was provided with the results of a study published after telephone research in March 2014 (The *Statutory Review Process Research Report*, August 2014). The study concerned users of internal review and referred also to published statistics on tribunal service appeals. HMRC ask whether internal review is achieving its objectives set out below:

‘The statutory review system is designed to give customers a relatively quick and easy way to ask HMRC to look again at our decisions. The process is open to all HMRC’s customers and is widely used by those who do not have an accountant or agent.’

In these documents, HMRC refer extensively to ‘customers’, thereby inaccurately describing those who are in dispute with them over their tax affairs. I continue to refuse to abuse the ‘c-word’ in this way and have substituted the words taxpayer or appellant in this article.

Questions were put to users of internal review in a telephone survey. The number of people surveyed is analysed in ***Table 1***.



The number of requests by taxpayers for review fell from 38,975 in 2012/13 to 37,668 in 2013/14. HMRC completed 38,621 reviews in 2013/14, including a ‘small number’ that related to previous years. HMRC statistics show that in 2013/14, 51% of the 38,621 reviewed decisions were upheld and 7% were varied, with 42% cancelled. This last figure may seem high but it includes penalty cases. When analysed further, these same statistics indicate that, in ‘non penalty’ cases, 67% of decisions were upheld, 7% varied and 26% are described as cancelled. That is still a lot of decisions that case officers got wrong!

HMRC go on to say they were notified of 7,081 appeals to the tribunal in 2013/14. Of these, 6,626 cases were determined at a tribunal. Most of the cases received but not closed are on hold pending a decision in a related lead case. If that statistic is correct it would suggest that there was no tidal wave of avoidance cases in 2013/14. This does make me wonder whether the current obsession with ‘tax avoidance’ based on activities in earlier years is justified – but that is another matter for another day.

HMRC goes on to say that the tribunal decisions ‘in HMRC’s favour’ amounted to 76.2% of the 6,626 cases. A further 6.2% are described as ‘partially in HMRC’s favour’ and some 17.4% were lost by HMRC. However, the document indicates that just four appeals in ten were determined at the tribunal, with the rest settled beforehand. HMRC give three reasons for this:

- appeals stood behind lead cases being closed when the lead case is decided;
- cases where either party decided not to proceed, perhaps because of new information received; and
- cases where the parties reach agreement before the hearing date.

HMRC state that a relatively small proportion of cases that are internally reviewed proceed to appeal: ‘Of the 6,626 appeals settled in 2013/14, 1,631 (25%) previously had a review.’ That would mean that in more than 18,000 cases (more than 90%) the internal review decision was not taken to the tribunal.

HMRC then reveals that only a relatively small number of taxpayers (15%) were represented by an agent (whether qualified or otherwise) at the review stage and only 34% were represented at the tribunal. One has to be careful about drawing conclusions from statistics but it does therefore seem likely that most cases that were reviewed and reached the tribunal would have involved represented taxpayers. What we cannot estimate from these figures is how many of the 17.4% of cases that were successful on appeal had representation, nor how many cases were won by HMRC against the unrepresented. Experience suggests that it is considerably harder for an unrepresented appellant to win at the tribunal, especially since they will usually be facing someone who is at least experienced in procedure and well briefed on the facts and the law.

The statistics suggest that taxpayers, including unrepresented ones, had more success in penalty appeals. That is probably not unrelated to the burden of proof regarding the underlying behaviour.

What conclusions can be drawn from the survey? HMRC rightly starts by suggesting that context must be considered. Someone who feels strongly enough about their position to take a reviewed decision to the tribunal (often based on professional advice) will already be disappointed but this may translate into exasperation with the process and decision maker. After all, it is easy to be seduced by one’s own arguments and blind to the strength of one’s opponent’s.

However, less than half of respondents found the review process ‘useful’. Of the remainder, 21% found it ‘not very useful’, while 33% found it not useful at all. Reflections on the interaction with the reviewing officer were similar, though not exactly the same. Of the respondents, 44% were prepared to say that they found the internal review decision impartial. So, comfortably more than half perceived at least some bias, with 38% fully rejecting the notion that the decision was impartial. Even allowing for the disappointment that comes from the reviewing officer disagreeing with one’s view, this is a percentage that should cause concern.

What cannot be deduced from the published survey is how many of the decisions upheld on internal review were then overturned by the tribunal. It is likely that an appellant in that situation would regard the internal review as biased or useless or both. Although that would not be fair in every case, it is a part of the reviewer’s job to try to reduce the number of losing cases that go to the tribunal. So, in a case that has been reviewed, but which HMRC lose, the reviewing officer should be prepared for criticism. That is especially so if the taxpayer had made the same argument that then found favour with the tribunal but without receiving adequate feedback at review stage.

Nevertheless, my own early experience of internal review was rather more positive than more recently. I wonder whether that might have been due to the importance to HMRC of a new system (internally rather than externally regulated), and the need for it to be seen to be working as intended. Once a system is ingrained, perhaps it becomes less of a concern.

Yet internal review is liable to disappoint in several ways: if it has clearly been rushed when we would have been happy to agree to more time; when it does not address the points we thought we had validly made but simply re-hashes arguments put forward by the original case officer; and when it is carried out in special investigations (SI) cases, in which impartiality is impinged by the reviewing officer being part of the directorate. I have yet to hear of a single (non-penalty) SI case that has been internal reviewed but not upheld. Readers are invited to email me if they know of such a case.

The survey makes these observations on the cases that are upheld on review but are not then pursued at the tribunal:

‘A fair number of HMRC’s customers who were unsuccessful at review stage do not take their dispute to tribunal due to a number of perceived barriers, irrespective of whether they think their case would succeed. 14% of those unsuccessful at the review stage feel they have no chance against HMRC at tribunal; 16% say the cost of going to the tribunal is prohibitive, and 14% say a tribunal would be too time consuming.’

It is most likely that the first 14% would be unrepresented. The second and third reasons amount to more or less the same problem, especially when the tax or penalty disputed is relatively small. There are plenty of examples of HMRC pursuing cases to tribunal where it cannot conceivably be economical to have done so, but taxpayers have to operate in the real world and many cases are withdrawn because the risk/reward ratio is unfavourable. Yet there is little evidence to suggest that HMRC take a ‘commercial’ view. The statistics for cases that settle before tribunal will be skewed by this and should not be taken as evidence that HMRC is predominantly correct.

Neither do I think the tribunal outcome statistics should be taken at face value. Many cases that HMRC win appear to involve unrepresented appellants, those with no realistic prospect of success, no history of taxation expertise, or those who just want their ‘day in court’. I think the results are a lot closer in cases involving properly qualified advocates and would be more so if there were a cost-effective way to pursue low-value cases beyond internal review.

To an extent, internal review was thought to be a remedy in ‘low value’ cases and it is disappointing that the survey results suggest it may not be as effective as it could be.