

LOW INCOMES TAX REFORM GROUP

HM Revenue and Customs and the Taxpayer: Tax Appeals against decisions made by HMRC RESPONSE TO CONSULTATIVE DOCUMENT

1. Executive summary

- 1.1. The overriding objective of this consultation should be to establish a robustly independent appeals system which is accessible to all and fairly administered. HMRC has a responsibility to the unrepresented appellant, in making them aware of their rights and options for appeal.
- 1.2. Case management in the early stages of a dispute are key to its early resolution. An internal review system must be designed to complement the new Tribunal structure rather than conflict with it or be viewed as a substitute for it. We outline here key safeguards that need to be in place, including:
 - 1.2.1. Internal reviews should be statutory (and so it would follow these should be administered consistently), but these should not be mandatory and those opting for them should retain access to an independent Tribunal at any time.
 - 1.2.2. Options and rights should be clearly explained to the appellant at the outset, with HMRC playing a vital role in this particularly where the appellant is unrepresented.
 - 1.2.3. An internal reviews process must distance itself as far as possible from internal influencing factors and should include external representatives on its panel and/or be subject to external audit.
 - 1.2.4. Timescales should be set and maintained to provide certainty for the appellant and time limits must be extended where they expire during the review process. Provision for late appeals must be maintained and a fast-track reviews procedure should be considered where cases involve tax credits or child benefit for example, where the appellant would otherwise be without the means to live.
 - 1.2.5. A separately-identifiable team should be responsible for reviews, allowing ease of monitoring costs, workload and benefits.

- 1.3. With any change in operations, it is paramount that these are adequately publicised, with information being made available in formats to suit a wide range of needs, taking into account disabled people and those with language barriers. Customer journeys must be tested in advance to prove their adequacy. Special needs must also be taken into account in the way cases are handled.

2. Introduction

- 2.1. The Low Incomes Tax Reform Group (LITRG) was set up by the Chartered Institute of Taxation to be a voice for the unrepresented in the tax system.
- 2.2. We welcome this opportunity to respond to HMRC's consultation document entitled *Tax Appeals against decisions made by HMRC*. We approach this consultation from the perspective of taxpayers and tax credits claimants on low incomes and without access to professional representation.
- 2.3. We have long been interested in appeals and Tribunal reform, initially responding to Sir Andrew Leggatt's consultation paper *Tribunals for Users* and again in September 2004 responding to the Department for Constitutional Affairs' White Paper *Transforming Public Services: Complaints, Redress and Tribunals*. In September 2006, we then published a report *Tax Appeals – a low income perspective*¹ in which, drawing on a survey of the views of members of the CIOT involved in tax appeals, we assessed the needs and expectations of unrepresented users, and made recommendations as to what kind of tax appeals system would best serve their interests.
- 2.4. Key principles underlying reform of the Tax Tribunals are to ensure:
 - actual and perceived independence from HMRC, unlike the current system whereby appellants may incorrectly perceive a link between HMRC and the Commissioners due to the way in which the system operates;
 - accessibility of the system for all;
 - that appellants are fully advised of their appeal rights and are provided with adequate and neutral information and guidance on the process.
- 2.5. In light of these key themes, we now turn to answering the specific areas addressed in the consultative document. In so doing, we understand that paragraph 3.11 of the consultation document confirms that tax credits appeals will be transferred to the chamber dealing with social security and child support rather than the tax chamber but that tax credits could be brought within the proposed scheme of 'impartial internal review'.

3. Chapter 4: Impartial internal review

- 3.1. We acknowledge the comment at 4.14 of the consultation document that review by an external body would be *'costly, and would to some extent duplicate the work of the tribunal'*. Hence the suggestion in this consultation is for HMRC to conduct internal case reviews. The problems with this lie in ensuring reviews are conducted impartially and that these are also viewed by the public as impartial.

¹ See <http://www.litrg.org.uk/reports/reports.cfm?id=384>

- 3.2. There is no shortage of commentary on the subject of impartiality and its features. For example, this was discussed in a judgement handed down by the House of Lords in January 2006 in the case of *Gillies v Secretary of State for Work and Pensions*². In this, Baroness Hale of Richmond discussed the issue of impartiality in the tribunal system, saying:

'Ever since the Franks Report, the watchwords by which any tribunal system has been judged are its 'openness, fairness and impartiality':

"Take... impartiality. How can the citizen be satisfied unless he feels that those who decide his case come to their decision with open minds?"
(para 24)

Thus,

"impartiality [appears to us] to require the freedom... from the influence, real or apparent, of Departments concerned with the subject-matter of their decisions."

She goes on to refer to *the 'fair minded and informed observer'* not being *'an insider... Otherwise she would run the risk of having the insider's blindness to the faults that outsiders can so easily see.'*

- 3.3. From this we can see that, by its very nature, an internal review system will neither be fully impartial, nor be perceived as such. But perhaps it can go some way to achieving a sufficient degree of openness and fairness so as to give the public confidence that its decisions are arrived at objectively.
- 3.4. The internal review system must therefore be designed to include a series of safeguards which seek to distance it as far as possible from internal influencing factors. We comment further on this in the specific answers to questions below.
- 3.5. Question 1: What factors would be important in ensuring that an internal review was regarded as impartial?**
- 3.6. In reality, HMRC will never be able to provide a fully impartial review service when this is conducted internally. An internal reviewer will have a natural bias and his or her sympathy will firstly lie with the colleague whose work or decision is under review, for example the reviewer will be aware of internal targets and pressures which might influence decisions. Internal reviewers cannot wholly divest themselves of this natural bias.
- 3.7. There are however certain measures which can be taken to achieve a degree of separation between the case and the reviewer which in turn can create a semblance of impartiality. But it would be misleading to describe the process as 'impartial' to the customer involved in seeking a review, as true impartiality is something which can only be achieved by taking their case to tribunal.
- 3.8. HMRC can however fully describe the internal review process to the customer so that s/he can gauge for himself or herself how impartial the decision is, in reality, likely to be. If that process were to include some of the following features, the customer might be expected to have some degree of confidence in the fairness of the review:
- 3.8.1. The review should be carried out by someone distanced from the original HMRC officer or team handling the case and not, for example, undertaken by

² <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jd060126/gillie-2.htm>

that officer's own line manager.

- 3.8.2. Reviews should be undertaken at senior rather than peer level.
- 3.8.3. If it is possible to review the case at arm's length, consideration could be given to making the case anonymous, so that the reviewer does not know the personal details of who is involved, both in terms of the taxpayer or tax credits claimant and the HMRC officer involved.
- 3.8.4. Cases for review should be referred to a separate office so as to distance the review from the originator.
- 3.8.5. Consideration should be given to reviews being carried out by a dedicated review team, rather than allocating reviews to other HMRC officers. Adding reviews to existing officers' caseloads would hardly be conducive to the creation of an effective system.
- 3.8.6. Full facts must be available to the reviewer. The problem with HMRC's file being passed internally for review is that this will have been prepared from one side only. Therefore the taxpayer or tax credit claimant should be able to submit further details for review to put their perspective on the case.
- 3.8.7. HMRC's file should be reviewed in full rather than sending a 'potted history' of the case to the reviewer. In tax credits cases, we have seen a system whereby HMRC filters complaints being sent to the Adjudicator rather than full details being passed through, which is widely seen by advisers as prejudicing the independence of the process.
- 3.8.8. The decision from the review should be set out clearly for the customer at the end of the process. Detailed reasoning should be provided for arriving at the decision, in understandable language particularly where it is targeted at the unrepresented. In addition, a meeting with the taxpayer could be offered to discuss the decision and to resolve any final misunderstanding.
- 3.8.9. There should be a system of spot-checking by independent reviewers, for example members of the tax profession working as an independent audit group, or by the Adjudicator or Ombudsman. This will help ensure quality-control and avoid the accusation that HMRC is acting as a law unto itself. Sampling of cases for such review should be on a random basis to ensure there is no bias. Confidentiality issues could be overcome by making cases for review anonymous. Findings from these reviews should be published.
- 3.8.10. As mooted in our report *Tax Appeals: a low income perspective*, another approach might be for each case to pass across the desk of an independent judicial figure at least once. That figure could be a member of the Tribunal, or a senior official in the Tribunals Service (or its successor body).
- 3.8.11. Similarly, cases should be tracked and findings published showing how many cases go through both internal review and formal appeal, demonstrating how many decisions are overturned or upheld. These figures will again show the efficacy of an internal review.

3.9. *Independent composition*

- 3.10. In addition, the review panel should consist at least partly of outsiders. Its composition should not be restricted to HMRC personnel. It may be objected that this would be costly; better, however, to incur the cost in making the early stages of the process as impartial and independent as possible, if that improved the chances of an early result satisfactory to both parties, rather than incur the greater expense of a full appeal mounted by a dissatisfied appellant. It could also be objected that an externally composed review panel would merely duplicate the work of the tribunal. No merely internal review body could do that; but an approach that both is, and is seen to be, fully independent of either side in the dispute stands a better chance of providing an effective early dispute resolution procedure.

3.11. *Feedback*

- 3.12. Finally, an essential component of an internal review system would be to establish feedback channels, so that HMRC learns from the collective experience of the process and positively changes its systems as a result, particularly if there are recurring patterns of cases under internal review.
- 3.13. This is not dissimilar to the role of the Taxpayer Advocate Service (TAS) in the USA, which describes itself as:

*'... an IRS program that provides an independent system to assure that tax problems, which have not been resolved through normal channels, are promptly and fairly handled.'*³

It also feeds back problems with a common theme to achieve positive change and avoid recurring issues. This is described as:

*'... we try to repair systemic flaws in the IRS and the tax code, which can cause trouble for taxpayers and IRS employees alike.'*⁴

- 3.14. In a similar fashion to the UK Adjudicator, we understand that the TAS has its own reporting lines to achieve a degree of independence from the main IRS whilst still being part of its overall organisation.

3.15. *Another possible model*

- 3.16. Apart from the TAS, HMRC might also consider the Department for Work and Pensions' (DWP) Internal Review Service when deciding what model to adopt. That body hears appeals against decisions by the DWP on applications for assistance from the social fund. The hallmark of the service is its speed (many claimants are in desperate need and cannot afford to wait) and its accessibility to claimants (most cases are dealt with by telephone discussion between the Inspector and the claimant). The fact that outcomes are roughly equally divided between those favouring the DWP and the claimant is testimony to the impartiality of its decision-making.

³ <http://www.irs.gov/advocate/article/0,,id=97392,00.html>

⁴ <http://www.irs.gov/advocate/article/0,,id=103729,00.html>

3.17. *Optional participation*

3.18. Participation in the internal review should be at the option of the appellant, who should be free to list his/her appeal before the Tribunal at any time. We favour the second option outlined in para 4.16.

3.19. *Question 2: What factors are important in determining the most effective way of providing for any review process?*

3.20. A review system should ideally have the following features:

3.21. One of the most essential factors is introducing an external element into the review process. Even if, as discussed above, the initial reviews are conducted within HMRC, there should be a random sample of cases which are re-reviewed externally in order to provide reassurance that the system is effective.

3.22. It should be accessible to all. This involves taxpayers and tax credits claimants being routinely advised by HMRC of the option to ask for a review. Information must be provided in a variety of formats, including in hard copy, and a full review should be undertaken to ensure accessibility for disabled people (in accordance with the Disability Equality Scheme) and for those with language barriers.

3.23. Particularly when dealing with unrepresented individuals, HMRC must be open about the process and the individual's rights, giving them a full understanding of the options for informal review and advising them of the alternative formal appeal process. HMRC should include in this details of how that individual can seek independent advice, either from professionals or the voluntary sector.

3.24. There must be a clear framework for the reviews. Guidance must be in place for officers carrying out reviews to ensure consistency. As noted above, we would rather there is a separate team dedicated to dealing with all reviews in order to achieve consistency and a degree of independence.

3.25. HMRC must ensure that individual case circumstances are taken into account in the way the case has been handled, for example if the customer is disabled or otherwise has special needs.

3.26. Reviews must be open to all customers on the same basis and HMRC must ensure these are consistently dealt with to a high standard. There should not be preferential treatment for different groups of HMRC customer.

3.27. The system should be in addition to the statutory appeals process. The ability to 'opt out' to formal appeal at any stage must be maintained rather than forcing the customer to go through a mandatory internal review first. Making the process mandatory would hamper the customer's basic right to having an independent appeal heard at the earliest possible juncture, potentially adding a costly layer of delay.

3.28. Of the options given in the consultation document, we therefore favour bullet 2 at paragraph 4.16. The process should be set out in law, HMRC should volunteer information about the process without being asked and the taxpayer should at any time be able to opt out in favour of a formal appeal.

3.29. The question of extending time limits during compliance checks (and so it would follow in case review) was discussed at the September series of workshops continuing consultation on HMRC's powers. There was some agreement amongst

those in attendance that the time limits extension available in VAT cases could be imported to other parts of the tax system. We believe this is a necessity where opting for a review could take a case beyond the usual statutory time limits.

- 3.30. Setting a timescale in which to have a review completed is important in order to give the taxpayer certainty of when matters might be resolved. Further comments on timescale are made under question 3 below.
- 3.31. Consideration will also need to be given to how this review system would interact with the proposed mediation stage provided for in the Tribunals Courts and Enforcement Act. Such mediation will be invaluable for the unrepresented appellant, the more so because it will be conducted by people independent of HMRC. HMRC's internal review system will therefore need to complement this stage of the process rather than being a hindrance to, or seen as instead of, it.
- 3.32. *Question 3: What advantages or disadvantages would there be in consistency across the taxes about whether reviews were non-statutory, statutory or mandatory, or about the time limits concerned? Can the costs or benefits be quantified?***
- 3.33. *Consistency*
- 3.34. Consistency is a key requirement in a new review process. Firstly, consistency of customer service standards should be adopted across HMRC. Secondly, to avoid unfairness, a review procedure should be available to all and on the same basis. As previously noted, we believe this should be a statutory basis but not mandatory. Internal reviews should in no way be viewed as a replacement of the role hitherto fulfilled by the General Commissioners.
- 3.35. The advantages of the General Commissioners (as identified in our Tribunals report in 2006) from the unrepresented appellant's point of view should be retained in the new order, for example their understanding of the needs of business, local knowledge, approachability etc. Even if appellants opt for internal review in the first instance, they should retain access to the first tier of the new tribunals system at all times throughout the process.
- 3.36. *Timescale*
- 3.37. Striking a balance is paramount in deciding timescales. They need to be adequate to allow for a thorough review of the case but not unduly protracted. Simplicity and transparency are objectives to be applauded, but whether this comes from a common time limit requires thought. It is probable that only HMRC has sufficient data to determine this. If the data is not available already, it would be sensible to engage in a study sampling some of the cases and issues which might go forward for informal review to examine the practicalities first-hand and on which to base the decision of timescale. A pilot exercise would therefore seem appropriate (as suggested in the consultation at 4.2 to take place in spring 2008), encompassing all types of HMRC customer and across the various heads of tax to enable a detailed examination of the issues.
- 3.38. It would also be worth considering the Adjudicator's turnaround times for investigating complaints, as there are possible analogies to be drawn. In her 2007 report, the Adjudicator states that her office's average turnaround time is 21.25

weeks⁵. HMRC would therefore need to ensure that any additional review service it offers has sufficient resources and functionality to avoid delays of this magnitude. So whilst the timescale needs to be realistic, we feel this should be limited to a maximum of 45 days to give the customer certainty (being the existing timescale in the various indirect tax reviews).

- 3.39. There are certain types of case where there will be a pressing need to reach a decision within a shorter timescale. Cases involving tax credits or child benefit may need to be turned around within days, or even hours, where the appellant would otherwise be without the means to live. For such cases it will be necessary to have a fast-track procedure, one which can sanction speedier methods of communication than the norm – eg faxed referrals and telephone discussions as part of the evidence-gathering process, as with the DWP's Internal Review Service (see above).
- 3.40. *Quantifying costs and benefits*
- 3.41. Our view is that it would be preferable to have a dedicated team to deal with internal reviews. In that way, HMRC can manage the resources and gauge performance much better than if work is distributed across other HMRC officers to deal with in addition to their 'day job'.
- 3.42. If reviews were dealt with instead by allocating them to other officers in addition to their other responsibilities, the temptation would be to expedite the reviews, particularly if they are not built into performance targets. Inefficiencies and poor decision-making would then feature heavily in the system. A separately identifiable team responsible for reviews allows for costs, workload and benefits to be most easily assessed.

4. Chapter 5: Administrative matters relating to appeals

- 4.1. ***Question 4: Do you have any comments on the principle that legislation should enable decisions to be revisited without the tribunal being involved?***
- 4.2. If this is a proposal to change the law, such as Section 54 TMA 1970, to arrive at agreements which effectively exclude the jurisdiction of the Tribunal, then we wholly oppose it. For example taxpayers (particularly the unrepresented) could perhaps agree to a settlement and later find themselves bound by estoppel. Is it intended that such agreements would be binding on both parties, so HMRC would be precluded from making future discovery assessments? The law should not be changed without a clearer explanation as to why it is necessary to do so.
- 4.3. There should always be a right to formal appeal if an informal agreement cannot be reached between the parties. HMRC has an obligation to deal with the unrepresented in a fair-handed manner and must be open in explaining their rights at each stage of discussions. At the very earliest stage, they must provide sufficient information so that the taxpayer can make an informed decision whether they should formally appeal rather than accept an informal resolution offered by HMRC and the appellant must be made aware at the outset that they can have recourse to a formal hearing at any stage. This must be done in a non-threatening manner, so it does not act as a deterrent to appeal.

⁵ <http://www.adjudicatorsoffice.gov.uk/pdf/report2007.pdf>

4.4. Question 5: Are there any areas where further alignment of time limits would be helpful?

- 4.5. The first point to make in answering this question is that there should always be a right of appeal against any decision made by HMRC. As we have previously pointed out in our response to consultation earlier this year on *Safeguards for Taxpayers*⁶, there is a noticeable lack of appeal rights in the tax credits system against overpayment recovery.
- 4.6. Secondly, it would simplify matters across the system if there were consistent time limits for appeals to be brought. For direct taxes, that time limit is generally 30 days and this might suggest a standard.
- 4.7. In general, we would favour a 30-day time limit, provided the same criteria for allowing late appeals are maintained as they are now.

4.8. Question 6: What extension to the time limits for appeals should there be for taxpayers who have told HMRC that they disagree with their decision?

- 4.9. After HMRC has conducted an internal review, taxpayers should be given a further opportunity to appeal to the Tribunal (as well as maintaining this right throughout the informal review process so that the taxpayer can exercise it at any time).
- 4.10. When the decision from the internal review has been handed down, the taxpayer should have a period of 30 days to apply for a formal appeal to the tribunal. In giving its decision, HMRC should clearly state its reasoning for having arrived at its verdict and provide a clear analysis for the taxpayer's review. Following receipt of this, the taxpayer will need time to digest the decision and may want to seek further advice. To therefore allow sufficient time for this, we have suggested 30 days, which broadly maintains the status quo in direct tax matters.

4.11. Question 7: Are there situations in relation to taxes other than VAT where it would be desirable for tribunals to be able to consider administrative decisions related to appeals?

Wherever an administrative decision is made against which there is no right of appeal to the tax appeal tribunal, but which is susceptible of judicial review, it is desirable that any tribunal hearing an appeal arising from a substantive issue connected with the administrative decision should also be able to consider the administrative decision. For example, certain notices given under Part III of the Taxes Management Act 1970 do not carry a right of appeal, but are susceptible of judicial review. But a tribunal hearing an appeal on any substantive issue with which the notice was concerned should have jurisdiction over the validity of the notice as part of those proceedings.

4.12. Question 8: Do you have any other comments about administrative matters relating to appeals?

- 4.13. *Administration of appeals*
- 4.14. At 5.4, we agree that it is a significant improvement that the Tribunal's own administrative staff will deal with case listing procedures. Wherever possible, this

⁶ See <http://www.litrg.org.uk/reports/submissions.cfm?id=456>

separation from HMRC should be replicated throughout the appeals system so that taxpayers have confidence that the Tribunal is robustly independent.

- 4.15. HMRC must realise that it is no more than a post-box. Emphasising the right of the taxpayer to apply directly to the Tribunal if they want their appeal listed should go some way to counter the sense of HMRC guarding the gateway to the appeals system.
- 4.16. *Late appeals*
- 4.17. Our response to this section is prefaced by the comment that we are broadly content with the current rules on late appeals. The consultation document proposes at 5.12 that the initial application for a late appeal is made to HMRC and that the application would only go through to the Tribunal if HMRC refuses to allow it.
- 4.18. Whilst we agree that this suggestion saves time for the Tribunal, this process must be carefully described to appellants, as it could be taken at face value that HMRC is making itself an obstacle in the route to independent appeal. It is therefore essential that the customer is made fully aware of their further right to apply to the Tribunal for a late appeal to be heard.
- 4.19. What would be preferable is for HMRC to review applications for late appeals and allow those they agree are reasonable. Those which HMRC turn down should automatically be passed to the tribunal without the customer having to exercise a right to take the case further. This would eliminate one step in the process and minimise the delay in obtaining a final decision from the Tribunal on whether the customer will be granted leave to submit a late appeal.
- 4.20. *Postponement of disputed tax*
- 4.21. Similar comments apply in this situation as for late appeals above.
- 4.22. *Interest*
- 4.23. Regarding paragraph 5.18 of the consultation document, with a view to achieving consistency we agree that the circumstances in which interest should be paid and the rate should generally be laid down by Parliament rather than determined at the discretion of the Tribunal.
- 4.24. There should however be scope for allowing the Tribunal to depart from statutory rates where there are other factors in particular cases, such as hardship, for which it may be reasonable for the appellant to seek additional recompense.
- 4.25. Now might also be the time to consider ending the distinctions between interest on overpaid tax and overdue tax, aligning the rates where they are different and aligning the timescales too so that repayment supplement becomes payable immediately without the current waiting time. We understand that this point might be the subject of separate consultation, as mooted in the Consultative Committee Meeting minutes of 5 November 2007 [CC2007/92].

5. Chapter 6: Transitional Issues**5.1. Question 9: Do you have any comments on these proposals on transitional issues?**

5.2. Paragraph 6.5 of the consultation states that '*new impartial internal reviews would apply only to decisions arising after the transfer of functions had taken place*'. We are aware however that HMRC is already piloting use of an informal reconsiderations process with their planned series of New Compliance Checks, as proposed on the Compliance Reform Forum.

5.3. How does this fit with the proposals in relation to appeals? We have concerns that at present anyone opting for an informal reconsideration will not have the same benefits of statutory protection and a fully operational system to fall back on. We would therefore urge that this process is in place and has been properly tested in advance of the transfer to the new tribunals system in April 2009.

5.4. Question 10: Are there any other transitional issues to address?

5.5. Anyone in the process of discussions with HMRC will need to be appropriately informed of the changes in the appeal system, so thought needs to be given to devising means of communicating these.

5.6. Guidance generally available to the public concerning the appeals process will need to be updated and must be in place ready to 'go live' as at April 2009. This will include updating both hard-copy and electronically-available information.

6. Annex B: Impact Assessment**6.1. Question 11: Do you have any comments on the assumptions made or any views on the likely costs and benefits of the different proposals?**

6.2. Under the impact assessment summary, we note that the policy is not expected to be reviewed until two years after the launch of the new tribunal system. We feel that two years is too long a delay before a review is commenced as if revisions were needed, they should be made sooner rather than later.

6.3. We disagree that the 'costs of allowing informal dispute resolution are expected to be nil or negligible for both agents and taxpayers' if the informal review process were to be introduced as a mandatory step before formal appeal. Hence our recommendation that this is optional rather than obligatory.

6.4. In any event, we do not see how the costs of setting up an internal review process can be described as nil or negligible. But we do strongly suggest that costs defrayed early on in case management with a view to early dispute resolution will save on far greater hearing costs further down the line.

6.5. We note that impact assessments have yet to be carried out, for example Race and Disability Equality Assessments and we urge that all proposed processes are reviewed in this context, in accordance with HMRC's statutory obligations. As a minimum standard, we would expect HMRC to review all its procedures in the context of the unrepresented customer, including relevant minority groups, including:

- People with disabilities, looking at various types of sensory, mental, learning or physical impairment;
 - People whose first language is not English.
- 6.6. Customer journeys should be followed to make sure procedures are watertight in advance of their introduction to enable all to benefit from the changes.

LITRG
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