2.3 Bringing a case to the Tribunal and internal review

The method of bringing a case to the Tribunal will depend on the type of case and, initially, whether or not the case concerns an appealable decision.

Prior to the introduction of the Tribunal system in 2009, it was generally HMRC who controlled the timing of cases coming to the Tribunal's attention. Although taxpayers had the right to notify the matter to the Tribunal unilaterally, very few were aware of this right and, therefore, the right was rarely exercised.

Under the current rules, it is generally the taxpayer who notifies the case to the Tribunal. However, HMRC can, to an extent, control the timing by offering a taxpayer an internal review, as this will eventually bring the matter to a head, leading the taxpayer to accept HMRC's position or being required to notify the case to the Tribunal. However, unlike the position before 2009, it is not possible for HMRC to delay bringing the matter to the Tribunal.

2.3.1 Responding to an appealable decision

Once an appealable decision is made, the taxpayer should respond within 30 days of the decision date (or, in the case of information notices, 30 days from the date of receipt). Taxpayers are strongly advised to do so even if they think that the matter will be resolved in another way (for example, by way of judicial review or by reference to the Adjudicator).

Direct and indirect tax cases

The process differs slightly for each of the taxes so care should be taken to ensure that the correct procedure is followed.

Direct tax cases

In direct tax cases, in general, the taxpayer should make any appeal against the assessment by writing to the decision-making officer within the 30 days stating that he disagrees with the decision and giving his grounds for disagreement. As confirmed in *Thuishyanthan*, failure to notify HMRC first of any appeal will mean that the Tribunal has no jurisdiction to hear the case and would lead

to the Tribunal being required to strike out any appeal made directly to it.

The taxpayer also has the right (and usually exercises it) to seek the postponement of the tax charged by the assessment. A postponement application should generally be made to HMRC at the same time as any appeal. (It will be noted that a postponement application will not reduce the impact of any interest charge should the tax turn out to be payable.)

The taxpayer has the right to notify the Tribunal of the case at any time after an appeal has been made, except at certain stages during the internal review process if applicable (see below). In practice, it is quite common for the parties to carry on negotiating before the appeal is subject to any internal review or notified to the Tribunal.

Law: TMA 1970, s. 49A(2), 49H (and similar provisions elsewhere)
Case: *Thuishyanthan v HMRC* [2016] UKFTT 186 (TC)

Indirect tax cases

In indirect tax cases, the taxpayer has two alternative responses to an appealable decision. The taxpayer should either accept the offer of an internal review (which is an essential part of the appealable decision) or, alternatively, notify the case directly to the Tribunal. In either case, the taxpayer should respond within 30 days of the appealable decision.

Law: VATA 1994, s. 83A, 83C, 83G (and similar provisions elsewhere)

2.3.2 Internal reviews

As with ADR, the ostensible purpose of the internal review process is to allow some cases to be settled without the need for the Tribunal to be involved.

Although available in virtually all cases, their main benefit is in fact-based cases which are not technically complicated, for example cases involving penalties where a reviewing officer might be able to see matters from a more independent viewpoint than his or her colleague.

In the more technical cases, internal reviews are less likely to give rise to a different outcome – partly because both the original officer making the decision and any officer in the course of the internal

review are likely to obtain advice from the same technical experts within HMRC. Nevertheless, except where time is of the essence, the author generally recommends that an internal review should be considered. He offers two reasons:

- first, should the review be successful, it will prove considerably cheaper than pursuing the appeal directly to the Tribunal; and
- secondly, the process forces the parties to set out their views in a single document each: this facilitates the shepherding of the respective arguments should the matter then proceed to the Tribunal. Indeed, the author often prefers to get involved in any appeal at the internal review stage so as to elicit early clarification of HMRC's position on certain issues.

It should always be noted, however, that internal reviews are not necessarily a one-way street for taxpayers. An internal reviewer can decide to increase the amount being charged by HMRC if it is considered that the original officer has understated the correct amount to charge.

During the conduct of an internal review, the taxpayer may not notify the matter to the Tribunal.

Law: TMA 1970, s. 49D; VATA 1994, s. 83G (and similar provisions elsewhere)

Where internal review is not always available

There are a few situations where internal review is not permitted. These are those situations where there is what HMRC call a "jeopardy amendment", effectively an interim assessment made in the middle of an enquiry where there is a perceived loss of tax. Although an appeal may be made against such amendments, all appeal rights (for example, internal review and Tribunal adjudication) are suspended until such time as the enquiry finally comes to an end.

Law: TMA 1970, s. 31(2); FA 1998, Sch. 18, para. 30(5); FA 2003, Sch. 10, para. 35(3); FA 2013, Sch. 33, para. 35(2)

Direct and indirect tax cases

Again, the process differs slightly for each of the taxes so care should be taken to ensure that the correct procedure is followed.

Direct tax cases

In direct tax cases the taxpayer may, at any time after an appeal has been made, request an internal review. HMRC would then be obliged to carry out such a review.

Alternatively, HMRC may offer an internal review. If HMRC do so, the taxpayer must respond within 30 days, either by accepting the offer or by notifying the case to the Tribunal. Failure to do either will mean that HMRC's view becomes final.

It is the author's view that some standard letters issued by HMRC, purporting to be an offer of internal review, do not actually constitute an offer. As a result, it might be possible to argue that the 30 day time limit that runs from the date of an offer is not in fact triggered. This argument could be particularly useful if a taxpayer is late in responding to such an offer from HMRC. This is because the legislation does not expressly allow a taxpayer to make a late acceptance; in such situations, the taxpayer must notify the matter to the Tribunal and seek the Tribunal's permission to have the late appeal admitted.

An offer by HMRC of an internal review should be accompanied by a statement of HMRC's view of the matter. This should permit the taxpayer to have a single document which sets out the factual and legal bases for HMRC's position. The document should therefore act as a starting point in any future discussions.

In cases where HMRC do not offer an internal review, the process may be triggered by the taxpayer. This can be done as early as the initial lodging of the appeal against HMRC's decision. Alternatively, it can be done at a later stage (provided that the matter has not already been notified to the Tribunal). A request by a taxpayer for an internal review is not complicated. It can be as simple as "The taxpayer requests an internal review of the decision".

HMRC are meant to respond to any such request by preparing the single document which sets out the factual and legal bases for their position, allowing it to act as a starting point in any future

discussions. This document ought to be prepared within 30 days of HMRC receiving the request for an internal review. However the statute does allow HMRC "such longer period as is reasonable". In cases where HMRC have spent too long in responding, the taxpayer can always short-circuit the process and unilaterally notify the appeal to the Tribunal.

Law: TMA 1970, s. 49B, 49C, 49D (and similar provisions elsewhere)

Indirect tax cases

As noted at **2.3.1** above, an offer of internal review is meant to be inherent in a notice of appealable decision. If the taxpayer wishes to proceed with the internal review, then the taxpayer should accept the offer within 30 days of the decision date.

Some indirect tax cases may be taken to the Tribunal by third parties (i.e. persons other than the taxpayer). For example, as VAT is often borne by the ultimate consumer rather than the person supplying the goods or services, it might be the consumer who has the financial interest in determining the correct VAT treatment. Where such third parties have not already notified a dispute to the Tribunal, they may instead pursue the internal review process by making a request to HMRC within 30 days of that person becoming aware of the decision.

The 30-day period may be extended by HMRC. Such an extension must be made during the 30-day period itself and notified to the taxpayer (in cases where it is the taxpayer who will accept the offer of internal review) or the third party (in those cases where the third party has the right to take the matter to the Tribunal).

The taxpayer (or third party) may alternatively accept an offer of (or request) an internal review outside the relevant 30-day time limit. However, HMRC are obliged to undertake the internal review in such circumstances only if they are satisfied that the taxpayer, or the third party:

- had a reasonable excuse for not accepting the offer or requiring the review within the time allowed; and
- made the request without unreasonable delay after the excuse had ceased to apply.

Rather anomalously, if HMRC refuse to undertake an internal review in such circumstances, a taxpayer had the automatic right to notify the appeal to the Tribunal, provided that the Tribunal was notified of the appeal within 30 days of HMRC's refusal. This interpretation was confirmed in *Scanwell*. The legislation was amended, however, with effect for review requests made on or after 1 June 2014 so as to require a taxpayer in that situation to obtain permission from the Tribunal.

Law: VATA 1994, s. 83A(1), 83B, 83C(1), 83D, 83E, 83G(4); SI 2014/1264
Case: *Scanwell Freight Services Ltd v HMRC* [2014] UKFTT 106 (TC)

All cases – conduct of internal reviews

A taxpayer is not obliged to engage in the internal review process beyond merely accepting any offer of internal review or (in the case of some direct tax cases) requesting an internal review. However, the benefits of the internal review process are obtained when the taxpayer responds to the document setting out HMRC's view of the matter.

From the author's perspective, this is often an ideal time to get Counsel involved as the document prepared as part of the internal review process will usually amount to the first draft of any subsequent skeleton argument that would be deployed at the Tribunal.

In practice, the internal review is supposed to be carried out by an officer independent from the original officer dealing with the case. In one case, the author was aware that the internal review was to be carried out by an officer in the same room as the original officer. Even though it was asserted by HMRC that the two operated independently of each other, HMRC were persuaded that it would be better if an officer located elsewhere carried out the internal review so as to give the perception of independence.

The normal period for internal review is 45 days, starting from HMRC's receipt of the taxpayer's acceptance or request for the internal review. However, the parties can agree to vary this period (either to extend it or to shorten it). Indeed, it is not uncommon for periods to be repeatedly extended, provided that both parties agree to the extension.

If HMRC fail to complete the internal review in time, then the original decision is treated as the conclusion of the internal review, but HMRC are required to notify this fact to the taxpayer (or third party). In practice, the taxpayer (or third party) will usually (but is not obliged to) consent to a retrospective extension of the internal review period.

Law: TMA 1970, s. 49E; VATA 1994, s. 83F (and similar provisions elsewhere)

All cases – incomplete internal reviews

There are cases in which the internal review appears to be little more than a "rubber stamp" of the prior decision. Furthermore, in some cases, it is not clear whether a taxpayer's representations have been even considered. In *Bloomsbury*, the Tribunal recognised that the nature and extent of the review should be "as appear appropriate to HMRC in the circumstances". However, where matters have been overlooked or representations have not been taken into account, the Tribunal held that the review might not be complete and, therefore, the time limits for notifying the case to the Tribunal (see below) will not be triggered.

A taxpayer adopting this approach will risk missing a time limit for notifying the appeal to the Tribunal. However, a Tribunal is very likely to allow a late appeal if a serious and timely attempt to clarify matters with HMRC is made. In any event, if the internal review was incomplete, there should be no need for the Tribunal's discretion as the time limits will not have started to run.

Case: *Bloomsbury Verlag GmbH v HMRC* [2015] UKFTT 660 (TC)

All cases – after an internal review

If an internal review has been carried out, then once again the taxpayer will have 30 days (from the date of the review) to notify the case to the Tribunal. Otherwise, the conclusions of the review will be treated as agreed. However, even if the 30-day period has passed, an appeal may still be notified to the Tribunal. However, it will not be admitted unless the Tribunal gives permission. The factors that govern the Tribunal's consideration of whether or not to admit such late appeals are discussed at **2.4.4** below. Strictly, HMRC have no right to overlook a taxpayer's delay. However, in practice, if

HMRC do not object to the late notification to the Tribunal, the Tribunal is unlikely to refuse to admit the late appeal.

In those cases where HMRC have failed to complete the internal review process within the statutory 45 days (or the time period agreed by the parties), the 30-day time period does not start to run until the day after HMRC notify the conclusions of the review.

Law: TMA 1970, s. 49G, 49H; VATA 1994, s. 83G (and similar provisions elsewhere)

The subject matter of any subsequent appeal

In *Half Penny*, the Tribunal concluded that the outcome of an internal review displaces the original decision. Therefore, it is the outcome of the internal review decision which becomes the subject matter of any subsequent appeal in the Tribunal.

This approach was followed very soon afterwards in *Archer*. In that case, there was an appeal against a refusal to consider special circumstances in relation to a penalty. Although the matter had been considered by the original decision-maker, the internal reviewer did not properly consider special circumstances and, therefore, to this extent the decision was flawed, enabling the matter to be revisited by the Tribunal itself.

Cases: *Half Penny Accountants Ltd v HMRC* [2016] UKFTT 45 (TC); *Archer v HMRC* [2016] UKFTT 141 (TC)

2.3.3 When to bring other cases to the Tribunal

When dealing with other types of case, there are no such rigid time limits. However, in cases involving late appeals to HMRC where the Tribunal has the jurisdiction to allow such appeals, it will be advisable for the taxpayer to act promptly. The considerations to be applied by the Tribunal in such cases are summarised at **2.4.4** below.

In such cases, and also in cases where a taxpayer is seeking a closure notice, the taxpayer may act unilaterally of HMRC and simply notify the Tribunal of the case.

In cases where a referral is being made to the Tribunal in the course of an enquiry, the referral should be made jointly by the taxpayer and HMRC.

Law: TMA 1970, s. 28ZA(2), 42(3); FA 1998, Sch. 18, para. 31A(2); CAA 2001, s. 204(3); FA 2003, Sch. 10, para. 19(2)

2.3.4 How to bring cases to the Tribunal

When HMRC seek prior approval from a Tribunal of a prospective information notice or inspection, the procedures are considered at **5.2** below.

The procedures for taxpayers to bring a case (an appeal or an application for a closure notice) to the Tribunal are considered at **5.3** and **5.4** (below).

2.3.5 "Litigation friends"

There may be circumstances in which a taxpayer is mentally incapacitated (either in the proper sense of the phrase or simply by being a minor) and precluded from commencing legal proceedings or giving instructions to a professional adviser.

It has been held in judicial review proceedings that the Tribunal rules are sufficiently broadly drafted so as to permit a friend or relative to act as the agent of the taxpayer so as to liaise with the Tribunal or, where appropriate, to give instructions to a professional representative.

Case: *R (oao C) v. FTT Procedure Committee, the Lord Chancellor* [2016] EWHC 707 (Admin), as applied by the EAT in *Jhuti v Royal Mail Group* UKEAT/0061/17/RN

2.3.6 Undischarged bankrupts and companies in administration

Conversely, taxpayers might be precluded from pursuing a case if they are insolvent. A taxpayer's rights to litigate a case are transferred to his trustee in bankruptcy or administrator who takes over full ownership of the case, including the right not to pursue it. In some cases, the taxpayer might be assigned the litigation rights, but this is a matter for the trustee in bankruptcy or administrator in any particular case.