

Tax Controversy 2022

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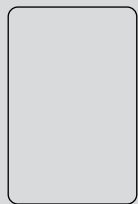
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Tax Controversy

2022

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Richard Jeens

Slaughter and May

Lexology Getting The Deal Through is delighted to publish the ninth edition of *Tax Controversy*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the European Union, Germany, Luxembourg and Ukraine.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Richard Jeens of Slaughter and May, for his continued assistance with this volume.



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United Kingdom

Charles Osborne, Dominic Robertson and Richard Jeens

Slaughter and May

OVERVIEW

Legislation

- 1 | What is the relevant legislation relating to tax administration and controversies? Other than legislation, are there other binding rules for taxpayers and the tax authority?

The legislation governing the administration of, and the process for dealing with disputes relating to, tax is not located in a single statute. For example, the Taxes Management Act 1970 contains rules for the administration of direct taxes on individuals, the Finance Act 1998 contains rules for the administration of corporate income tax and the Value Added Tax Act 1994 contains rules for the administration of value-added tax (VAT).

In addition to being found in primary legislation, rules relating to tax administration and tax controversies are also found in secondary regulations. These regulations include rules relating to particular taxes, such as the Value Added Tax Regulations 1995, but also the rules governing how disputes are brought before the UK tax tribunals, such as The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The UK tax authority also publishes guidance that, although not binding, sets out its approach to certain issues.

International legislation and treaties, including double tax treaties (of which the UK has an extensive network), may also bind taxpayers and the UK tax authority.

In addition to the legislation and treaties described above, decisions of the UK courts are also binding on taxpayers and the UK tax authority.

Despite the UK's exit from the EU, pre-'exit day' EU law and jurisprudence continues to form part of UK law and will likely to continue to bind taxpayers and the UK tax authority for the foreseeable future as a result of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020).

Relevant authority

- 2 | What is the relevant tax authority and how is it organised?

The relevant tax authority is Her Majesty's Revenue & Customs (HMRC). Although HMRC is a government department, ultimately accountable to the Chancellor of the Exchequer, government ministers are not involved in its day-to-day activities.

The legal powers given to HMRC are vested in persons known as the Commissioners for Her Majesty's Revenue & Customs (Commissioners). There are two key managerial bodies within HMRC – the Executive Committee and the HMRC Board – which are broadly analogous to the senior executive team and a supervisory board within a company.

Decisions around tax disputes are taken at various levels of HMRC, depending on the significance and sensitivity of the dispute. Three of the Commissioners sitting together make decisions on the most significant

and sensitive disputes. In reaching their decisions, these Commissioners consider the recommendations of the Tax Disputes Resolution Board, which is made up of senior representatives across HMRC. Decisions about the next level down of dispute are referred to case boards that sit within the various business areas of HMRC, and are made up of senior leaders across the department. There are several different case boards, including Enforcement and Compliance; Large Business; Specialist Personal Tax; Diverted Profits; and Transfer Pricing. A large transfer pricing case may need to be approved by the Transfer Pricing Board, the Tax Dispute Resolution Board and the Commissioners. HMRC also has a Penalty Consistency Panel.

ENFORCEMENT

Compliance with tax laws

- 3 | How does the tax authority verify compliance with the tax laws and ensure timely payment of taxes? What is the typical procedure for the tax authority to review a tax return and how long does the review last?

The UK tax system is fundamentally a self-assessment system: generally, individuals and companies are required to self-assess their liability to tax and file a return with Her Majesty's Revenue & Customs (HMRC) stating their tax liability for the particular period in question.

HMRC is able to open an enquiry into a self-assessment return within 12 months of it being filed. HMRC may open such an enquiry without giving any justification for doing so, and the enquiry can be into any aspect of the return. On opening an enquiry, HMRC typically sets out the specific issues that it wishes to enquire into. HMRC is not bound by the contents of the initial enquiry notice and may narrow or expand the scope of its enquiry at any time.

There is no legislative deadline by which time HMRC must have completed its enquiry but, where an enquiry takes an unduly long time, taxpayers are able to apply to a tribunal for a direction that HMRC closes the enquiry.

Once HMRC closes an enquiry (using a closure notice), recent case law suggests that the matters that can then subsequently be disputed in relation to the particular return are limited to what is referred to in the closure notice.

HMRC does not enquire into every self-assessment return that it receives, instead choosing which returns to enquire into based on risk factors, such as the taxpayer's size, record of compliance, use of tax avoidance schemes and involvement in cross-border transactions. In any event, the taxpayer itself is under an obligation to retain all records and documents that were required in order to produce a full and accurate tax return for, generally, a minimum of six years.

Types of taxpayer

4 | Are different types of taxpayers subject to different reporting requirements? Can they be subjected to different types of review?

Individuals and companies are required to self-assess their liability to tax and file a return with HMRC, stating their tax liability for the return period. The period in relation to which the individual or company is required to compute their tax liability will depend on the tax in question and the nature of the taxpayer. For example, companies compute their income tax liability by reference to accounting periods that are 12 months in duration, and are required to file their tax return within 12 months of the end of the accounting period in question. VAT liability is typically computed quarterly.

Both individuals and companies may have to make payments on account to HMRC.

HMRC's ability to open an enquiry into a tax return or issue a 'discovery' assessment applies equally to individuals and companies. The duration of any enquiry will generally depend on the complexity of the taxpayer's affairs.

Requesting information

5 | What types of information may the tax authority request from taxpayers? Can the tax authority interview the taxpayer or the taxpayer's employees? If so, are there any restrictions?

HMRC has formal powers to request information from taxpayers but also commonly requests information informally.

Formally, subject to restrictions in the case of information or documents subject to legal professional privilege (LPP), and to a limited right to appeal, HMRC has the power to require a taxpayer to provide information or to produce a document if the information or document is reasonably required by HMRC for the purpose of checking the taxpayer's tax position or collecting a tax debt. HMRC can also require a third party to provide information or produce documents in relation to a taxpayer's tax affairs if that information or document is reasonably required for either of these purposes. In each case, HMRC cannot require anyone to produce a document that is not in their possession or power (but note the record-keeping obligation described above).

HMRC may also inspect a taxpayer's business premises and other property in the exercise of its functions.

Although HMRC's formal powers to interview taxpayers and the employees of taxpayers are generally triggered only in cases of fraud or criminal investigations, in practice, it is quite common for HMRC to informally request such interviews.

Available agency action

6 | What actions may the agencies take if the taxpayer does not provide the required information?

Failure to comply with a formal information request from HMRC can result in penalties. Criminal consequences may arise in cases of concealment of information or fraud.

Protecting commercial information

7 | How may taxpayers protect commercial information, including business secrets or professional advice, from disclosure? Is the tax authority subject to any restrictions concerning what it can do with the information disclosed?

Subject to specific exemptions in relation to criminal conduct, the key protection for taxpayers in this area is LPP. The two forms of LPP that are most likely to apply are:

- legal advice privilege, which applies to confidential communications that pass between a lawyer and a client for the purpose of obtaining legal advice; and
- litigation privilege, which applies to confidential communications that are made for the dominant purpose of existing, pending or completed litigation that pass between (1) a lawyer and a client; and (2) a lawyer, client or a third party.

Under its normal powers, HMRC is not able to request or inspect any document protected by LPP, though HMRC may (and frequently does) dispute whether or not particular documents are subject to LPP.

Subject to a number of limited exceptions, HMRC officials are prohibited by statute from disclosing to any third party any information that is held by HMRC in connection with its functions. There are criminal sanctions for breach of that prohibition if the breach relates to a person whose identity is specified in the disclosure or can be deduced from it.

Limitation period for reviews

8 | What limitation period applies to the review of tax returns?

HMRC is able to open an enquiry into a self-assessment return within 12 months of it being filed.

Once the time limit for opening an enquiry into a tax return passes, or HMRC formally closes its enquiry into a particular tax return, the tax return is generally regarded as final. In such circumstances, HMRC can only collect further tax by raising a discovery assessment.

A discovery assessment is raised by HMRC on 'discovery' (which can extend to a change of heart by HMRC) that a taxpayer has been under-assessed to tax, or has been given excessive relief from tax. Formally, a discovery assessment can only be raised by HMRC where one of the following conditions is satisfied:

- the under-assessment to tax or excessive relief was brought about carelessly or deliberately by the taxpayer or someone acting on his or her behalf; or
- at the time that the 12-month time limit for enquiry into the relevant return expired or HMRC formally closed its enquiry into the relevant return (as applicable), a hypothetical HMRC officer could not reasonably be expected, on the basis of the information then available to him or her, to be aware of the under-assessment to tax or excessive relief.

The second of these conditions has been interpreted by the courts very widely.

Where only the second of these two conditions applies, a discovery assessment can only be made within four years from the end of the period to which the assessment relates.

In cases involving a loss of tax brought about carelessly by the taxpayer, a discovery assessment can be made within six years from the end of the period to which the assessment relates. Where such a loss of tax is brought about deliberately, a discovery assessment can be made within 20 years from the end of the period to which the assessment relates.

Alternative dispute resolution

9 | Describe any alternative dispute resolution (ADR) or settlement options available.

HMRC has set out its approach to the resolution of tax disputes in its Litigation and Settlement Strategy document (LSS), which gives HMRC a number of options other than formal litigation.

Once a notice of appeal has been given to HMRC, but before a tax dispute proceeds to the tribunal, taxpayers may request that HMRC carries out an internal review of their case. This review will be carried

out by an officer of HMRC who has not been involved in the taxpayer’s case to date. It is up to HMRC to choose the nature and extent of the review. Around 40 per cent of these reviews result in a reversal or amendment of HMRC’s initial decision.

Settling tax disputes in the UK using ADR is a relatively recent development that, given the potential savings that it can result in for both taxpayers and HMRC, may become increasingly common. ADR commonly uses mediation and may be suitable to deal with some tax disputes, but HMRC may consider it inappropriate for cases that turn on a point of law.

It is possible to conclude a contractual settlement agreement with HMRC; however, the LSS sets out a number of restrictions on this:

- HMRC will only agree to such a settlement where it considers that it is better off overall (ie, considering both tax receipts and the use of HMRC resources) to settle than to pursue a claim in the courts;
- where HMRC believes that it has a 51 per cent or better chance of winning a binary dispute, it will not settle for less than 100 per cent of the tax; and
- there must be a technical basis for any settlement outcome.

Collecting overdue payments

10 | How may the tax authority collect overdue tax payments following a tax review?

HMRC has a wide range of enforcement options available to it, including:

- seizing certain of the taxpayer’s goods in order to compel the payment of tax. If the taxpayer continues to refuse to pay, HMRC can arrange for the goods to be sold at auction;
- recovering tax through the civil courts. Where this is unlikely to be effective, HMRC can seek a bankruptcy or winding-up order against the taxpayer;
- recovering tax against taxpayers who are employees through deduction at source on their employment income;
- demanding security for debts of certain taxes; and
- recovering the tax from third parties if the person primarily liable does not pay it.

Legislation was introduced in 2015 that allows HMRC to collect tax due to it directly from taxpayers’ bank accounts in the UK, provided that the sum that HMRC seeks to collect exceeds £1,000. This is intended to be a measure of last resort.

Penalties

11 | In what circumstances may the tax authority impose penalties?

Generally, HMRC may impose penalties for:

- inaccuracies in tax returns and documents;
- failures to notify HMRC of a liability to tax;
- failures to file returns on time; and
- failures to pay tax on time.

There are also distinct penalty regimes relating to failure to comply with HMRC information requests and for the promotion or use of tax-avoidance schemes.

12 | How are penalties calculated?

Penalties for inaccuracies in tax returns and documents and for failures to notify HMRC of a liability to tax are often described as ‘tax-gear’d’ penalties, meaning that they are calculated as a percentage of the tax that is due. The amount of the percentage will depend on whether the inaccuracy or failure was careless, deliberate, or deliberate and

concealed, and also whether the discovery of the increased liability to tax was voluntarily disclosed to HMRC or not.

Penalties for a failure to file a return or pay tax on time differ depending on the tax to which the failure relates. These penalties often start as requirements to pay fixed amounts, but can become fixed daily penalties or tax-gear’d penalties, depending on the nature and length of time for which the failure continues.

Penalties for failure to comply with HMRC information requests start as a requirement to pay a fixed amount, with a variable daily default penalty. Tax-gear’d penalties will apply in cases of continued failure to comply.

The raising of penalties is subject to review by HMRC’s Penalty Consistency Panel.

13 | What defences are available if penalties are imposed?

Penalties for a non-deliberate failure should generally not apply if there is a reasonable excuse for the failure. HMRC takes a restrictive view on what amounts to a reasonable excuse, with not having enough money to pay the tax generally not being sufficient. Reliance on an agent (such as accountants or lawyers) may be a reasonable excuse, or, more likely, indicates that the taxpayer has taken reasonable care.

Penalties may be suspended in situations where the failure is a ‘one-off’.

Collecting interest

14 | In what circumstances may the tax authority collect interest and how is it calculated?

Interest becomes due when tax is paid late. HMRC publishes a late payment interest rate on its website. This rate is currently the Bank of England base rate plus 2.5 per cent.

Criminal consequences

15 | Are there criminal consequences that can arise as a result of a tax review? Are these different for different types of taxpayers?

Criminal consequences will generally require fraudulent or dishonest conduct by the taxpayer. Where HMRC suspects a person of acting fraudulently, it has certain criminal investigation powers that go beyond its usual powers.

Traditionally, corporates were generally only criminally liable for the actions of their employees and other associated persons if the controlling mind of the corporate is proved to have been involved in the relevant criminal behaviour. However, in 2017, following recent global tax scandals, the UK government introduced a new strict-liability, US-style approach, where the burden is on corporates to demonstrate that appropriate prevention procedures were in place in order to avoid a criminal charge of ‘failing to prevent’ a tax-related crime committed by someone else.

The consequences of being found guilty of a tax-related crime depend on the taxpayer involved. For individual taxpayers and for the directors of corporations, fines and prison sentences are available. For the corporations themselves, fines are available.

Enforcement record

16 | What is the recent enforcement record of the authorities?

The majority of tax disputes are resolved before proceeding to the tribunal, with one or other party conceding, or reaching a compromise settlement (which, to comply with HMRC’s LSS, must be a technically justified outcome). In those cases that do proceed to court, HMRC’s

enforcement record is good, particularly in cases involving perceived tax avoidance. In 2019/20, the First-tier Tribunal ruled in HMRC's favour in 83 per cent of the tax disputes that it heard.

THIRD PARTIES AND OTHER AUTHORITIES

Cooperation with other authorities

17 | Can a tax authority involve or investigate third parties as part of the authority's review of a taxpayer's returns?

Yes. Her Majesty's Revenue & Customs (HMRC) can require a third party to provide information or produce documents if that information or document is reasonably required to check the taxpayer's tax position or to collect a tax debt. However, HMRC needs the approval of the taxpayer or the tribunal to do this, unless the third party is a financial institution, in which case, only written notice from an authorised HMRC officer is required. HMRC cannot require the third party to produce a document that is not in its possession or power, and the legal professional privilege rules apply.

HMRC may also inspect a third party's business premises and other property in the exercise of its functions. Recent case law suggests that the taxpayer does not need to be given an opportunity to make representations to HMRC opposing the inspection of the third party's premises where the tribunal gives permission for such an inspection.

If the third party is an auditor, such third party cannot be required to provide information held in connection with the performance of carrying out a statutory audit. Likewise, any person appointed to give advice about the tax affairs of another person cannot be required to produce documents that consist of relevant communications with that person's client or another tax adviser of the client related to advice on that client's tax affairs.

Failing to comply with an information request by HMRC may result in penalties.

18 | Does the tax authority cooperate with other authorities within the country? Does the tax authority cooperate with the tax authorities in other countries?

Yes. HMRC cooperates with a variety of other authorities in the UK, including the National Crime Agency, the Serious Fraud Office, the Financial Conduct Authority and Her Majesty's Treasury.

HMRC also increasingly cooperates with the tax authorities in other countries to share information. In particular, the UK has entered into many Tax Information Exchange Agreements with other jurisdictions, under which HMRC and the relevant tax authorities agree to cooperate in tax matters through the exchange of information. HMRC also exchanges information with other tax authorities under the joint Council of Europe/OECD Convention on mutual administrative assistance in tax matters and many of the UK's double taxation treaties.

SPECIAL PROCEDURES

Voluntary disclosure and amnesties

19 | Do any special procedures apply in cases of financial or other hardship, for example when a taxpayer is bankrupt?

Her Majesty's Revenue & Customs (HMRC) may agree to scheduled payment plans in cases where the taxpayer's means or situation make it difficult to pay the full amount of tax owed on time. Late payment interest will continue to apply on any tax not paid by the due date.

20 | Are there any voluntary disclosure or amnesty programmes?

HMRC has historically operated a number of campaigns designed to encourage individuals to voluntarily disclose under-declared income. By disclosing as part of one of these schemes, taxpayers would be treated as having made a 'voluntary' disclosure to HMRC, giving the taxpayer the most favourable outcome when it comes to levying applicable penalties.

HMRC has also operated schemes allowing settlement opportunities for the users of certain marketed tax-avoidance schemes. The aim is to offer taxpayers and HMRC the best opportunity to resolve disputes in these areas in a way that is both cost-effective and consistent. Where people decline the settlement opportunity, HMRC will move to take legal action against such taxpayers as swiftly as possible.

Given the current climate of cracking down on tax avoidance, whether any similar schemes will be launched in the future is uncertain.

RIGHTS OF TAXPAYERS

Rules protecting taxpayers

21 | What rules are in place to protect taxpayers?

Her Majesty's Revenue & Customs (HMRC) has published a non-binding taxpayer charter that sets out the rights and responsibilities of HMRC and taxpayers in relation to one another. For example, the charter provides that taxpayers can expect HMRC to provide a helpful, efficient and effective service, to protect taxpayers' information and respect their privacy, and to deal with complaints quickly and fairly. In return, HMRC expects taxpayers to give full, accurate and timely answers and to treat HMRC employees with respect. In addition, although not binding on HMRC, HMRC has published guidance for its employees on resolving tax disputes in the LSS that can be used by taxpayers as a helpful guideline on how HMRC will approach disputes.

HMRC also has well-established internal governance procedures and is ultimately subject to judicial review procedures and parliamentary oversight in the discharge of its functions.

Requesting information

22 | How can taxpayers obtain information from the tax authority? What information can taxpayers request?

Taxpayers can request information from HMRC pursuant to the provisions of the Data Protection Act 2018 (DPA 2018) and the Freedom of Information Act 2000 (FOIA 2000).

Under DPA 2018, taxpayers may request personal information that HMRC holds about the taxpayer. HMRC must comply with requests within one month. HMRC may withhold information where, for example, its release would be likely to prejudice the prevention or detection of crime, the apprehension or prosecution of offenders, or the assessment or collection of any tax or duty.

Under FOIA 2000, taxpayers may request any recorded information held by HMRC (other than in relation to personal information, for which see previous paragraph). A request under the FOIA 2000 must be made in writing, and HMRC must respond within 20 working days.

Tax authority governance

23 | Is the tax authority subject to non-judicial oversight?

HMRC is subject to internal reviews, publishes annual reports setting out its performance for the year in question and is ultimately accountable to the Chancellor of the Exchequer and various parliamentary committees.

COURT ACTIONS

Competent courts

24 | Which courts have jurisdiction to hear tax disputes?

Generally, the court of first instance for tax disputes is the tax chamber of the First-tier Tribunal. Occasionally, disputes with no contested facts that instead turn on a particularly complex point of law, or that involve a particularly large sum of tax, will bypass this stage. Such cases, and cases on appeal from the First-tier Tribunal, will be heard in the tax and chancery chamber of the Upper Tribunal.

In England and Wales, appeals from the Upper Tribunal are heard by the Court of Appeal and from there proceed to the Supreme Court, the highest court in England and Wales. There is an equivalent process for tax disputes proceeding through the Scottish courts.

The European Court of Human Rights and (for those cases referred on or before 31 December 2020) European Court of Justice can also hear tax disputes, particularly cases involving EU law or VAT.

Criminal cases or cases involving judicial review may be heard in other courts, such as the Crown Court or the Administrative Court.

Lodging a claim

25 | How can tax disputes be brought before the courts?

Appeals can generally be brought against any final decision of Her Majesty's Revenue & Customs (HMRC) to levy tax or penalties. There is no minimum monetary threshold before an appeal can be brought.

To bring a claim before the courts, a taxpayer must first give HMRC notice of appeal against the final decision in question. The deadline for doing so is usually within 30 days of the decision in question being appealed. The taxpayer must then raise the appeal with the tribunal (this will generally be the First-tier Tribunal). Only the taxpayer has the standing to appeal to the tribunal.

As well as the traditional method of bringing a tax appeal, the decisions of UK public bodies (including HMRC) may be reviewed in certain circumstances using judicial review. Where an appellant successfully brings a judicial review challenge in respect of a public body's decision, the public body can be required to revisit its decision and the reasoning behind it.

There are strict requirements relating to when a judicial review claim can be brought (particularly as to timing), and the extent of the failings of the public body, which must be satisfied before a court will agree to hear a judicial review appeal. The First-tier Tribunal cannot hear judicial review claims.

Combination of claims

26 | Can tax claims affecting multiple tax returns or taxpayers be brought together?

Yes. The tribunals and courts have broad case management powers, which allow the tribunal or court in question to bring multiple claims together so that they are heard at the same time, to make group litigation orders, and to direct that a number of cases that turn on the same point of law be stayed pending the outcome of a lead case. Such orders can be made by the tribunal or court on its own initiative, or at the request of the parties.

Usually, where a number of cases turn on the same point of law, HMRC and the relevant taxpayers will agree which case is the most suitable to proceed as the lead case, and ask the tribunal to issue a direction on this basis. Where, however, agreement cannot be reached, the parties may make representations to the court, and a hearing may occur during which the tribunal will decide which case is to be the lead case.

Where a particular issue is relevant to multiple tax returns of a single taxpayer, HMRC may agree with the taxpayer that a decision in relation to one particular tax return will govern the outcome of the disputes relating to each tax return.

Pre-claim payments

27 | Must the taxpayer pay the amounts in dispute into court before bringing a claim?

Generally, no. However, in certain cases involving indirect taxes or diverted profits tax or, since July 2014, perceived tax avoidance, taxpayers may be required to do so.

If the taxpayer ultimately loses its appeal before the courts, the penalty and interest obligations in respect of the tax in dispute will run from the original payment deadline, and not from when the dispute is finally concluded.

Taxpayers may, however, apply for a postponement of any tax due that, if accepted, effectively puts a stop on any penalties pending determination of the substantive dispute. If the taxpayer loses a direct tax appeal at first instance then, notwithstanding any onward appeal to the Upper Tribunal, the taxpayer must pay the disputed tax in question.

Cost recovery

28 | To what extent can the costs of a dispute be recovered?

Generally, costs can only be recovered in the First-tier Tribunal if the case is complex or if the tribunal considers that one of the parties has acted unreasonably in bringing, defending or conducting the proceedings.

In the Upper Tribunal, Court of Appeal and Supreme Court, the general approach is that the unsuccessful party will be ordered to pay a proportion of the costs of the successful party.

However, the tribunal or court may choose not to take this approach where, for example, the conduct of the successful party is such that it appears appropriate to penalise it by not awarding costs in its favour.

It is generally difficult for litigants in person to recover costs.

Third-party funding

29 | Are there any restrictions on or rules relating to third-party funding or insurance for the costs of a tax dispute, including bringing a tax claim to court?

There are no formal restrictions on the use of third-party funding or insurance for the costs of a tax dispute. Many third-party funders are members of the Association of Litigation Funders, which issues a code of conduct that sets out rules governing the relationship between a funder and its client and provides clarity on issues such as case control, settlement and withdrawal. Insurance companies that issue policies of legal expenses insurance are regulated in England and Wales by the Financial Conduct Authority and the Prudential Regulation Authority.

Court decision maker

30 | Who is the decision maker in the court? Is a jury trial available to hear tax disputes?

This depends on which court the proceedings are before. In the First-tier Tribunal and the Upper Tribunal, decisions are generally made by a panel made up of judges or judges and lay members (individuals who are not legally qualified but who have other relevant professional qualifications or experience), but they may also be made by a single judge sitting alone. Whom the case is heard by will depend on the nature of the case.

Where there is a panel, decisions are taken based on a simple majority, with the presiding member of the panel having the casting vote in tied decisions.

In the Court of Appeal and Supreme Court, decisions are taken by a panel of judges deciding based on a simple majority.

Jury trials are not used in tax disputes unless these are part of criminal proceedings.

Time frames

31 | What are the usual time frames for tax trials?

The time frame for each trial will vary according to the complexity of the dispute in question.

Disclosure requirements

32 | What are the requirements concerning disclosure or a duty to present information for trial?

In the run-up to any tax trial, each party will disclose to the other a list of documents on which it proposes to rely. Should one party form the view that the other is in possession of relevant material that it is not disclosing, that party may request the tribunal to direct that the other party provides documents, information or submissions.

Recent case law suggests that, in cases involving complex issues or serious allegations, there may be a presumption that parties will be under a duty to disclose all relevant material, not just that on which either seeks to rely.

In practice, the parties will often try to agree a statement of agreed facts to save the court having to hear evidence on points that are already agreed.

Permitted evidence

33 | What evidence is permitted in a tax trial?

The First-tier Tribunal has extensive case management powers to control what evidence is admitted (whether oral or documentary).

The tribunal may permit the testimony of various witnesses of fact (including the taxpayer) and expert witnesses. There is no requirement that the taxpayer gives testimony. However, if a question of fact turns on an issue that the taxpayer ought to be able to give evidence on but chooses not to, the court may draw certain inferences from this.

Nonetheless, in many tax trials, even where testimony is permitted, there will be no need for the witnesses to take to the stand, with their pre-prepared witness statements standing as evidence before the tribunal.

Permitted representation

34 | Who can represent taxpayers in a tax trial? Who represents the tax authority?

A taxpayer can appear as a litigant in person before the full range of courts that deal with tax trials, from the First-tier Tribunal to the Supreme Court.

Taxpayers may also appoint a representative to represent them before the full range of courts. Before the First-tier Tribunal and Upper Tribunal, this representative does not need to be legally qualified. Before the Court of Appeal and the Supreme Court, however, this representative must be a barrister.

Where a taxpayer cannot afford representation, public funding may be available on a means-tested basis. There are also a range of organisations and individuals, including lawyers, who may be able to provide pro bono advice and representation to taxpayers.

HMRC is generally represented by barristers who are appointed and briefed by the HMRC Solicitor's Office.

Publicity of proceedings

35 | Are tax trial proceedings public?

Generally, yes. A tribunal or court may grant permission for proceedings to take place in private, but this will only be granted in exceptional circumstances.

Burden of proof

36 | Who has the burden of proof in a tax trial?

The burden of proof is normally on the appellant. In the context of a first instance tax trial, this will normally be the taxpayer.

Case management process

37 | Describe the case management process for a tax trial.

All of the tribunals and courts that deal with tax trials have extensive powers to manage proceedings. These powers include the ability to require expert evidence, to compel the attendance of witnesses and to consolidate cases. Although the tribunals and courts can issue directions on their own initiative, it is more common for the parties to apply for directions. In general, the parties will agree directions for the management of the case between themselves but, if they are unable to do so, the tribunal or court will list a preliminary hearing at which the judge will issue relevant case management directions.

Appeal

38 | Can a court decision be appealed? If so, on what basis?

Yes, with permission. At each of the First-tier Tribunal, the Upper Tribunal and the Court of Appeal, the losing party can apply for permission to appeal to both the tribunal or court in which it has just lost and the higher tribunal or court.

Appeals from the First-tier Tribunal must be applied for within 56 days of the decision. Appeals from the Upper Tribunal must be applied for within one month. Appeals from the Court of Appeal must be applied for within 28 days.

Appeals may generally only be made in respect of points of law. However, in certain cases, where the finding of facts is such that no judge acting properly could have come to the determination under appeal, this may be extended.

UPDATE AND TRENDS

Key developments of the past year

39 | What are the current trends in enforcement of tax controversies? What are the current concerns of the authorities and taxpayers in relation to the enforcement and handling of tax controversies and are these likely to change? Are there proposals to change the relevant legislation or other rules?

Tax avoidance remains a key focus of UK government authorities, with Her Majesty's Revenue & Customs (HMRC) continuing to strengthen its powers to more effectively tackle promoters and enablers of tax avoidance. In particular, measures are currently proposed which would expand HMRC's ability to freeze the assets of promoters and otherwise disrupt their practices (including through applications to wind-up promoters on public interest grounds and by enabling HMRC to more pro-actively challenge claims by promoters as to the success of their schemes).

At the same time, measures introduced to mitigate the economic impact of the covid-19 pandemic have changed the way in which tax

abuse may be perpetrated, with nearly 13,000 HMRC investigations opened into potential fraud and non-compliance with the government's furlough programme, self-employment income support scheme and Eat Out to Help Out subsidy scheme in the period up to March 2021. In response, HMRC has established a dedicated Taxpayer Protection Force, staffed by 1,250 HMRC employees, to investigate and prosecute those who have wrongly or fraudulently claimed under such schemes. It is, therefore, expected that coronavirus-related tax abuses will be a key focus of HMRC for the foreseeable future.

Coronavirus

40 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

A number of legislative and concessionary measures have been taken to address the difficulties created by the covid-19 pandemic. Among these:

- Tribunals have been given greater flexibility to manage and dispose of tax appeals, with the majority of hearings continuing to take place virtually or on a papers' basis. Late appeals will also be accepted by HMRC, provided they are raised within three months of the usual deadline and concern a review decision dated February 2020 or later.
- Unintended changes to residency or taxable status as a result of coronavirus may be disregarded by HMRC. Coronavirus may also be considered a reasonable excuse for non-compliance with some tax obligations, such as meeting deadlines for filing returns or making payments.
- Payment deadlines for self-assessed income tax and certain instalments of VAT were also deferred, although these payments have now resumed. HMRC has, however, established a coronavirus helpline for taxpayers experiencing financial hardship and who require further time to pay.
- More generally, a number of relief programmes have been implemented in response to the coronavirus pandemic, such as the Coronavirus Job Retention Scheme (which pays eligible employees 80 per cent of their wages) and the Self-Employed Income Support Scheme (which pays eligible individuals up to 80 per cent of their previous monthly trading profits). Sector-specific reliefs were also granted to the hospitality and leisure sector, such as a temporary lower rate of VAT and exemption from business rates.

Taxpayers experiencing compliance difficulties should approach HMRC promptly and ensure that they maintain adequate records should HMRC subsequently challenge their circumstances.

To keep track of current measures, refer to: <https://www.gov.uk/government/organisations/hm-revenue-customs>

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