CHAPTER 2. DEALING WITH HMRC

2.1.1 Introduction

In their corporate report *Building a trusted, modern tax administration system*, HMRC set out their 10-year strategy to institute "a fully digital tax system able to support taxpayers across the full range of their needs". At the heart of this strategy lies the Making Tax Digital programme ("MTD") which is now in force for VAT businesses and is due to become mandatory for businesses with turnover of more than £30,000 for income tax over the next few years.

In fact, HMRC have been strongly encouraging taxpayers to use online methods as their primary means of fulfilling their obligations and securing their entitlements under the tax system, and have been developing their electronic systems to further that end. At one time, HMRC's predecessors, the Inland Revenue and Customs and Excise, ran local enquiry centres which dealt with local administration, helped callers in person and by telephone, stocked a range of printed forms and leaflets which could also be sent for by post, and housed local inspectors who dealt with taxpayers in their localities either personally or through local officials reporting to them. But in the course of two decades, financial constraints have forced the closure of all enquiry centres and the cessation of hard-copy leaflet distribution while large regional centres (known as "hubs") are taking over much of the work of the old enquiry centres. Contact with taxpayers is done by online means where possible, or through telephone calls to "contact centres" or paper correspondence both of which encounter delays, and information and guidance has moved exclusively to HMRC's pages on the generalised government website GOV.UK.

In view of such developments, the question must arise, how do HMRC now deal with taxpayers who, however naturally compliant, either cannot go online, or need accessible software to do so, or cannot use the telephone, but who might at one time have gladly gone to a local enquiry centre to see someone face to face? Indeed, the better enquiry centres used to provide a home visiting service for taxpayers with mobility problems.

HMRC's own answer to that question is set out in a corporate report entitled *HMRC's principles of support for customers who need extra help*. This document is published alongside the 2020 revision of their Charter (see **2.2.2**). It briefly sets out how HMRC will support taxpayers who:

- are identified as in need of extra support through contact by telephone or correspondence;
- require accessible means to communicate with HMRC digitally, or alternative means of contact because they are unable to go online; or
- are involved in compliance investigations or court or tribunal hearings.

The document goes on to list a range of characteristics which would attract such extra support, as follows:

- dyslexia, autism or cognitive difficulties;
- reduced mobility or physical disabilities;
- sensory disabilities, like a visual, hearing or speech impairment;
- mental health conditions, like depression, stress or anxiety;
- financial hardship - for example the taxpayer cannot afford essentials like food, bills or rent;
- victims of domestic abuse, including economic abuse;
- being in hospital.

It also states that the support available is not limited to those categories of people.

There is throughout the UK a network of Extra Support Teams (EST) whose members are HMRC officials trained to offer the requisite soft skills to deal with special cases, and who are authorised to spend extra time in supporting those assigned to them to resolve their difficulties (see **2.1.2**). Other means of giving extra help include (**2.1.3**):

- textphone, webchat or British Sign Language (BSL);
- information in an accessible format.

Certain taxpayers who would otherwise face an obligation to keep records or file information with HMRC online may apply to do so using alternative methods if the online route causes them particular difficulty (see **2.1.4**).

Guidance: Building a trusted, modern tax administration system - GOV.UK (www.gov.uk)

2.1.2 Extra support teams

The function of HMRC's Extra Support Teams (EST) is to help people who need a greater level of support in dealing with their tax affairs because of their particular circumstances. Such circumstances may include:

- a mental health condition or learning difficulty;
- a visual, hearing or speech impairment;
- a disability or reduced mobility;
- a recent bereavement;
- hospitalisation;
- their first language is not English;
- they are experiencing domestic or economic abuse;
- they are in financial difficulty;
- their tax affairs have become particularly fraught or difficult.

The EST (originally termed "Needs Extra Support", or NES) were established in 2014 in view of the planned closure of all local enquiry centres in major towns and cities throughout the UK. While the enquiry centres were open to all members of the public, HMRC's object in setting up EST was to ensure that taxpayers in vulnerable circumstances, such as those listed above, still had some way to contact an adviser when in difficulty with their tax affairs following closure of the enquiry centres.

The normal method of approaching EST is by telephoning the appropriate contact centre. If a contact centre adviser detects that a caller needs extra support, or if the caller tells them that they do, they can transfer the caller to an EST adviser by means of a "warm handover" (that is to say, the caller does not have to explain their circumstances more than once during the call).

Once connected with the caller, the EST adviser can spend more time on the phone than is normally possible for the contact centres, not being tied down by a script. The adviser can also liaise with other parts of HMRC and with tax advice charities (TaxAid and Tax Help for Older People), and will generally aim to see the case through to resolution.

Originally the EST adviser could also arrange to meet the caller face-to-face either at the caller's home or at a location close to the caller, although that aspect of the service was suspended during the coronavirus pandemic. The service was reinstated in October 2022. Those who have particular difficulty using a telephone (because, for example, of a hearing or speech impairment) are able to complete an online form to apply for a face-to-face appointment (see Appointment request to arrange a face to face meeting with HMRC).

EST advisers can help with matters such as:

- form-filling (such as completing tax returns, including VAT or corporation tax, or filing online particularly where the taxpayer is digitally excluded or lacks confidence);
- Self Assessment;
- PAYE tax codes;
- National Insurance;
- the distinction between self-employed and employed status;
- tax credits and child benefit, or the cross-over with universal credit;
- tax debt (in which case the initial approach should be made via Debt Management whose officers are, like contact centre advisers, being trained to identify taxpayers who may be in need of extra support);
- tax compliance (for example, if HMRC are carrying out a check or enquiry, or investigating a case involving disguised remuneration).

A webchat facility is available for some but its extent is currently under review. Someone who needs extra support can still contact the EST teams via webchat if their query is about PAYE or self-assessment.

While EST are well able to assist with routine, process-based matters, anything contentious – such as a contested penalty or appeal – should normally be handled by an independent adviser. EST have good links with the tax advice charities, TaxAid and Tax Help for Older People, which offer free professional advice and assistance to taxpayers on low incomes who fulfil the financial criteria.

According to HMRC's *Annual Report and Accounts* for 2020-21 (page 61), the EST helped 97,162 taxpayers during the period covered by the report. Of those, 6,284 received help with applications for financial support during the pandemic.

Guidance: HMRC corporate document HMRC's principles of support for customers who need extra help - GOV.UK (www.gov.uk) (updated 4 November 2021)

HMRC: Appointment request form.

HMRC *Annual Report and Accounts 2020-21*

Other sources: Low Incomes Tax Reform Group: What is the HMRC Extra Support Service? | Low Incomes Tax Reform Group (litrg.org.uk); Office of Tax Simplification: *Taxation and Life Events* (October 2019), 5.32ff.

2.1.3 Alternative ways to contact HMRC

As shown at **2.1.1**, the usual ways of contacting HMRC are by telephoning the appropriate contact centre or going online. But there are alternatives for people for whom either of those methods presents challenges.

- Those who cannot use a telephone (because, for example, of deafness or a speech impediment) can use the UK Relay Text Service or, in the case of some helplines, textphone. The Extra Support Teams (see **2.1.2**) are contactable by webchat for certain types of query, and HMRC in association with the Royal Association for Deaf people provide a British Sign Language (BSL) interpretation service. There is more information at Get help from HMRC if you need extra support: If you cannot use a telephone and need a different way to contact HMRC - GOV.UK (www.gov.uk) and Tax and Tax Credit Info For Deaf people - Royal Deaf Tax.

- HMRC provide written materials, such as forms or leaflets, in accessible formats for people who find standard sized print difficult. The different formats available include Braille, large print, audio or text on CD, coloured paper. Details are given at Get help from HMRC if you need extra support: If you need information in a different format - GOV.UK (www.gov.uk).

2.1.4 Exemptions from online filing for digitally excluded taxpayers

For those with certain types of disability, using electronic means of communication – with or without aids to accessibility – can be far preferable to other ways of interacting, for example by telephone if the person is deaf. But where a particular disability makes it very difficult or impossible for an individual to comply with a requirement to file information with HMRC online, there are situations in which they may apply to be exempt from the requirement.

Currently, such exemptions are available for:

- care and support employers (i.e. elderly or disabled persons who employ someone to provide domestic or personal services at the employer's home) who would otherwise be required to file PAYE data electronically under the real-time information system (RTI);
- those for whom it is not reasonably practicable to file online for any reason, including disability, age or remoteness of location (the digital exclusion exemption). This exemption applies to filing of VAT returns, and will also apply to record-keeping and filing obligations under HMRC's Making Tax Digital (MTD) programme for income tax self-assessment when it becomes mandatory for most businesses (see below).

Care and support employers who are exempt from online filing of RTI returns may instead use a paper alternative. For MTD for VAT, the normal alternative to online filing is to file by telephone, but where neither that nor online filing is reasonably practicable for the taxpayer, paper filing may be used.

Where a person has already obtained a digital exclusion direction from HMRC in respect of their VAT returns, that exemption will also cover them for MTD without the need for them to re-apply. Currently MTD for income tax is voluntary but it will be mandatory for self-employed individuals and landlords with turnover exceeding £50,000 for accounting periods that start on or after 6 April 2026 (6 April 2027 for businesses with turnover between £30,000 and £50,000). Accordingly, those who do not already have an exemption from online VAT filing should consider whether they might need one for MTD when the time comes.

The date of mandation for partnerships has not been confirmed at the time of writing. However, in the case of a partnership, each member of the partnership must be digitally excluded in order to benefit from the exemption.

Anyone aggrieved by HMRC's refusal to grant them a digital exclusion exemption has the right to appeal to the tax tribunal (VATA 1994, s. 83(1)(zc) and TMA 1970, Sch. A1, para 16).

Other exempt categories include:

- a practising member of a religious society or order whose beliefs are incompatible with the use of electronic communications;
- other employers for whom HMRC have directed that it is not reasonably practicable for them to file PAYE returns online on or before the time of payment (for example, because they were working in the fields at the end of a shift).

The Bishop case

The digital exclusion exemption for VAT originated from a judgment of the First-tier Tribunal (*Bishop*) that certain regulations which made online filing of VAT returns compulsory without making allowances for the appellants' disability, age or remote location were unlawful under the European Convention on Human Rights, Article 1 of Protocol 1 (protection of property) and Article 8 (right to respect for private and family life) combined with Article 14 (prohibition of discrimination). *Bishop* was a lead case; that is to say, it was one among some 100 appeals and was selected to go forward to the tribunal as being representative of the issues raised in all of them. After the decision was made in the lead case, its principles were applied to the remaining appellants who also retained the right to continue with their appeals.

The facts in *Bishop* were that two of the four appellants found it very difficult to use computers or go online because of their age and certain visual impairments. They were both electrical engineers.

- One was 56 and suffered from hydrocephalus which caused loss of vision in one eye. His condition was treated by means of a shunt in the back of the neck which gave him neck pains. It also made him prone to headaches and loss of consciousness from flickering lights or lights on screens.
- The other, who was 72, had severe rheumatoid arthritis and very poor eyesight as a result of central retinal artery occlusion. Medical evidence confirmed that he would find it difficult to use a computer accurately because of his health problems.
- A third appellant experienced a similar difficulty because of his age and the remoteness of his location, far from any reliable internet connection. He was 62 and ran a fuel-filling station in a village in the Brecon Beacons where he had lived all his life.

In summary, the judge (Mosedale J) said (at p. 922,925):

> "I have found that because of its disproportionate application to persons who are computer illiterate because of their age, or who have a disability which makes using a computer accurately very difficult or painful, or those who live too remotely for a reliable internet connection, that the regulations were an interference with Convention rights under A1P1 and A8 combined with A14 which was not justified.
>
> "For these reasons, HMRC's decision, to apply regulations which were, so far as the joint appellants were concerned, unlawful, was unlawful and for that reason I must allow the joint appellants' appeals."
>
> Following the decision in *Bishop*, HMRC amended the regulations by introducing an exemption from VAT online filing where the "not reasonably practicable" test was satisfied, an approach which was subsequently followed also for MTD.

Law: TMA 1970, s. 12C and Sch. A1, para. 14; SI 1995/2518, reg. 25A(6), 32B(1); HRA 1998, s. 3 and Sch. 1, Part 1; SI 2003/2682, reg. 67D(1), (11); SI 2021/1076

Case: *LH Bishop Electrical Co Ltd & Ors v HMRC* [2013] UKFTT 522 (TC)

Guidance: Apply for an exemption from making tax digital for income tax (23 September 2021, updated 11 February 2022)

2.2 Getting redress

2.2.1 Introduction

In this section we examine the ways in which a taxpayer who is aggrieved by something HMRC have done or failed to do – by the conduct of an official, undue delay or poor customer service – can raise a complaint and get redress for the consequences. The system whereby taxpayers can dispute a decision by HMRC which carries a right of appeal, or challenge an exercise of discretion by an official, which may ultimately be resolved by a court or tribunal, is covered in section **2.3**.

HMRC publish a Charter in which they set out the standards and values they aim to uphold when dealing with taxpayers (see **2.2.2**). If a taxpayer believes that HMRC are in breach of any of the standards or values set out in the Charter, that may form the basis for a formal complaint. In **2.2.3** we consider the internal HMRC process for handling complaints, and in **2.2.4** we see how a matter which has not been resolved by this process can be referred to an impartial referee, the Adjudicator.

2.2.2 The HMRC Charter

The Commissioners of Revenue and Customs ("the Commissioners") have a statutory duty to prepare a Charter which must "include standards of behaviour and values to which [HMRC] will aspire when dealing with people in the exercise of their functions". They must also:

- regularly review the Charter;
- publish revisions, or revised versions, of it when they consider it appropriate to do so;
- at least once a year make a report "reviewing the extent to which [HMRC] have demonstrated the standards of behaviour and values included in the Charter".

The original Charter was published in 2009 since when there have been two revised versions: in 2016 and again in 2021. The current version ("the HMRC Charter") lists the standards to which HMRC aspire under broad heads, as follows:

- "getting things right
- making things easy
- being responsive
- treating you fairly
- being aware of your personal situation
- recognising that someone can represent you
- keeping your data secure."

Under an overarching heading of "Working with you to get tax right", HMRC say they will "help you meet your tax responsibilities and make sure you get any benefits, tax credits, refunds or other support you can claim. However, we will take firm action against the small minority who bend or break the law."

Although it is a legal duty for the Commissioners to prepare and maintain the Charter, its terms are not justiciable – in other words, one cannot take HMRC to court for any breach or failure on their part to observe the standards set out. But as a statement of the standards that taxpayers are entitled to expect in their dealings with HMRC, any breach could form the basis for a formal complaint which could ultimately come before the Adjudicator.

For people with disabilities that are such as to interfere with how they handle their tax affairs or deal with HMRC, the heading "being aware of your personal situation" might be of particular interest. It states:

> "We'll listen to your worries and answer any questions clearly and concisely. We'll be mindful of your wider personal situation, and will give you extra support if you need it."

Example

Mr G had been added to his partner's claim for tax credits without his knowledge. When the relationship broke down, the couple's entitlement came to an end by operation of law, but neither party informed the Tax Credit Office (TCO) so an overpayment accrued. Mr G was alerted to the claim, and the overpayment, for the first time when the DWP began recovering his 50% share of the overpayment from his universal credit award.

Although Mr G told HMRC that he was a victim of domestic violence resulting in his admission to hospital, HMRC did not identify him as such or follow the appropriate guidance when communicating with him, merely reiterating their policy about how they apportioned liability for tax credit overpayments when a relationship broke down. They asked him to produce evidence that he knew nothing of the tax credit claim made by his former partner. When Mr G's complaint reached the Adjudicator, he related his experience to the standards set out in the Charter, and the Adjudicator found that this was a clear example of HMRC failing to take his personal circumstances into account.

(From *The Adjudicator's Office Annual Report 2021*, Case Study 7.)

Published alongside the HMRC Charter is a corporate report setting out "principles of support for customers who need extra help", which outlines the nature of that extra support referred to in the above quote. The main channel through which such help is delivered is the Extra Support Teams and these are described in **2.1.2**.

Law: CRCA 2005, s. 16A; FA 2009, s. 92

Guidance: *The HMRC Charter* (5 November 2020); *The Adjudicator's Office Annual Report 2021; HMRC's principles of support for customers who need extra help* (revised November 2021)

2.2.3 Complaints

A taxpayer, or their agent or representative, can make a formal complaint to HMRC if they are aggrieved by the conduct of an official or otherwise dissatisfied with the service they have received, for example because of unreasonable delay or failure to follow departmental guidance. If the substance of the complaint is that a decision by HMRC is wrong, the appropriate redress is usually through appeal or internal review (see **2.3**). If the taxpayer is complaining about serious misconduct by an official, such as assault, corruption, fraud or unlawful disclosure of personal information, the Independent Office for Police Conduct supervises how HMRC deal with such allegations.

Complaints can be made online by the taxpayer, or by post or telephone by the taxpayer or their agent or representative.

HMRC's complaint process has two internal stages:

- first tier review, at which stage HMRC aim to resolve as many complaints as possible;
- second tier review, if the complainant is dissatisfied with the outcome of the first tier review and wishes their complaint to be reviewed again by a different official.

If the complaint is still unresolved, the taxpayer may ask for the matter to be referred to the Adjudicator (see **2.2.4**).

If the taxpayer has suffered financial loss as a result of the conduct complained of, HMRC may offer to reimburse reasonable costs directly flowing from such conduct, for example postage and

telephone costs or professional fees. If the taxpayer has experienced anxiety or distress, they might receive a small consolatory payment. In any case where the complaint is upheld they should get an apology.

HMRC aim to "learn from complaints" in order to improve the Department's customer service for the future, something in which the present Adjudicator has been influential.

Guidance: *Complain about HMRC* (gov.uk)

2.2.4 The Adjudicator and beyond

If a complainant (see **2.2.3**) remains dissatisfied after exhausting HMRC's internal complaints process, they can refer the matter to the Adjudicator, who is an impartial referee for HMRC, the Valuations Office Agency (VOA) and the Windrush Compensation Scheme.

The Adjudicator, although her office is part of HMRC and is staffed by secondees from HMRC, takes an independent view of the matters she is asked to consider. She and her office are subject to a service-level agreement with HMRC which enables them to consider complaints about matters such as mistakes, unreasonable delay, poor or misleading advice, processes and inappropriate staff behaviour. The Adjudicator can consider whether HMRC have followed their own rules, standards, guidance and codes of practice fairly and consistently in the cases before her, but not whether those rules, standards, guidance and codes of practice are themselves right or fair – although she can, and does, influence HMRC's thinking on wider policy in the course of consultation and discussion.

If the Adjudicator upholds a complaint wholly or in part, she may recommend to HMRC that they give redress or compensation for, among other things, worry and distress, reimbursement of financial loss or poor complaints handling. She may also recommend that tax liability be given up.

Every year the Adjudicator publishes her annual report which contains examples of cases that have come before her office and how they have been resolved. They are of particular interest in showing how complaints from taxpayers with disabilities or vulnerabilities, such as mental health conditions, have been dealt with. See for example the report for 2020-21 at The Adjudicator's Office annual report 2021 - GOV.UK (www.gov.uk).

If the complainant remains dissatisfied with the outcome of a reference to the Adjudicator, they may ask their MP to refer the matter to the Parliamentary and Health Service Ombudsman (https://www.ombudsman.org.uk), whose remit is to investigate cases of alleged maladministration. This they should do within one year of the Adjudicator's decision. The Ombudsman operates a three-stage filter which means that in practice very few cases are actually accepted for investigation, and of those it is only very rarely that decisions made through a department's own internal adjudication process are overturned.

Guidance: *Service level agreement for the provision of complaints adjudication services for HM Revenue & Customs and Valuation Office Agency by the Adjudicator's Office*

2.3 Appeals and reviews

2.3.1 Introduction – starting an appeal

Most decisions by HMRC carry a right of appeal. These include decisions on assessments, penalties, refusals of reliefs or exemptions, and certain compliance decisions. When a taxpayer is notified of a

decision, the notice should state whether it can be appealed and the time limit within which the right of appeal can be exercised (normally 30 days from the date of the decision).

Where there is a right of appeal, there is normally the possibility of an internal review by a team within HMRC who are removed, in terms of line management, from the decision maker. In direct tax cases (these include income tax, capital gains tax, corporation tax, inheritance tax) the written notice of appeal must be given to HMRC, who may offer a review of their decision, or the taxpayer may ask for one, but if the taxpayer wishes to go directly to the tribunal he or she can do so. In indirect tax cases (such as VAT or excise duties), notice of appeal must be sent straight to the tribunal, unless the taxpayer accepts HMRC's offer of a review. In either case, if a review is in progress, the taxpayer is prevented from appealing to the tribunal until the review is concluded. There are some advantages for the taxpayer in opting for a review, not least that if a review concludes in favour of HMRC, the taxpayer can still go to the tribunal – see **2.3.2**.

Late notice of appeal

In giving notice of appeal, it is highly advisable to adhere strictly to the normal deadline of 30 days from the date of the decision. However, HMRC have discretion to accept a late notice of appeal, and are required to do so if three conditions are fulfilled:

1. the taxpayer has so requested in writing;
2. HMRC are satisfied that there was a reasonable excuse for not giving the appeal within the time limit; and
3. the notice was given without unreasonable delay after the excuse had ceased.

If HMRC do not agree to accept late notice of appeal, the taxpayer may apply to the tribunal for their permission. The tribunals are generally reluctant to interfere with time limits set by statute, but are more likely to grant applications for late appeals where:

- the delay in appealing is not serious or significant;
- the appellant has a good explanation for the late appeal; and
- evaluating all the circumstances of the case – including the prejudice that would be caused to both parties by granting or refusing permission – tilts the balance towards permitting the application (*Martland*).

Further information

Fuller and more detailed information on tax appeals is obtainable from *Tax Appeals: Law and Practice at the FTT* by Keith Gordon, and *Taxpayer Safeguards: Rights and Protections for Individuals* by Robin Williamson, both published by Claritax Books.

Law: TMA 1970, Pt. V; VATA 1994, Pt. V

Case: *Martland v HMRC* [2018] UKUT 178 (TCC)

Guidance: HM Courts and Tribunals Service explanatory leaflet *Making an Appeal* T242

2.3.2 Settling an appeal

When the taxpayer gives notice of appeal, some discussion between him/her and HMRC ensues which may culminate in a formal agreement settling the appeal. There is a statutory mechanism for reaching an agreement in settlement of an appeal (a "section 54 agreement"); this can be done at

any time after the taxpayer has given notice of appeal and before the tribunal has reached its decision, including while an internal review is in progress. A section 54 agreement can also be concluded by the taxpayer's agent, or anyone acting on the taxpayer's behalf. There is also an equivalent statutory mechanism for VAT appeals.

A section 54 agreement may provide for the decision under appeal to be:

- upheld without variation; or
- varied in a particular manner; or
- discharged or cancelled.

The agreement, once made, has the same force as if its terms had been decided by the tribunal. If the agreement itself is not in writing, written notice confirming its terms must be given by HMRC to the taxpayer, or vice versa, whereupon the agreement is deemed to take effect from the date of the notice.

The taxpayer can resile from the agreement within 30 days of it being concluded by giving HMRC notice to that effect.

Any such agreement must be genuinely intended by both parties: it cannot be concluded by the mere acquiescence of one party (*Schuldenfrei v Hilton*), nor can one party impose agreement on another unilaterally (cf *Hauser*, where HMRC attempted unsuccessfully to impose a section 54 agreement by writing to the taxpayer in terms that unless she replied by a certain date, her appeal would be treated as settled on their terms).

Law: TMA 1970, s. 54; VATA 1994, s. 85

Cases: *Schuldenfrei v Hilton* [1999] BTC 310; *Hauser v HMRC* [2015] UKFTT 682 (TC)

2.3.3 Internal review

Any right of appeal carries with it a right to a review by a team within HMRC which was not involved in the original decision and is removed from the decision maker in terms of line management.

There are three main advantages of a review:

1. It is optional. To start the process, the taxpayer gives HMRC notice of appeal, then HMRC should offer a review. It is up to the taxpayer whether to accept HMRC's offer or reject it; if he/she chooses the latter, the appeal goes directly to the tribunal. If HMRC have not offered a review, the taxpayer can ask for one – at least in direct tax cases. The option lies with the taxpayer whether or not to seek a review, and if the review decision goes against the taxpayer, he/she can still appeal to the tribunal.
2. It is cost-free. The taxpayer incurs no costs by opting for the review process.
3. It is time-limited. The review must be concluded within 45 days, extendable only with the consent of the taxpayer.

During the process, the taxpayer can make representations to the team carrying out the review. The review may be concluded in one of three ways:

- by upholding HMRC's decision;
- by varying it; or
- by cancelling it.

At the end of the process, the review team must notify the taxpayer of its conclusion, and reasoning, within the 45 day time limit or longer if agreed with the taxpayer. If it does not, HMRC's view is treated as upheld and the taxpayer can appeal to the tribunal. Or the taxpayer can appeal to the tribunal within 30 days of:

- notifying HMRC of his/her appeal;
- the date on which HMRC offer the taxpayer a review, if the taxpayer does not wish to accept their offer; or
- the date on which the review team notifies its conclusion to the taxpayer.

For indirect tax, the procedure is slightly different. The initial notice of appeal is sent to the tribunal rather than to HMRC, but the offer of a review still comes from HMRC – there is no provision for the taxpayer to ask for one.

In either case, the taxpayer may not appeal to the tribunal while a review is in progress but must wait until it is concluded.

Are reviews worthwhile?

An interesting statistic is that in 2020-21, 81% of reviews were requested by unrepresented taxpayers. There is also a reasonable chance – good in case of an automatic penalty appeal – of the original decision being cancelled or varied in favour of the taxpayer. In 2020-21, while 86% of decisions across all courts and tribunals went in favour of HMRC, 65% of review conclusions were varied or cancelled (though admittedly, if one strips out the appeals against automatic VAT penalties, 75% of the remainder were upheld in HMRC's favour). Altogether, therefore, more review conclusions go the taxpayer's way than court or tribunal decisions, and there is nothing to be lost by opting for a review, given its cost-free status and the fact that one can still appeal at the end of the process.

Law: TMA 1970, s, 49A-49H; VATA 1994, s. 83A-83F

Guidance: *Appeals, reviews and tribunals guidance*, ARTG 2000ff.; HMRC *annual report and accounts 2020-21*, *Tax assurance commissioner's report* (p. 151ff)

2.3.4 Mediation

Mediation, often referred to as alternative dispute resolution or ADR, is a non-statutory process whereby a trained mediator (mostly a senior HMRC official) facilitates a discussion between the taxpayer and HMRC with a view to bringing about the resolution of a dispute between them. The process should be confidential and without prejudice (*Ritchie*), although in their Factsheet CC/FS21 HMRC state that any new information or evidence disclosed by the taxpayer that has an effect on the tax position will be on record.

The object of the process is to resolve misunderstandings, to establish facts and matters of law underpinning a dispute, or to remove obstacles to resolution of a dispute where the parties have become so entrenched in their positions that it has become impossible to make progress. Typically, ADR is used in general compliance disputes. It is not used in disputes involving:

- tax debt;
- tax credits;
- VAT default surcharge (but these often go to internal review, see **2.3.3**);
- automatic late filing or late payment penalties (see **2.3.3**);

- PAYE coding notices;
- the application of extra-statutory concessions; or
- cases being dealt with by HMRC's criminal investigators.

An application for ADR is made by means of an online form and can be requested at any time during the progress of a dispute except while an internal review is being conducted. The First-tier Tribunal has a duty under rule 3(1) of the First-tier Tribunal Rules, where appropriate, to:

> "bring to the attention of the parties the availability of any alternative procedure for resolution of dispute; and if the parties wish and it is compatible with the overriding objective [(see **2.3.5**)], to facilitate the use of the procedure."

HMRC have a target that 75% of cases accepted for mediation should be resolved through the process; in 2020-21, 78% were fully or partly resolved by agreement as compared with 90% in the previous year. Of 834 requests for mediation, 163 were rejected, and 62 went on to litigation. There is therefore a reasonable prospect of requests being accepted and leading to a satisfactory outcome, although care should be taken not to miss any appeal deadlines while engaged in the process.

Law: SI 2009/273, rule 3

Case: Ritchie v HMRC [2016] UKFTT 509 (TC)

Guidance: *Use Alternative Dispute Resolution to settle a tax dispute* (Use Alternative Dispute Resolution to settle a tax dispute - GOV.UK (www.gov.uk)); *Alternative Dispute Resolution: Practice Statement for First Tier Tribunal Tax Chamber* (15 June 2020) (Alternative Dispute Resolution: Practice Statement for First Tier Tribunal Tax Chamber | Courts and Tribunals Judiciary); *HMRC annual report and accounts 2020-21*, *Tax Assurance Commissioner's report* (page 148ff)

2.3.5 Appeal to the tribunal

The tax tribunal is an independent judicial body entirely separate from, and independent of, HMRC. A taxpayer may exercise the right of appeal to the tribunal:

- at the outset of an appeal, if the taxpayer prefers not to opt for a review; or
- at the conclusion of a review, if the taxpayer is dissatisfied with the outcome.

Tax appeals are made in writing to the Tax Chamber of the First-tier Tribunal (FTT) via an online form, or on the appeal form that accompanies the decision letter, or by correspondence. An appeal must be made within 30 days of the notice of the decision being appealed against, or the conclusion of the review. Late appeals may be considered in the circumstances set out in **2.3.1**.

If the taxpayer or HMRC wish to appeal against a decision of the FTT, they can apply within 56 days for permission to appeal to the Upper Tribunal, but only on a point of law as the findings of fact of the FTT are conclusive. The only exception to that rule is where the appellant is arguing that the FTT's findings of fact are "such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal", or the tribunal has "acted without any evidence or upon a view of the facts that could not reasonably be entertained" (per Lord Radcliffe in *Edwards v Bairstow & Harrison*).

On receiving an application for permission to appeal, the FTT must consider whether to review its decision, which it may do if satisfied that it contained an error of law. There is a right of appeal to the Upper Tribunal if the FTT refuses permission to appeal. From the Upper Tribunal there is a further right of appeal to the Court of Appeal, again with permission.

The tribunal allocates appeals to one of four categories:

- Default paper, which are generally decided on the basis of written submissions without a hearing;
- Basic, which are decided at an informal hearing with minimal exchange of documents beforehand;
- Standard, generally disposed of after a hearing and subject to more case management than the previous two categories; and
- Complex, which the tribunal considers will involve lengthy or complex evidence, a lengthy hearing, a complex or important principle or a large financial sum.

Procedure in the First-tier and Upper Tribunals is governed by a set of rules, themselves subject to "the overriding objective" which is "to enable the Tribunal to deal with cases fairly and justly" (rule 2). The tribunals are given a range of powers – case management, the giving of directions, power to deal with situations where a party is non-compliant including striking out – all of which they must exercise within the context of the overriding objective. At any stage during proceedings, the tribunal must if appropriate draw the attention of the parties to the possibility of mediation (see **2.3.4**)

The procedural framework, in brief, is as follows:

- the tribunal reads the appellant's notice of appeal and, in all but basic cases, directs HMRC to respond by way of a "statement of case" within a prescribed time limit;
- the appellant has a further period in which to respond to HMRC's statement of case;
- default paper cases are then determined on the basis of the paperwork unless either party has requested a hearing;
- in standard and complex cases, the parties exchange lists of documents on which they intend to rely;
- complex cases may then be transferred straight to the Upper Tribunal if the parties consent.

The costs regime is designed to ensure that the majority of cases may be disposed of without the taxpayer being exposed to an adverse costs order. In default paper, basic and standard cases, the parties normally bear their own costs, but the tribunal may make an order for costs in exceptional circumstances, such as where the tribunal considers that a party or a party's representative "has acted unreasonably in bringing, defending or conducting the proceedings". In complex cases, costs normally follow the cause (i.e. the loser pays the costs of the winner as well as their own) unless the appellant (or taxpayer) makes a written request to be excluded from liability for costs within 28 days of the case being categorised as complex.

The majority of hearings are now held by video, power to do so having been introduced by the Coronavirus Act 2020. Otherwise, hearings in person are held in London or in regional centres. For video (or audio) hearings, tribunals may direct that they be broadcast to enable the public to view them, or for them to be held in private. They may also direct that cases are disposed of without a hearing if satisfied that the matter is urgent, a hearing is not reasonably practicable, and that it is in the interests of justice to proceed without one.

Law: Tribunals, Courts and Enforcement Act 2007, Pt 1; SI 2008/2698; SI 2009/273

Case: *Edwards v Bairstow & Harrison* (1955) 36 TC 207

Guidance: HM Courts and Tribunals Service, explanatory leaflet T242: *First-tier Tribunal Tax Chamber: Making an Appeal*

2.3.6 Judicial review

Where there is no right of appeal against HMRC's decision (and there is generally no such right against an exercise of discretion by HMRC or an officer of the Department), judicial review may be the appropriate – sometimes the only – remedy. It is available where (per Lord Templeman in *Preston*):

> "a decision-making authority exceeds its powers, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached, or abuses its powers."

Judicial review is therefore appropriate where the claimant wishes to question not so much the content or correctness of an administrative decision, but whether the process by which it was arrived at was lawful or unlawful. Where the claimant is arguing that the decision is simply erroneous, there is usually an alternative remedy such as a right of appeal, in which case judicial review is inappropriate.

To Lord Templeman's categorisation above can be added breaches of a person's fundamental rights under the *Human Rights Act* 1998 or their rights under the *Equality Act* 2010, and misuse of an official discretion – for example, the decision-maker had exceeded the parameters within which its discretion should have been exercised, or not gone far enough ("fettered" its discretion).

Because of its complexity, the strict time limits, and the high costs involved in taking proceedings for judicial review, a would-be claimant might find lodging an official complaint (see **2.2.3** and **2.2.4**) a more accessible way of pursuing a grievance against decisions by HMRC that do not carry the right of appeal.

Jurisdiction

Judicial review is the preserve of the High Court, whose jurisdiction is derived from common law rather than statute so that it can consider whether or not legislation is lawful. In addition, the Upper Tribunal has limited judicial review jurisdiction under the *Tribunals Courts and Enforcement Act* 2007. The following types of relief are available:

- a *mandatory order* requiring an authority to do something it is not doing but should;
- a *prohibiting order* preventing an authority from doing something it ought not to;
- a *quashing order* by which an unlawful decision or action is set aside. A quashing order can provide for the quashing not to take effect until a specified future date, or removing or limiting any retrospective effect of the quashing;
- a declaration; and
- an injunction.

Procedure

To apply for judicial review, the claimant must have a sufficient interest in the matter being litigated (*locus standi*). Charities, trade unions and similar representative groups may bring claims on behalf of their beneficiaries or those whom they seek to help, and this is often the only possible way for private individuals to take judicial review proceedings given the very high costs involved.

The various stages in the procedure are as follows:

- *Pre-action protocol*, which involves writing letters before action and in some cases trying to settle the matter by document exchange, mediation and similar initiatives. The outcome of the application may partly depend on how well the pre-action protocol has been observed.
- *Seek permission to apply for judicial review*, which comes before a judge. If the judge is persuaded as to the merits, the application will normally be granted; if not, and permission is refused, the claimant may appeal.
- Permission, if granted, will be accompanied by *case management directions* from the judge.
- *Full hearing*.

There are very strict time limits – the claimant must begin the action as soon as possible, and at any rate within three months of the action being complained of.

Costs

Important though the procedure is as a means of challenging an exercise of official discretion which could have life-altering effects on an individual, the risk of costs is usually an insurmountable barrier for someone who lacks the support of a larger organisation. Costs are generally awarded in the cause, so that if a claimant fails to meet the very high bar of proving irrationality or some other abuse of administrative power, they face paying all the costs incurred by both sides.

The involvement of a supporting organisation such as a trade union or charity, or of lawyers who act pro bono, might reduce the claimant's exposure to their own costs, but not necessarily to those of their opponent, unless the latter has agreed to waive its own costs. It is also possible to apply to a judge at an early stage in the proceedings for an order restricting the costs that may be recovered by the opponent; such "costs capping" orders may be granted in cases that the court is satisfied raise a matter of public importance.

Uses of judicial review

Judicial review may be invoked in cases where a public authority reaches a decision that is so irrational that no public body acting rationally could have reached it. This "irrationality" test sets a high bar: the decision-maker must have failed to give due weight to matters that were relevant to the decision, or taken into account matters that were irrelevant; or, even if the right matters were taken into account, the decision is one that no reasonable body could have come to (known as *Wednesbury* unreasonableness after the leading case on the topic). This degree of irrationality is very hard to prove, and (per Lord Greene MR in *Wednesbury*) "would require something overwhelming".

> **Example**
>
> Because of the interaction in universal credit between the claimant's assessment period and her monthly pay day, the claimant was treated by universal credit regulations as having received two payments in some months and none in others. This typically happened when the usual pay day fell on a bank holiday, and the employer paid the claimant early. Thus, her assessment period ran from 30th of the month to 29th of the next month, but at the end of 2017 she was paid on 30 November and on 29 December, as that was the last banking day of the month. The DWP treated her as receiving two payments in the assessment period beginning 30 November, and nothing in the assessment period beginning 30 December. Not only did the operation of this rule lead to an unpredictable cash flow, but she also lost her entitlement to a work allowance in the period when she was deemed to have received no pay, costing her some £120.

> The Court of Appeal held that the refusal of the Secretary of State for Work and Pensions (SSWP) to "put in place a solution to this very specific problem" was "so irrational that I have concluded that the threshold [for establishing irrationality] is met because no reasonable SSWP would have struck the balance in that way" (*R v SSWP oao Johnson & Ors,* per Lady Justice Rose at para 107).

Another situation in which judicial review may be sought as a remedy is where a Government department or official has raised a "legitimate expectation" that a matter will be conducted in a particular way, then reneged on that. For example, the principle may be invoked where a taxpayer follows clear and unambiguous, but incorrect, guidance and HMRC refuse to abide by it in circumstances which the court decides are so unfair as to amount to an abuse of power by HMRC. The leading cases of *Preston*, *MFK Underwriting* and *Matrix Securities* laid down a set of conditions that must be fulfilled if a taxpayer is to succeed in such an action against HMRC:

- the taxpayer must have made full disclosure of all relevant information;
- HMRC must have made a representation, whether giving specific advice or contained in guidance or inferred from a course of dealing, that is "clear, unambiguous and without relevant qualification";
- the taxpayer is within the class of persons to whom the representation was made or it is otherwise reasonable that the taxpayer should rely on it; and
- the taxpayer did indeed rely on it to his or her detriment.

So when might an action for breach of legitimate expectation lie against HMRC?

HMRC is of course obliged by statute to collect all tax that is due by law and may not remit any tax except where to do so is conducive to the better management of the tax system. The courts will uphold HMRC's exercise of this duty except where they find that HMRC's conduct is so "conspicuously unfair as to amount to an abuse of power".

> **Example**
>
> Thus, the taxpayer succeeded in an action for judicial review where HMRC had for more than 20 years acquiesced in the late submission of group loss relief claims, then without warning disallowed the claim for a particular accounting year on the grounds that it was outside the 2-year time limit. In a course of dealing stretching for over 20 years, HMRC had accepted the taxpayer's loss relief claims despite their lateness, and given that course of dealing, to reject a claim without clear advance warning was "so outrageously unfair that it should not be allowed to stand" (per Simon Brown LJ) (*Unilever*).

Law: Senior Courts Act 1981, s. 29; Tribunals, Courts and Enforcement Act 2007, s. 15ff; Judicial Review and Courts Act 2022, s. 1

Cases: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 233; *R v CIR, ex parte Preston* [1985] 1 AC 835; *R v CIR, ex parte MFK Underwriting Agencies & Ors* [1989] BTC 561; *R v CIR, ex parte Unilever & Anor* [1996] BTC 183; *R (on the application of Johnson & Others) v Secretary of State for Work and Pensions* [2020] EWCA Civ 778

Guidance: MoJ Practice Direction: *Pre-action protocol for judicial review* (updated 1 December 2021)

Other material: Public Law Project, *An introduction to judicial review* (Intro-to-JR-Guide-1.pdf (publiclawproject.org.uk)