

The rise and fall of statutory reviews

Sean Wakeman outlines how the statutory review process works, and explains how and where it could be improved

A statutory review process was introduced in 2009 for use by clients/taxpayers who disagreed with a tax decision made by HMRC.

A client can ask for a review, make an appeal to the tax tribunal, or take both actions. The statutory review system was intended to give taxpayers a quick and easy route to ask HMRC to look again at their decisions.

Sixteen years ago, the introduction of a second 'pair of eyes' was generally welcomed as a bold and innovative move by HMRC to give taxpayers a second opinion, to prevent rogue decisions getting to the Tribunal and protect against maverick inspectors. It was also doubtless intended to curb over-enthusiastic practitioners who perhaps had an overly optimistic view of their chances of success at a tax tribunal.

Requesting a statutory review costs nothing and it can be a cost-effective way to resolve a dispute. In requesting a review, the taxpayer's statutory rights are not affected. You can still take your appeal to tribunal if you are unhappy with the Reviewing Officer's decision.

The statutory time limit for reviews is 45 days (or a longer agreed time period). If an extension is not agreed by the client or his/her agent, the original decision stands. Only 1% of cases last year resulted in a 'deemed' decision like this.

Currently, it is taking on average 80 days to give a conclusion, which is why practitioners are seeing so many requests for extensions from HMRC. This might reflect understaffing, although there are currently 400 review officers who each work on average 10 cases at any one time.

Having the tribunal determine an appeal is time consuming and costly both for the client and HMRC; many practitioners are precluded from the tribunal route as it is not usually 'commercial'. The reviews process can avoid unnecessary litigation, cost and stress, but clients can still appeal to the tax tribunal if they disagree with a review conclusion.

Examples of review cases include closure notices following an enquiry, assessments and information notices. Customers have 30 days from the date of the decision to accept the review offer, but if the client has new information or arguments it is possible to delay the start of the review just in case agreement can be reached.

The purpose of the review is to look at the decision again, not to assess new facts or evidence that has not been considered by the caseworker. However, the review officer will give taxpayers the opportunity to send in further information during the review period. In practice, such new arguments or information are handed back to the caseworker in case he/she changes their mind.

Reviews were moved from Local Compliance to HMRC SOLS (recently rebranded Legal) in 2016. In my opinion, this was not helpful given that the move was from a review carried out by another officer, unconnected to the case in a different office and often in a different part of the country, which prevented any suspicions of complicity or the old boys' network. What replaced it was a tick-box review carried out by officers, working alongside lawyers, tasked

with checking the legality of HMRC's position rather than applying commonsense and informed consideration of the facts in a balanced and impartial manner.

The review officer now checks that the appealable decision is:

- legally and technically correct.
- consistent with HMRC's policy.
- consistent with HMRC's Litigation and Settlement Strategy.

A review can also help to clarify the facts and the understanding of both parties. However, some disputes involving a direct challenge on HMRC's interpretation of legislation may need to be determined by the tribunal or higher courts, since a review officer cannot override HMRC policy.

More complex cases are dealt with by a senior team who must each have more than four years' training experience. Every substantive review is counter-signed by an officer one grade higher than the review officer. Conclusions/review decisions are notified on the same day to the taxpayer and the caseworker.

At the end of the review, the review officer will conclude if the decision is:

- upheld,
- varied, or
- cancelled.

The review officer will write to the taxpayer to explain their conclusion, their reasons and the customer's next options. If the decision is upheld or varied, and the taxpayer (or their agent) disagrees with the review officer's conclusion, they will have 30 days from the date of the review conclusion letter to appeal to the tribunal.

Last year, excluding 'non automated penalties', 72% of decisions were upheld, 16% were varied (although the adjustments could have been in quite small sums) and 12% were cancelled. Some 99% of people who had a penalty review did not go to a tribunal, presumably as this was not cost-effective. Reviews on average cost HMRC four times less than litigation.

Artificial intelligence is not yet being used by HMRC in the review process, but this can only be a matter of time. Farewell, therefore, to any semblance of flexibility and compromise. Not only will there be less need for civil servants in these seats, there will also be more rigid outcomes and therefore more litigation, the very thing that reviews were meant to reduce or avoid.

In practice, the reviews system has been very effective in preventing thousands of low-value penalties from reaching a tribunal hearing, but it has failed in its intention (certainly from the perspective of practitioners) of limiting the number of substantive cases reaching a full tribunal by applying a measure of commonsense and/or flexibility.

On the delivery of a decision by a caseworker, there should be a formal alternative offer for 'larger' cases of an Alternative Dispute Resolution (ADR) mediation instead of a statutory review, with similar preservation of a client's rights if agreement cannot be reached. Whilst this is available informally at almost any time before a tribunal hearing, it needs to be written in to the legislation. This would increase uptake and take pressure off the reviews service. Timescales would be similar, and face-to-face mediations would offer a people element based on negotiation rather than confrontation and litigation. ADRs certainly seem to have more in common with 'old style' reviews.

For the time being at least, practitioners, for larger/more involved cases will remain sceptical of the value of reviews for their clients; they seldom result in a change of mind or cancellation of a decision by HMRC!

- Sean Wakeman, Partner – Tax Resolutions, Crowe UK LLP