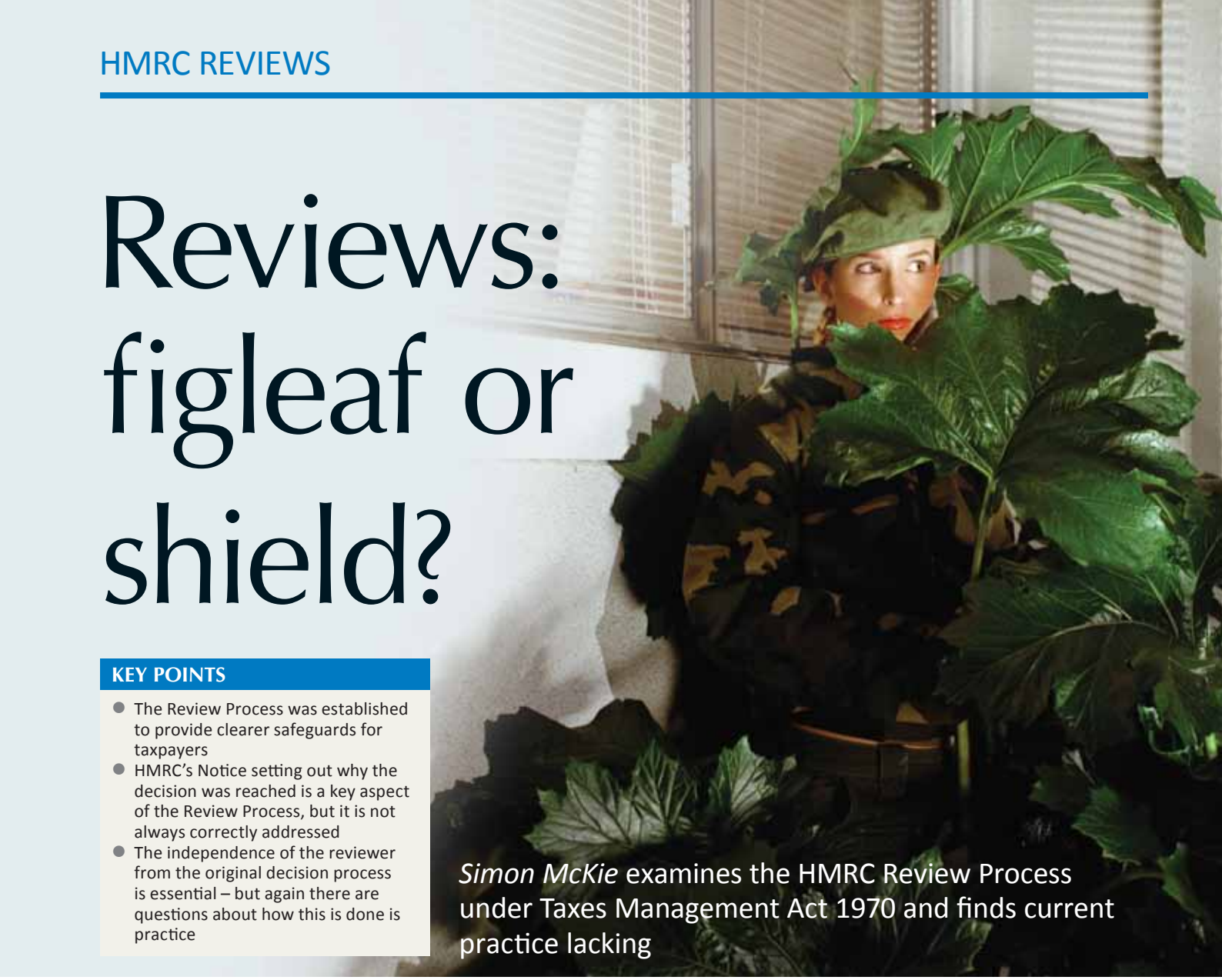
Reviews: figleaf or shield?



KEY POINTS

- The Review Process was established to provide clearer safeguards for taxpayers
- HMRC's Notice setting out why the decision was reached is a key aspect of the Review Process, but it is not always correctly addressed
- The independence of the reviewer from the original decision process is essential – but again there are questions about how this is done is practice

Simon McKie examines the HMRC Review Process under Taxes Management Act 1970 and finds current practice lacking

The Tribunals, Courts and Enforcement Act 2007 introduced a comprehensive new regime for direct and indirect taxation appeals as part of a newly harmonised Tribunal system. That appeal system includes a statutory right for the appellant taxpayer to have the decision (the Decision) of HMRC which is the subject of his appeal, reviewed by HMRC. This article deals with the process of such reviews (the Review Process) under the provisions of the Taxes Management Act 1970 (TMA 1970), ss 49A–49I as they relate to a taxpayer who requests a review under those sections. It does not consider, for example, the similar provisions which apply for Inheritance Tax or Stamp Duty Land Tax.

HMRC's statistics

HMRC have published statistics of the results of the first year of the Review Process in a document entitled *HMRC's Review Process – the first 12 months*, although this deals with all reviews, and not just those conducted under TMA 1970. They make startling reading. No less than 44.9% of the completed reviews cancelled the Decision concerned in its entirety. In a further 5.2% of completed reviews the Decision was varied. It appears, therefore, on the basis of HMRC's own statistics, that where a decision is made which is appealed by the taxpayer concerned and a review is conducted, they are wrong in more than half of cases. If one looks only at those cases which do not involve penalties, the decision was either cancelled or varied in 39.3% of them. One doesn't know whether to be appalled that so many incorrect assessments are raised or pleased that the Review Process has managed to prevent such a large number of unnecessary hearings.

HMRC's unsatisfactory approach

One might think therefore, that the Review Process has proved to be a success but it is clear to me from my own experience and from the comments of others, that the process is not being applied correctly by HMRC and, in technically more complex cases, that it is regarded by them as a mere exercise in rubber-stamping. That may be because HMRC do not seem to recognise the significance of the change from the purely internal and discretionary procedures which preceded the Review Process to the Review Process itself which is a process governed by statute.

For example, in the first statistical review released by HMRC (*HMRC's Review Process – Nine Months On*) they explained:

> "On 1 April 2009 HM Revenue & Customs (HMRC) introduced a new optional, internal review process."

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It is Parliament that passes legislation, however, and not HMRC.

In their Manual (*Appeals, Reviews and Tribunals Manual,* para 4030) they refer to a customer appealing to HMRC, but HMRC are neither a Tribunal nor a court and appeals cannot be made to them. Appeals to which the Review Process applies are any appeals under the Taxes Act. Such appeals are appeals from the Decisions of HMRC to the First-tier Tax Tribunal or, in some circumstances, to the Upper Tribunal. HMRC have not yet become judge in their own cause. Perhaps HMRC are confused because notice of an appeal to the Tribunal is first given to HMRC and, as we shall see, if the Review Process is activated, notice to the Tribunal is suspended until it has been completed.

A potentially useful process

The Review Process is a statutory process which imposes various duties on HMRC. Where a statutory body, such as HMRC, does not comply with that statutory duty the law, through judicial review, will provide a remedy.

If HMRC are persuaded or forced to apply the process properly, it can be of great benefit to a taxpayer. First, a reconsideration of the issues by a person genuinely independent of the original decision maker can and should lead to many assessments being withdrawn before they reach a Tribunal. Even where that is not the result, the process can be useful. HMRC often refuse to give the grounds of their conclusions in raising Closure Notices or Discovery Assessments or give only the sketchiest view of their reasoning. The Review Process ought to give the appellant taxpayer a much better idea of the grounds of HMRC's Opinion and of its strengths and weaknesses before he goes to the considerable expense and inconvenience of notifying his appeal to the Tribunal. Undertaking the review procedure will force HMRC to consider their own position and to undertake quite a large amount of work. That will encourage them to identify where they have a weak case and to settle the matter before they are forced to undertake the onerous work of a review.

It is, therefore, important that the appellant taxpayer should insist that the review is conducted strictly in accordance with its statutory framework and it is to be hoped that, where it is not and HMRC refuse to remedy their failure, appellant taxpayers will seek judicial review.

A purposive construction

As we shall see, HMRC are given a wide discretion to determine the nature and extent of the review but, as the case of *BMBF v Mawson* made plain, all legislation must be construed in the light of Parliament's purpose in enacting that legislation. The function of a purposive construction of a statute is to ascertain, not what Parliament meant, but the true meaning of what Parliament said.

Although in certain circumstances the determination of Parliament's purpose may be aided by reference to external materials, it is primarily to be determined from the legislation itself by a consideration of its form and of its place in the wider context of the legislation of which it forms part. HMRC's discretion to determine the nature and extent of the review, therefore, must be exercised so as to fulfil the statutory purpose of the Review Process and that purpose is primarily to be determined from the statutory provisions which govern it, although external materials may be referred to where the purpose is not apparent from the words of the legislation itself.

Where a taxpayer appeals against any of the forms of assessment listed in TMA 1970, s 31 including against a Closure Notice under s 28A or a Discovery Assessment under s 29, the appeal must be lodged within 30 days and must specify the grounds of the appeal. HMRC or, on appeal, the Tribunal may allow the hearing of an appeal made after the expiry of this time limit (TMA 1970, s 49).

The Notice of Appeal must be given to "the relevant officer of the Board" – that is to the officer by whom the Notice of Assessment was given.

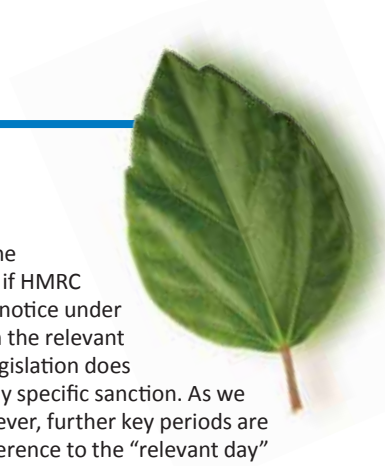
As we shall see, the legislation contains very exact provisions providing for information to be supplied to the appellant taxpayer by HMRC and for the appellant taxpayer to make representations to the Reviewing Officer. Those provisions are clearly designed to allow an even-handed review to be made of the Decision before the matter is brought before the Tribunal. Because that review is at the option of the taxpayer it is reasonable to assume from the form of the provisions that the purpose of the Review Process is to provide a review of the Decision which is independent of the decision maker so that HMRC can identify if the Decision is incorrect and avoid wasting the time and money of the taxpayer in an unnecessary appeal.

This view of the purpose of the provisions gained from a consideration of their form is supported by external materials.

Sections 49A–49I were inserted into TMA 1970 by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order with effect from 1 April 2009. When the Order was published in draft, an explanatory memorandum (the Explanatory Memorandum) was issued which explained the "policy background" to the Tribunal reform and of the introduction of the Review Process as part of that reform. That document explained at para 7.2.5:

> "The adoption of a common policy on review across HMRC's tax business is intended to provide clearer safeguards for taxpayers who dispute HMRC decisions and to help ensure that the Tribunal is not burdened by cases which could have been resolved by review. Important benefits include:
> - making HMRC action in reviewing decisions more transparent for taxpayers;
> - helping assure quality and consistency in HMRC decision making;

> **"The purpose of the review process is to provide a review of the decision which is independent of the decision maker**



- helping ensure that as many disputes as possible are resolved informally, without the expense or anxiety of a hearing;
- helping to achieve the HMRC aspiration to improve communication and to be more open in its dealing with taxpayers."

It can be seen that the Explanatory Memorandum distinguishes between the intention of the adoption of the review and the benefits which are expected to flow from it. The intention is:

a. to provide clearer safeguards for the taxpayer.
b. to help ensure the Tribunal is not burdened by cases which could have been resolved by review.

That the purpose of the process is to safeguard the taxpayer appellant was emphasised throughout the consultations which took place on these provisions.

> **"If HMRC have issued an amendment they must know why they have reached the conclusion that the amendment is necessary**

The purpose of the legislation is not, therefore, primarily to benefit HMRC but rather to safeguard the taxpayer and to avoid wasting the Tribunal's time. The benefits for HMRC which are listed in the bullet points are incidental to those purposes. It is clear that if the Review Process is to safeguard the client and to save the Tribunal from wasting its time, it must be concerned with whether or not the Decision is correct and not, for example, with whether it is in accordance with Revenue practice or internal departmental procedures.

The provisions in detail

The provisions of TMA 1970 in relation to the Review Process are now examined in more detail.

Section 49A

Section 49A provides the appellant taxpayer with the right to a review. It provides that where a notice of an appeal has been given to HMRC, the appellant may notify HMRC that he requires HMRC to review the matter unless it has already been notified to the Tribunal or a review is already either in progress or has taken place (s 49B(4)).

Notice of HMRC's views under s 49B(2)

Once an appellant has notified HMRC that he requires a review, HMRC must, within the relevant period, notify the appellant of HMRC's views. The relevant period is the period of 30 days beginning with the day on which HMRC receive the notification from the appellant taxpayer or such longer period as is reasonable. One might think that if HMRC have issued an amendment under a Closure Notice or Discovery Assessment they must know why they have reached the conclusion that the amendment or assessment is necessary and, therefore, ought to be able to state their view of the matter within a matter of days rather than a month. It is difficult, therefore, to envisage any circumstances in which a longer period would be reasonable.

In respect of s 49B(2), the Explanatory Memorandum refers to the situation where negotiation and discussion have taken place since the original appeal notification. Where the review is requested by the taxpayer, however, he will normally do so at the time of his appeal and the function of s 49B(2) is clearly more important than simply dealing with the rare situations where additional information has become available after the appeal. Unless HMRC's reasoning in arriving at its conclusion is set out it is difficult to see how the Review Officer can determine whether the Decision is correct or how the appellant taxpayer could have an adequate opportunity to put his own arguments before the Review Officer as he has a right to do under s 49E(4). Where a Closure Notice is issued, the Notice only has to state the Officer's conclusions and not the grounds of those conclusions (TMA 1970, s 28A(1)). Similarly, a Discovery Assessment simply has to state the additional amount of income or gains which are to be charged to tax (TMA 1970, s 29(1)). It is clear that stating HMRC's view of the matter must involve much more than this and that, in the light of the statutory purpose of the legislation, must involve a statement of the reasoning leading to the Decision.

In practice, in notifications under s 49B(2), HMRC often merely repeat the wording of the Decision or, sometimes, merely refer to the Decision notice as containing their view of the matter. Where HMRC do so, it is clear that they have not complied with s 49B(2). I have even had experience of HMRC not issuing a notice or purported notice under s 49B(2) at all because the officer concerned had thought that that sub-section referred to the conclusions of the review itself! As we shall see, whether or not a valid notice under s 49B(2) has been given is crucial to determining the time limits which apply to the later parts of the Review Process.

What are the consequences if HMRC do not issue a notice under s 49B(2) within the relevant period? The legislation does not provide any specific sanction. As we shall see, however, further key periods are defined by reference to the "relevant day" which is the day when HMRC notifies the appellant of HMRC's view of the matter in question. Thus if no notification of HMRC's view is made, the appeal is put into a sort of stasis. The appellant taxpayer's only means of enforcing HMRC's exercise of their duty is by making an application for judicial review. Of course, it may be that he will be happy for the whole matter to be suspended.

The conduct of the Review

According to HMRC's published guidance, once the Review Process has commenced, the Review Officer should write to the appellant taxpayer (referred to in the guidance as the "customer") informing him:

- that he will be undertaking the review;
- of his contact details;
- of when he expects to complete the review, seeking agreement to a new time limit if appropriate;
- of what will happen if he does not complete the review by the time limit; and
- asking the "customer" to send to him any further information or arguments that the "customer" wants him to consider.

Independence of the reviewer

It is clear that if the review is to achieve its statutory purpose, the reviewer must be independent of the decision maker, and this was emphasised during the consultation process. In fact, this requirement is often breached. I have heard of (but not experienced) cases in which the decision maker himself has been appointed to review the matter. What I have experienced are situations where substantially the same point is relevant to a group of taxpayers, in particular where they have undertaken tax planning transactions to a common pattern, and an officer raising assessments on one taxpayer within the group has been appointed to review a Decision in respect of another taxpayer within that group. In such a case, it is clear that the Review Officer cannot conduct the review with the independence necessary to achieve the purpose of the provisions and it is therefore arguable that his purported review is not a review for the purpose of the provisions at all. Similarly, I have seen situations where a review has been conducted and the Decision upheld where the review was invalid, because, for example, no Notice had been issued under s 49B(2), and the same individual

who has conducted the invalid review has then been reappointed to conduct a correct review. It is difficult to see how such an individual can have the required independence of the Decision if he has already purported, invalidly, to uphold it.

Reviewing HMRC's policy and procedure

As we have seen, HMRC have a wide discretion as to the nature and extent of the review, but that discretion must be such as to fulfil the Review Process' statutory purpose. The internal guidance (*Reviews, Appeals and Tribunals Manual* para 4080) says that:

> "The Review Officer does not have discretion to go outside current policy and practice."

If, however, current policy or practice has led to an incorrect Decision, a refusal to consider the correctness of that policy or practice will lead to the frustration of the purpose of the review. If the very matter in dispute is the subject of the policy or practice then it is clear that the Review Officer has a duty to consider its correctness. If HMRC's internal procedures prevent him from doing so, HMRC have a duty to change their procedures.

Use of HMRC Specialists

The duty under the statute for HMRC to conduct a review is an absolute one. It is not qualified by, for example, the resources which are available to HMRC (TMA 1970, s 49B(3)). It is HMRC's duty to employ sufficient, and sufficiently competent, staff to conduct the review. The Review Officer may take advice even if that advice comes from an HMRC specialist. If the purpose of the legislation is to be achieved, however, that advice must itself be independent of the Decision and the Review Officer must be at least capable of considering its correctness. He cannot simply accept it without turning his mind to the question of whether the person consulted has the necessary expertise and whether he has properly addressed the questions which have been put to him.

In practice, it appears that Review Officers simply defer to HMRC specialists without making any independent assessment of the specialist advice. Often, the specialist concerned is the very specialist on whose advice the Decision maker has relied in reaching his Decision. It is clear that in such circumstances the Review Officer is not conducting an independent review of the correctness of the Decision.

Representations under s 49E(4)

Section 49E(4) provides that:

> "The review must take account of any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them."

It is plainly necessary for the appellant taxpayer to be given an opportunity to consider the matters set out in the notification under s 49B(2) particularly if he has not previously been given a full account of HMRC's reasoning. If he is to do this he must be given a reasonable amount of time to do so after the notification under s 49B(2) and, of course, the Review Officer must take sufficient time to consider the points which are made to him. The Review Officer must therefore allow time for the appellant taxpayer to consider the notification under s 49B(2) and to make representations under s 49E(4) and for the Review Officer to consider those representations.

In practice, HMRC often seem to regard the requirement of s 49E(4) for the Review Officer to consider the appellant taxpayer's representations to be a matter of mere form. In one case I dealt with, the Review Officer's letter requesting information from the appellant taxpayer arrived on the day on which he issued his conclusions.

The conclusion of a Review

The Review Officer's conclusions must be notified to the appellant taxpayer within a specified time period which begins with the relevant day, that is with the day on which a notification under s 49B(2) is issued. So if no such notification is issued, no notice of the conclusions of the review may be given. The period is 45 days, beginning with the relevant day or such other period as may be agreed.

If HMRC do not issue their conclusions within this period the review is deemed to have been concluded and HMRC's view of the matter to have been upheld. HMRC must notify the appellant of the conclusion which the review is treated as having reached.

The provisions of s 49E(8) deeming a review to have been concluded will not apply to the situation where no notice has been issued under s 49B(2). As we have seen, the period in which the Review Officer must give notice of the conclusions of his review only begins when that notice is issued, so until it has been issued it will not be possible to say that HMRC have not issued the conclusions within the time period provided.

The review may conclude that HMRC's view of the matter in question is to be upheld, varied or cancelled.

Notification to the Tribunal after a Review is concluded

Where a review has been concluded the conclusions are treated as if they were an agreement in writing between HMRC and the appellant taxpayer under s 54(1). This does not apply, however, if the appellant notifies the appeal to the Tribunal under s 49G. Under s 49G the appellant may notify the appeal to the Tribunal within the post-review period or, if that period has ended, he may do so if the Tribunal gives permission. Where there has been an actual conclusion of the Review Process, the post-review period is the period of 30 days beginning with the date of the document in which HMRC gave notice of the conclusions of the review. Where HMRC have not issued a conclusion but are deemed to have done so because the review period has ended, the 30-day period runs from the end of the review period until 30 days after the date on which HMRC gave notice of the deemed conclusions of the review under s 49E(9).

This is some protection against the taxpayer overlooking the fact that the review period has passed without HMRC having issued a notice of their conclusions of the review.

Section 49G only applies where there has been a conclusion, or a deemed conclusion, to the review. Where there has not, because no notice under s 49B(2) has been issued, having requested a review the appellant taxpayer cannot notify the appeal to the Tribunal. As we have said, the appellant taxpayer's only remedy is to apply for an order, under judicial review, that HMRC should give the notice required by s 49B(2).

Conclusion

The right of a taxpayer to require HMRC to review a Decision, construed purposively, is an important one which gives substantial protection to the taxpayer and imposes onerous duties on HMRC. It is clear that HMRC do not give proper weight to those duties and that their practice fails to comply with them in a number of important respects. An appellant taxpayer should be prepared to insist that the procedure is followed properly and be prepared to enforce it with judicial review proceedings, in appropriate circumstances, if necessary.