

How we resolve Tax Disputes

The Tax Assurance Commissioner's
annual report 2012-13



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Foreword



Edward Troup
Tax Assurance Commissioner and
Second Permanent Secretary

This report, my first as HMRC's Tax Assurance Commissioner, outlines the department's performance in resolving disputes with taxpayers for the period from my appointment in August 2012 to March 2013.

HMRC's role is to collect the tax due by law from all taxpayers, large or small, under the rules set out by Parliament and to challenge effectively any case where we think the right amount of tax is not being paid.

The overwhelming majority of taxpayers pay the correct amount of tax and pay it on time. But they need to be confident that we take action against those who do not do so and that we apply the rules even-handedly to all taxpayers. My role is to provide confidence in our even-handedness to the public and to Parliament and to demonstrate that when we settle disputes we do so in accordance with the law.

I do not engage with any specific taxpayer on their tax affairs, but I oversee our decision-making processes. With two other Commissioners, I act as the final point of approval for settlements in the largest and most sensitive cases.

Since my arrival, I have found a great deal that gives me confidence. We have the processes in place to ensure that the right decisions on tax liabilities are made and I have seen how we do make good decisions in practice. Over the past months, I have been impressed by the level of expertise and discipline in the way our 17,000 tax professionals work, and their very visible commitment to ensuring that the law is applied as Parliament intended.

My direct involvement in the oversight of large settlements, my scrutiny of the processes for resolving disputes of all sizes and my engagement with HMRC's teams across the country allows me to provide assurance that we do consistently achieve the correct tax outcomes for the Exchequer under the law.

There is, of course, plenty of room for improvement. For example, more needs to be done to ensure that the overall governance framework for tax decisions is well understood, particularly in the more specialist areas of the department; I want our review of settled cases to have a broader range this year and for lessons to continue to be effectively learned; and I want to make sure that, while the confidentiality of taxpayers' affairs is maintained, there is a better public understanding of how we resolve tax disputes. This report is a first step in that wider process of enhancing transparency.

I would also like to highlight the commitment and professionalism of staff across HMRC for whose support, both in the work they do and in contributing to this report, I am very grateful.

I would welcome feedback on the content of this report and will be happy to consider how it can be improved in future years.

Edward Troup
Tax Assurance Commissioner and Second Permanent Secretary

Statement on behalf of Audit and Risk Committee



John Whiting
Chair, HMRC Audit and Risk Committee

The Audit and Risk Committee is chaired by John Whiting (Non-Executive Board Member). Other Members are Paul Smith (Non-Executive), Leslie Ferrar (Non-Executive) and Colin Cobain (Non-Executive). Lin Homer (Chief Executive), Simon Bowles (Chief Finance Officer), and representatives from the National Audit Office and the Head of Internal Audit are standing invitees.

The Audit and Risk Committee has taken a close interest in the development and implementation of changes to HMRC's governance and assurance processes for tax disputes. We have received regular updates, enabling us to provide oversight to the work that Lin Homer and Edward Troup have been carrying out in this important area. The main emphasis of the work carried out by HMRC to date has been in establishing appropriate processes. We agree with this approach.

The Committee has also agreed the programme and approach for the work carried out by HMRC's Internal Audit team to review the processes used in settled cases and has received reports on the findings.

We have seen this report in draft during its preparation. It is not our function to audit the report, but we have had the opportunity to comment on the drafts and challenge the information presented. We believe that the report is a fair report on and representation of HMRC's governance and assurance of tax disputes following the changes introduced during 2012-13.

John Whiting
Chair, HMRC Audit and Risk Committee

Chapter 1: Introduction and background

In February 2012 we made a number of changes to further strengthen our governance arrangements in relation to settling large tax disputes. As part of a package of changes we undertook to publish an annual report on our governance of settled cases. This is the first of those reports.

The Audit and Risk Committee has endorsed the scope and content of this report and a statement from the chair of the Committee can be found on page 3.

Background

The National Audit Office (NAO) reported in 2011 on our handling of tax disputes with large businesses and commended the strength of the governance arrangements in place. But it noted five cases in which the normal governance processes had not been followed and one case in which an error had been made in calculating liabilities. The PAC followed up these issues in hearings during late 2011 and in its report in December 2011 made a number of critical findings and recommendations for change in HMRC's handling of large tax disputes.

We acknowledged the error made in one case but we did not – and do not – accept that large tax disputes had been resolved on an inappropriate basis¹. A further report by the NAO in June 2012, following an in-depth review of the five cases highlighted in its earlier report, found that those cases had all led to reasonable outcomes for the Exchequer. However, we accepted that there was a need to restore public confidence in the way in which we handle tax disputes.

On 27 February 2012, we announced a package of changes designed to address concerns and provide greater assurance by improving the transparency of our processes and strengthening our governance of decisions in the largest and most sensitive cases.

This first report describes those changes and sets out the governance and assurance framework that underpins how we now handle tax disputes.

Package of changes

We are a non-Ministerial department, where the Commissioners are responsible for the collection and management of revenue.

Day-to-day operational decisions relating to the collection of taxes

are made by tax professional staff with the appropriate training and management oversight, depending on the size and scale of the work involved. The most significant decisions are made by the Commissioners themselves. Decisions made at different levels within the Department have always been taken in the context of appropriate governance and oversight that is proportionate to the size, and potential impact, of the issue being considered. That governance ranges from line management oversight for straightforward, low-value decisions, through to boards of senior officials and, now, at least three Commissioners being involved in sensitive or particularly high-value decisions.

These arrangements have always been subject to a high level of scrutiny by the National Audit Office and Parliamentary committees, such as the Public Accounts Committee and Treasury Select Committee, with taxpayers being able to take appeals against decisions they disagree with to the independent tribunal and courts.

¹ The High Court held in *UK Uncut Legal Action Ltd v Commissioners for HMRC* (May 2013) that, although HMRC made errors in settling one dispute, there were significant and substantial reasons for HMRC's decision in relation to it and that the decision was lawful.

Against this background, the changes we made were:

- The introduction of the new post of Tax Assurance Commissioner, whose role is to ensure that Parliament and the public can have confidence in HMRC's work, with an explicit challenge role to assess whether a proposed settlement secures the right tax efficiently and in so doing treats taxpayers even-handedly. The Tax Assurance Commissioner does not engage with specific taxpayers on their liabilities, nor manage case-workers
- Changes to the decision-making model for our largest and most sensitive cases (using the Tax Disputes Resolution Board and ensuring decisions on whether to settle or not are made by three Commissioners)
- A systematic review programme of the processes that we follow in settled cases, looking at a sample of cases from across the spectrum of our risk work²
- An enhanced role for our Audit and Risk Committee, including considering the reports from our review of settled cases programme and recommending follow-up action to improve compliance with those processes³
- Publishing a new code of governance on settling tax disputes, to improve

transparency about our processes

- An annual published report on our tax settlement work, signed off by the Audit and Risk Committee.

How we delivered the changes

Following Edward Troup's appointment as Tax Assurance Commissioner, we established our Tax Disputes Resolution Board (TDRB) in September 2012. The work of the TDRB and the overall HMRC dispute resolution process is outlined below and in Chapters 2 and 3.

On 1 November 2012, we published the Code of Governance⁴ for resolving tax disputes setting out our decision-making processes. This followed informal consultation on an earlier draft over the summer and reflected comments from internal and external stakeholders.

In Autumn 2012, our Internal Audit directorate carried out a pilot, reviewing governance processes in around 200 settled cases to ensure that the proposed format of the review would work in different business areas. The findings are set out in Chapter 6, along with information about the proposed programme of reviews in 2013-14.

The Tax Assurance Commissioner is responsible for overseeing large settlements, but does not engage with specific taxpayers, nor manage case workers.

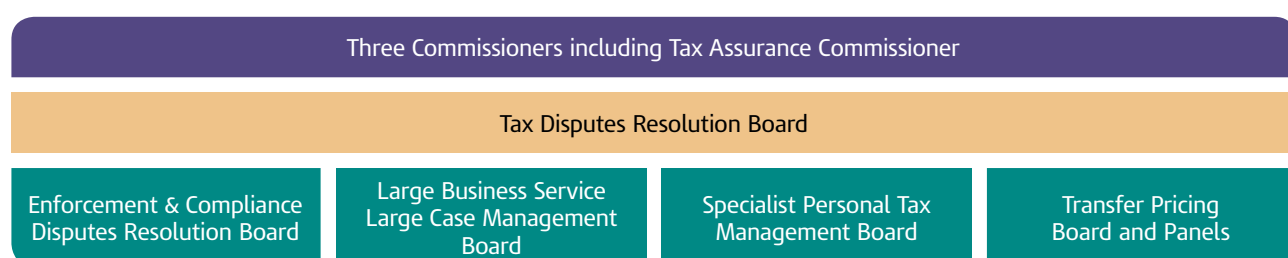
² A pilot was carried out in 2012-13 testing the proposed methodology. The full programme will start in 2013-14

³ www.hmrc.gov.uk/adr/resolve-dispute.pdf

⁴ The responsibilities of the Tax Assurance Commissioner are detailed in the Code of Governance (page 4).

Overview of governance processes

Case governance



The TDRB considers proposals to settle tax disputes in cases where the total tax under consideration across all issues is more than £100 million or cases which are particularly sensitive, where the decision could have a significant impact on HMRC policy, strategy or operations. Tax under consideration is a theoretical estimate of what the tax liabilities might be if the taxpayer fully accepted alternative tax positions across all identified tax risks. It does not take into

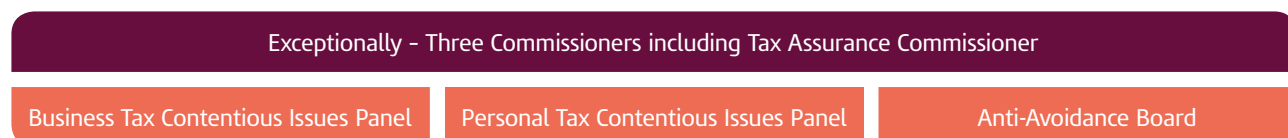
account the strength of HMRC's or the taxpayer's arguments concerning these alternative tax positions and does not therefore represent an estimate of the actual expected tax liabilities. Rather, it is a helpful way for HMRC to quantify the maximum potential tax at stake, which is then used to set the appropriate level of case governance.

The TDRB makes recommendations to three HMRC Commissioners as decision-makers. The TDRB and

Commissioners also consider a sample of cases where the total tax under consideration is in the range of £10 million to £100 million. Further information on the TDRB and Commissioners is in Chapter 3.

Beneath the TDRB we have established a range of governance boards, which make decisions on settling smaller cases and are responsible for ensuring sample cases are referred to TDRB and Commissioners. Further detail on these boards can be found in Chapter 2.

Issues governance



To ensure that we take a consistent approach to different taxpayers, our Contentious Issues Panels and Anti-Avoidance Board set

the handling strategy for issues affecting a number of taxpayers. These arrangements have been refreshed to make sure they fit as

part of the new arrangements for case governance outlined above. Further details on these boards are in Chapter 4.

Chapter 2: HMRC governance of dispute resolution

Our governance and assurance processes for resolving tax disputes are set out in the Code of Governance published on 1 November 2012.

The overall aim is to have processes in place that:

- ensure that tax collection runs smoothly
- allow our tax professionals to carry out their work with appropriate regard for their expertise
- provide assurance to HMRC's many stakeholders that disputes are resolved appropriately and fairly.

As the code makes clear, the skills and expertise of our 17,000 tax professionals underpin all our work on resolving tax disputes. We support our staff in developing and maintaining those skills through our training programmes, our range of accredited tax qualifications, continuous professional development, tax talent management and by offering career opportunities that allow them to continue to develop their tax professionalism.

Why do tax disputes arise?

Differences of view (or 'disputes') between a tax authority and taxpayers on the correct amount of tax due – or the timing of payment

– are a normal feature of tax administration across the world and arise in cases of all sizes.

There is a wide range of triggers for disputes, covering the simplest penalty cases through to the most complex technical points. Most tax disputes are resolved by agreement once the facts have been established and the points at issue discussed, including in cases where there is a formal appeal against the view we have taken. Resolving disputes by agreement, rather than by litigation, is our preferred approach and tax law facilitates this. This approach means legal and administrative costs can be minimised and earlier certainty achieved. Only a small minority of disputes need to be resolved by litigation, either in a tribunal or a higher court, when it has not been possible to reach agreement.

HMRC's strategic objectives are to maximise revenue collected, improve customer service and reduce costs. In line with those objectives, we resolve tax disputes on the basis set out in our Litigation and Settlement Strategy (LSS)⁵. The LSS makes clear that we will only resolve a tax dispute on a basis that is consistent with the law, whether by agreement with the customer or through litigation. We aim to resolve disputes through collaborative working wherever possible and reach agreement without litigation as that is the quickest and most efficient approach⁶.

The skills and expertise of our 17,000 tax professionals underpin all our work on resolving tax disputes.

⁵ The LSS applies to cases resolved using civil rather than criminal procedures

⁶ More information on the LSS is available here www.hmrc.gov.uk/practitioners/LSS.pdf

Where we cannot agree with the taxpayer then, as part of the formal appeals process, the taxpayer can ask us to carry out a review of the decision in question, or make an appeal to the First-Tier Tribunal⁷. In 2011-12 we carried out approximately 56,000 reviews, and around 4,300 appeals to the First-Tier Tribunal were closed, either at a formal hearing by the Tribunal or without a hearing.

Annex 1 provides further detail on why disputes arise and how we seek to resolve them. We also respond to the recommendations made by the NAO in their June 2012 report *Settling large tax disputes*.

Annex 2 provides a breakdown of the number of tax disputes resolved formally by review or at a tribunal hearing in 2011-12 (the latest year for which detailed figures are available).

Governance and management oversight

Our smallest and least complex disputes are handled by our case workers using extensive technical guidance, overseen by line management and subject to appropriate quality assurance arrangements. Reviews are carried

out by officers independent of the original decision-maker. Where complex issues arise, such as a technical uncertainty, or multiple interdependent issues are under consideration, case workers have access to specialist technical advice and, when necessary, legal advice. Under the LSS, all relevant staff should be consulted on the handling of these complex disputes including, where appropriate, our legal advisers, and decisions should be made by consensus. This partnership ensures that our approach to a specific case is thoroughly tested.

Business area boards

Each business area within HMRC has a senior decision-making board, with members drawn from across the Department, to consider proposals to resolve disputes in cases with significant amounts of tax under consideration or which raise novel or sensitive issues. The three senior decision-making boards sit below the TDRB, covering our Enforcement and Compliance, Personal Tax and Business Tax lines of business.

The Enforcement and Compliance Disputes Resolution Board (E&C DRB) was set up on very similar

principles to the TDRB. It covers all cases in E&C where the tax under consideration, across all risks, is between £10 million⁸ and £100 million. This range represents the significant tax disputes in E&C and is the 'population' from which sample cases for TDRB are drawn. The Board was developed from the Managing Complex Risk Programme (MCRP) Board and the E&C DRB now oversees this programme⁹.

E&C DRB is chaired by the deputy director for the large and complex teams within Enforcement and Compliance and includes representatives from across HMRC. The E&C DRB works closely with the TDRB to ensure a consistent approach is taken to risks and to cases that may come within the TDRB's remit as sensitive.

The E&C DRB has met monthly since its first meeting in January 2013. Six cases reached the Board between January and April, with two identified as sample cases to progress through to TDRB and Commissioners.

⁷ The First-Tier (Tax) Tribunal is independent of HMRC and hears most appeals against decisions of HMRC in relation to tax (www.justice.gov.uk/tribunals/tax)

⁸ The monetary limits of this remit (ie cases over £10 million) focuses on the total tax under consideration across all the disputed points in the case. For example, a case with six disputed points totalling £15 million will be referred to the E&C DRB to take decisions on individual disputed points that each might be less than £10 million.

⁹ The MCRP is the risk resolution programme within our Local Compliance Large & Complex business area for high-profile, complex and highest risk customers. It uses a clearly defined issue resolution process, in line with the Litigation and Settlement Strategy (LSS), through senior level engagement and partnership working across directorates to achieve quick resolution of issues and quick decisions.

In Personal Tax, all cases where the tax under consideration is more than £10 million, or which are particularly sensitive, go to the Specialist Personal Tax Senior Management Board, sitting with at least one other senior colleague from a different business area. There were no cases of more than £10 million in 2012-13 and the number of cases of that size or considered sensitive that the Board expect to see in 2013-14 is estimated to be between six and 12.

This small number means that we currently expect all Personal Tax cases above £10 million to be referred on to the TDRB and Commissioners as sample cases, ensuring that they are seeing examples from across the Department.

In Business Tax, the Large Case Management Board (LCMB) was established in April 2013 with representatives from across HMRC. The LCMB takes decisions, and provides advice, on high value and significant tax disputes between £25 million and £100 million.

Transfer pricing issues are decided within the transfer pricing governance structure. Transfer Pricing (TP) Panels decide on cases where the tax under consideration in a transfer pricing dispute is between £5 and £25 million. The Transfer Pricing Board decides cases between £25 million and £100 million and makes recommendations on cases within the remit of TDRB¹⁰. In 2012-13 150 cases were considered for settlement under the TP governance process.

The work of these three governance boards in the business areas underpins the Tax Disputes Resolution Board and the Commissioners, ensuring that decisions on the largest and most sensitive tax disputes are subject to appropriate cross-HMRC governance.

Three governance boards in the business areas underpin the Tax Disputes Resolution Board and the Commissioners, ensuring that decisions on the largest and most sensitive tax disputes are subject to appropriate cross-HMRC governance.

¹⁰ Where the case also involves risks that are separate from the transfer pricing issue, then, depending on the total amount of tax under consideration, the case may also go to the relevant line of business case board.

Chapter 3: Tax Disputes Resolution Board and Commissioners

The Tax Disputes Resolution Board (TDRB) considers proposals for resolving the point or points in dispute in a case and recommends to the HMRC Commissioners the appropriate basis for resolving the largest and most sensitive tax disputes.

Commissioners now make decisions in sensitive cases and those with more than £100 million tax under consideration (a reduction from the previous £250 million threshold). The new decision-making model draws on best practice established by the High Risk Corporates Programme Board, which has been incorporated into the TDRB.

Tax Disputes Resolution Board

The Tax Disputes Resolution Board brings together senior HMRC officials from a range of business areas, including the Solicitor's Office. Its membership and terms of reference are set out in the Code of Governance. It considers tax disputes when a decision point is reached in:

- a case where the tax under consideration across all risks is more than £100 million¹¹

- a case which is sensitive, or where an individual risk is sensitive¹²
- a sample of cases where the tax under consideration in the case as a whole is at least £10 million but less than £100 million.

The TDRB recommendation to the Commissioners will focus on whether there is an appropriate basis for settling the dispute by agreement or whether HMRC should continue to press for a different outcome, if necessary in litigation.

The TDRB may also consider cases in which novel or unusual features are present and may either decide the basis for resolving disputed points or refer them to the Commissioners with a recommendation (see Annex 3). The Board also acts as the governance board for cases in the High Risk Corporates Programme.

The TDRB is an internal governance process supported by a secretariat. Case teams complete detailed submissions presenting both HMRC's and the taxpayer's arguments. The secretariat has a key role in ensuring that the papers represent the arguments in a balanced way. A standard template is used to set out the facts and arguments on the disputed point, key case papers are included and case workers are present at

the Board to deal with queries and hear the debate.

The TDRB meets monthly and held its first meeting in September 2012. Seven meetings took place in 2012-13, with 31 cases considered. Additional meetings can be convened to deal with peaks in the volume of cases or if a case needs urgent consideration, but there have been none in this period.

TDRB decisions and recommendations are reached by consensus. If consensus cannot be reached, the point is referred to the Commissioners with the points of divergence clearly laid out, or the case may be referred back to the case workers for further work.

HMRC Commissioners

Decisions are made by three HMRC Commissioners, and have to be unanimous. The Commissioners meet to consider recommendations and referrals from the TDRB, working from material presented in standard templates with appropriate supporting material, and supported by the secretariat of the TDRB, with further explanation from case workers in person.

¹¹ The monetary limits of this remit (ie cases over £100 million) focuses on the total tax under consideration across all the disputed points in the case. For example, a case with eight disputed points totalling £125 million will be referred to the TDRB to take decisions on individual disputed points that each might be less than £100 million.

¹² Sensitive cases or individual risks are those where a decision to resolve a dispute might have a significant and far-reaching impact on HMRC policy, strategy or operations. They are likely in consequence to prompt significant national publicity.

Each meeting is made up of three Commissioners, chaired by the Tax Assurance Commissioner, who draws on the tax, financial and operational expertise within the pool of Commissioners.

In 2012-13, 22 TDRB referrals were considered by the Commissioners. The four Commissioners who took part were Edward Troup (Tax Assurance Commissioner), Jim Harra (Director General, Business Tax), Simon Bowles (Chief Finance Officer) and Jennie Granger (Director General, Enforcement and Compliance).

Of the 22 referrals, the Commissioners agreed that in 11, worth £1,368 million, the taxpayer was now proposing an acceptable basis for resolving the disputes. Commissioners rejected the taxpayer's proposals in five cases worth £398 million, and in another six cases, worth £285 million, Commissioners accepted the proposals, but with additional conditions attached. Annex 4 provides aggregate information about the cases considered by TDRB and Commissioners.

Sample cases

The TDRB and Commissioners consider a sample of smaller cases where tax under consideration is in the range £10 million to £100

million. The three boards for the business areas are responsible for ensuring TDRB receives sample cases. (As noted above, all these boards include at least one representative from a different business area.) Taxpayers in sample cases are made aware that there is a further governance stage to be completed before there is a final decision on HMRC's position. We are working to ensure that cases of the relevant size or sensitivity that may need to go to TDRB are identified as early as possible so that we can provide clarity on the process that will apply and minimise any potential delay to reaching a final decision on our position.

Since the TDRB was set up, attention has focused on establishing the pool of cases across HMRC from which the sample is drawn and on developing processes to identify the cases that will move from their line of business governance to the TDRB and Commissioners as sample cases.

As the first tranche of sample cases were identified late in 2012-13, few of them have yet reached a decision point requiring TDRB and Commissioners to consider them. One sample case was considered, however, and we expect others to be ready for referral to TDRB and Commissioners during 2013-14.

Of 22 tax dispute cases referred to Commissioners in 2012-13, 11 were accepted for settlement, five were rejected and six settled with conditions.

Chapter 4: Setting HMRC's approach to issues affecting multiple taxpayers

This chapter describes the process for deciding our position on a disputed tax point that arises in multiple cases (an "issue" that is relevant to more than one case).

Setting a framework for handling an issue consistently across the range of cases in which the point is in dispute is an important element of our work, and helps to ensure that we administer the tax system in an even-handed way.

The Business Tax and Personal Tax Contentious Issues Panels (BT and PT CIPs) and the Anti-Avoidance Board are the bodies established by HMRC to consider issues and agree HMRC's approach to them.

Contentious Issues Panels

The BT and PT CIPs are governance groups with members drawn from across the Department who decide our strategy for handling major contentious issues. A major contentious issue is one that involves a point of law or practice which might have a significant and far-reaching impact on our policy, strategy or operations, affects multiple cases, impacts on different parts of HMRC, or may result in major litigation.

By having these panels set the handling strategy for such issues, we ensure that cases are handled in a coordinated and consistent manner across HMRC. Where a

CIP cannot reach a unanimous decision, it may commission further work by the issue owner(s), or refer the issue to the Commissioners for a view.

During 2012-13 the PT CIP considered six issues and the BT CIP considered 16.

Anti-Avoidance Board

The Anti-Avoidance Board (AAB), made up of representatives from all business areas involved in tackling tax avoidance, approves and monitors strategies to handle tax avoidance issues, and makes strategic decisions about HMRC's anti-avoidance work. This ensures that throughout the life of an avoidance issue, proper consideration is given to:

- the level of risk posed by the issue
- the appropriate means of counteraction
- the allocation of resource.

Over the course of 2012-13, the AAB considered 130 issues.

Once a handling framework has been set for an issue, whether by a CIP or the AAB, a disputed point in a case that involves that issue should be resolved on the basis of the agreed approach. Whether or not the agreed approach has been followed is one of the factors tested in the Internal Audit reviews of process in settled cases.

Examples of issues considered by CIPs and AAB in 2012-13 can be found in Annex 5.

In 2012-13, the Anti-Avoidance Board considered 130 issues and the Contentious Issues Panels considered 22 issues.

Chapter 5: Significant litigation in 2012-13

As our Litigation and Settlement Strategy makes clear, we aim wherever possible to resolve tax disputes by agreement, provided a satisfactory outcome within the law can be reached. Litigation can be time-consuming, costly and always has an element of risk. There are various options that are available before litigation.

Where taxpayers do not agree with our decision, they can ask for an internal review of the decision. An officer who was not involved in the original decision then looks again at the facts, legal position and process of the decision. The review officer decides whether to uphold, vary, or cancel the decision, in accordance with the LSS.

In line with the Government's dispute resolution commitment, taxpayers can also consider whether alternative dispute resolution (ADR) techniques will aid in reaching an agreed resolution in line with the LSS, instead of proceeding to tribunal. ADR can be useful in some cases which are very fact-heavy where views have become entrenched. We have recently trialled the use of ADR in two pilots and we are now building on their successes as part of business as usual¹³.

ADR is designed to overcome deadlocks in dispute resolution by establishing or re-establishing constructive dialogue. It uses an intensive, mediated, process to remove personality from a dispute, examine and agree facts, or tease out what facts are not agreed, why that is and what is needed to achieve agreement. The focus is neutral and involves collaborative engagement. It also examines the assumptions that underlie each side's view of how the law applies to those facts so that mutual understanding can be achieved.

Subject to governance processes, ADR can also bring decision-makers from both sides to the table, so that opportunities for misunderstandings are minimised. Where resolution has been reached, this has been on the basis that a shared understanding of the facts and how the law applies has been achieved. Where the dispute remains unresolved, there is usually a better appreciation of the arguments and underlying reasons for the dispute, which makes litigation better focused.

Although resolving disputes by agreement is our preferred approach, we will take cases to litigation if an outcome consistent with the LSS cannot be achieved any other way. Around 4,300 appeals to the Tribunal were closed in 2011-12 (the latest year for which figures are available). The

majority of these were individual disputes about the facts in a specific case or the application of penalties, without wider impact or precedent value. However, each year there are also cases heard where the outcome could have significant implications for HMRC and taxpayers in general.

For example, in 2012-13, there were 18 cases heard in the Court of Appeal/Court of Session and four in the Supreme Court to which HMRC was a party. 14 of these confirmed HMRC's view of the law, including significant decisions on the scope of legal professional privilege¹⁴ and the relief that can be given when trustees make decisions with unforeseen tax consequences¹⁵. In six cases, the decision went against HMRC's arguments and two judgments have not yet been issued. The tribunals and courts also issued decisions on 33 avoidance cases with 27 going in HMRC's favour, protecting more than £1 billion of tax.

In 2012-13, litigation decisions across all cases decided in HMRC's favour protected tax of around £10 billion¹⁶. Annex 6 highlights some of the significant judgments in litigation given in 2012-13. We do not comment on the figures of tax at issue in these cases as the figures are not always in the public domain.

¹³ Figures for the SMEi pilot can be found www.hmrc.gov.uk/news/adr-public-eval-report.pdf

¹⁴ R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another.

¹⁵ Futter/Pitt v The Commissioners for Her Majesty's Revenue and Customs.

¹⁶ Judgments in HMRC's favour protected in the region of £10.89 billion. Judgments against HMRC totalled £663 million, but many of these are under appeal and we are confident of success.

Chapter 6: Review of governance processes in settled cases

In addition to the changes described in earlier chapters, we have committed to carry out a programme of reviews of the governance processes used in a sample of settled cases from across HMRC.

A pilot was carried out in the second half of 2012-13 with the full programme starting in 2013-14. This review programme looking at process is in addition to quality assurance programmes in business areas¹⁷.

Review of Settled Cases

Internal Audit examines case files for the programme of reviews of settled cases.

The review programme will be an annual programme in which the emphasis may shift from year to year, with the aim of ensuring coverage over time of all areas of HMRC in which tax disputes arise. The 2012-13 pilot and 2013-14 full programme focus on the business areas where most tax disputes arise: Enforcement and Compliance and Business Tax, with some cases from Personal Tax.

The reviews focus on checking that the appropriate processes have been followed when working a tax dispute – for example, whether appropriate advice was taken from internal stakeholders, where necessary; whether governance processes were followed; whether the outcome of the dispute was recorded appropriately. Reviews do not re-open the points in dispute: they are intended to identify areas in which process improvements could be made for the future. Where cases are not found to be satisfactory, this does not necessarily indicate that there was any loss of tax, rather that there are improvements that could be made in the way governance processes were followed. The Tax Assurance Commissioner oversees the review programme and the findings are reported to our Audit and Risk Committee, who may recommend follow-up action.

In 2012-13 we established the methodology for the programme of reviews and tested it in a pilot programme, where 213 settled cases from 2011-12 were reviewed, drawn from Local Compliance and Specialist Investigations in Enforcement and Compliance and the Large Business Service in Business Tax.

We have committed to carry out a programme of reviews of the governance processes used in a sample of settled cases from across HMRC.

¹⁷ For example, every year as part of Measuring High Quality (MHQ) programme, Local Compliance review more than 2,000 randomly-selected compliance checks from across all of the tax regimes within LC. The MHQ review measures the quality of the cases against 15 MHQ questions, providing recommendations about areas of improvement.

Each year the Large Business Service produces a quality assurance plan involving a number of quality reviews to be carried out across the business. The findings and recommendations of these reviews feed into process changes.

Overview of findings and lessons learned

The pilot programme tested the processes followed in the cases against a set of common governance criteria, reflecting what governance processes were required at the time the case was settled. The pilot was intended to check the methodology ahead of a full programme of reviews that will be carried out annually from 2013-14.

The overarching finding of the pilot was that the methodology was sound, although some slight changes have been made for the 2013-14 programme to make some of the criteria clearer.

The pilot found that in the majority of cases (195 out of 213) there was satisfactory adherence to governance processes. There were 18 cases where we had not followed all the processes relevant to the case, and these broadly related to two areas:

1. process involved in the application of penalties
2. processes for recording yield and the future impact on revenue.

Internal Audit were satisfied that these issues were the result of changes being made to systems and processes at the time; this

was a transitional period for both penalties and the approach to recording yield.

Business areas are taking action to address concerns identified both within the Internal Audit pilot and in their line of business based assurance work. This includes:

- developing improved guidance on the operation of penalty processes, including the streamlining of the penalty authorisation process and development of support tools. There has also been face-to-face training for all caseworkers and managers on penalties
- developing improved guidance on the recording of yield, with feedback processes established so staff can raise issues, suggest improvements and identify gaps as they use the new yield system
- an ongoing programme of workshops/surgeries to assist caseworkers on penalties, settlements and emerging issues
- placing an increased emphasis on improving audit trails.

As a result of these changes, and the transitional period involved, Internal Audit did not consider there to be any underlying causes for concern that required any specific recommendations.

Work programme for 2013-14

The agreed programme of work for 2013-14 will cover more areas of the business than the pilot and aims to review approximately 400 cases. The review will report throughout the year, so that business areas can respond to any lessons as soon as possible. This reporting will also provide an overview across the areas to identify if there are any common areas of concern, for which action needs to be taken as soon as possible.

Annex 1: Overview of tax disputes

Why do tax disputes arise?

Differences of view might arise because the law is complex or because the way the law applies in a particular set of circumstances is not straightforward.

HMRC might believe that a taxpayer has failed to assess their liabilities correctly or meet a deadline for payment; or has carelessly provided inaccurate information; or has deliberately misled us. We might take the view that a taxpayer is trying to avoid tax by using the law in a way that was never intended. Or we might take a different view from a taxpayer on the way the law is meant to work in their situation.

These differences of view between HMRC and a taxpayer or their agent might arise in a number of ways. For example, we might receive a claim for a tax relief or a tax repayment which we do not believe is due. We might impose a penalty for a late payment or return which a taxpayer or agent believes is not justified. We might be aware that a particular individual or business has used a notified avoidance scheme. Most typically, however, a dispute will arise because our risk assessment identifies one or more points that we believe need to be challenged.

Risk-based working

Compliance activity within HMRC is based on risk. By that, we mean the risk of a taxpayer failing to meet their tax obligations. We work within a common set of risk priorities, prioritising our highest risks. This can be by reference to taxpayer behaviour¹⁸, by threats to regimes or by the size and complexity of the risk involved. Focusing on areas of most significant risk across different taxpayer groups, we carry out targeted and appropriate interventions, from education and local support through to full enquiries that can result in substantial financial or custodial penalties.

Our approach to all of our taxpayers is to treat everyone even-handedly in line with tax law, as set out in our Litigation and Settlement Strategy; and to ensure we are consistent in the way we deal with them so that they pay the tax they owe and receive the reliefs to which they are entitled.

Our approach to the 2,000 largest businesses¹⁹, to ensure they pay the correct amount of tax, is to invest in a close working relationship with them so that we have in-depth knowledge of their business model, business and tax

issues, appetite for risk in tax planning and internal governance. Our Customer Relationship Managers (CRMs) are experienced tax professionals who lead teams of our most highly-skilled specialists to manage these complex and high-risk taxpayers.

We encourage these businesses to have an open and transparent working relationship with us, identifying and resolving issues as soon as they arise, if possible. This is the most cost-effective way to increase revenue flows, while supporting business growth and improving the taxpayer experience.

We seek to work issues in real-time with all large businesses, no matter what their tax strategy. This not only provides earlier certainty for the taxpayer, but also allows HMRC to detect avoidance more quickly.

For large businesses who are low risk – judged by their internal systems and controls and attitude towards avoidance – fewer audits take place. Our focus on the biggest risks means we use our resources better and work the most significant cases more intensively, resulting in increased yield.

¹⁸ HMRC segments its customers into seven categories, ranging from ‘willing and able’ to ‘rule breakers’. These segments relate to the behaviours exhibited by customers in relation to their tax liabilities.

¹⁹ Defined as those with a turnover of £600 million or above, or assets of £2 billion or more.

Centralised risk assessment

We also use sophisticated IT systems to cross-match more than a billion pieces of data to identify cases where it appears that collection of tax is at risk, including matching our data against third-party information. We use this kind of data matching to identify individual cases to follow up and as the basis for targeting certain taxpayer groups with campaigns aimed at recovering tax and making them more compliant²⁰.

Complaints and tax disputes

Interactions between a taxpayer and HMRC can lead to a taxpayer complaining about HMRC service, perhaps where they feel they have been treated unfairly.

Separately, a taxpayer may disagree with or dispute HMRC's decision or view about their tax position.

Complaints

If taxpayers are unhappy with HMRC's service, they can make a complaint. Examples might include unreasonable delays, mistakes, and unfair treatment. HMRC will try to resolve the complaint with them.

If the taxpayer remains unhappy, the complaint can be reviewed by a second complaint handler. If the taxpayer is still not satisfied, they can send their complaint to the Adjudicator's Office and ask them to look into it. The Adjudicator is an independent referee, and the service is free.

Disputed decisions

If taxpayers think our decision about tax (for example, in an assessment) is wrong, they can either ask for a review of our decision or appeal to an independent tribunal. If the taxpayer asks for a review they can still appeal to a tribunal if they disagree with the outcome of the review.

We seek to resolve disputes at the earliest possible stage and reviews offer a good opportunity for the taxpayer to present any new evidence or arguments and for HMRC to re-examine the case.

Reviews are carried out by review officers within HMRC who were not involved in the original decision. The review officer looks again at the facts, legal position and process of the decision and decides whether to uphold, vary, or cancel the decision, in accordance with the Litigation and Settlement Strategy.

Appeals are heard by the tax chamber of the First-Tier Tribunal. The tribunal is independent of HMRC and can re-examine decisions on the basis of the facts or the law.

If the taxpayer disagrees with the tribunal's decision, they can appeal the decision to the Upper Tribunal. Decisions of the Upper Tribunal can be appealed on to the Court of Appeal (Court of Session in Scotland), and ultimately the Supreme Court.

Many appeals are settled by agreement without the time and inconvenience of a tribunal hearing. However, there will always be cases when the parties cannot agree and the tribunal will be asked to decide.

Resolving tax disputes

The basis on which we will resolve a tax dispute is set out in our Litigation and Settlement Strategy. We will only agree to settle a dispute by agreement if that gives an outcome consistent with the law. Some disputed points can only be settled in one of two ways – for example, an item of income might be taxable or not taxable or an item of expenditure might or might not be deductible from taxable income. There are many examples of this kind of binary question in tax case law.

²⁰ National campaigns are programmes of work that address a specific area of strategic risk for HMRC. Campaigns provide opportunities that make it easier to be compliant – offering an incentive to self-correct and encourage voluntary disclosure to provide HMRC with the information needed to improve processes and deal more efficiently with customers in future.

Other disputed points might give rise to a range of possible answers; for example, a valuation question, the appropriate amount of an expense to be deducted where an apportionment can be made, or where there is more than one possible acceptable technical analysis of a series of linked transactions. So resolving disputes can often be complex and requires technical skill and judgement to be exercised. Where there is a range of possible outcomes, the guiding principle is that HMRC will only settle a dispute by agreement if we believe that the outcome is one we might reasonably expect to obtain in litigation.

The National Audit Office report of June 2012 explained that when there are multiple complex issues in dispute between the Department and a taxpayer, interdependency is inevitably created between them, so that the best outcome for the Exchequer may be achieved by conceding HMRC's stance on an issue if that means our position on other issues is accepted. The NAO recommended that HMRC should set out more clearly the extent to which it is acceptable to settle individual issues in the context of a wider settlement.

The LSS requires each dispute with a taxpayer to be resolved on its merits: this is a key principle which discourages the practice of engaging in multiple disputes in the hope that HMRC will always concede a proportion of them. The LSS also makes clear that a dispute should only be taken to litigation if litigation would be cost-effective. We accept that there might exceptionally be complex cases in which litigation on a particular dispute, even if HMRC would expect to succeed, would not be cost-effective if pursuing the issue to litigation would prejudice cost effective resolution of other disputes in the case. Usually the factors to be considered in deciding how to proceed on a disputed issue, including the read-across to other cases, precedent value and the impact on taxpayer behaviour (in the immediate case and more widely), will mean that the right decision is that litigation would be cost-effective. Any decision not to litigate but to concede such an issue in order to resolve a multi-issue case would therefore be rare in practice and should be taken through the relevant formal case governance procedures. The commentary to the LSS is being amended to bring this out more clearly.

The NAO made four other recommendations in its June 2012 report which HMRC accepts.

- The LSS commentary will be amended to cover the specific position of disputes in relation to Controlled Foreign Companies²¹
- Lawyers will be consulted on proposals for settlement in all significant tax disputes that are in litigation²²
- Case teams are present at meetings of the TDRB and Commissioners, so hear first hand the considerations that are taken into account²³
- The Code of Governance makes clear that taxpayers and their advisers should be made aware of any further governance steps to be completed before proposals for resolving tax disputes are discussed²⁴.

²¹ **Recommendation** – The Department should update the Litigation and Settlement Strategy, or the guidance accompanying it, to make clear how cases involving controlled foreign companies are compatible with the Litigation and Settlement Strategy.

²² **Recommendation** – The Department should ensure that lawyers are always consulted before finalising settlements on issues that are in litigation.

²³ **Recommendation** – The Department should explain more clearly to its specialist staff how settlements are reached, including, where appropriate, the rationale for the settlement terms on individual issues.

²⁴ **Recommendation** – The Department should ensure that it makes clear to taxpayers that settlements agreed in principle should not be considered final until they have been through all relevant approval processes.

Annex 2: Overview of dispute outcomes at review and appeal 2011-12*

Total number of reviews of HMRC decisions – 56,228

Percentages may not sum to 100 due to rounding

Non-penalty cases	2011-12	
Upheld: review complete	4,487	68%
Deemed upheld: time limit expired	12	0%
Varied	504	8%
HMRC decision cancelled	1,611	24%
Total	6,614	

VAT penalty cases	2011-12	
Upheld: review complete	9,785	32%
Deemed upheld: time limit expired	1	0%
Varied	2,242	7%
HMRC decision cancelled	18,317	60%
Total	30,345	

Other penalty cases	2011-12	
Upheld: review complete	14,020	73%
Deemed upheld: time limit expired	237	1%
Varied	341	2%
HMRC decision cancelled	4,671	24%
Total	19,269	

Approximately 30,600 requests for reviews were made by companies, 21,700 by individuals and 2,300 by partnerships.

* This is the latest year for which detailed figures are available.

Total number of appeals decided with or without a hearing - 4,354

Some cases can be resolved without a hearing if they are withdrawn or settled or because they are closed in line with the decision in a lead case. Figures below represent the outcome for those cases that go to a hearing.

Outcome of Tribunal hearings:

	2011-12	
In HMRC's favour	855	61%
Partially in HMRC's favour	97	7%
In taxpayer's favour	443	32%
Total	1,395	

Further details have been published and are available on the HMRC website at:
www.hmrc.gov.uk/complaints-appeals/reviews-appeals-2011-12.pdf

Annex 3: Governance case studies

These case studies are drawn from experience in actual cases to illustrate HMRC's processes but are not a description of the position of any specific taxpayer.

Case studies

Scenario 1

HMRC had seven separate tax disputes with a Large Business taxpayer. In four of the disputes, HMRC was challenging the taxpayer's use of avoidance schemes to reduce its taxable profits – for example, by artificially inflating the value of a tax relief or by making arrangements which purported to shield income or gains from tax. Three of the disputes were technical: HMRC was not arguing that the taxpayer was seeking to avoid tax, but did not agree with the customer's view of how the law applied to the specific facts in their case.

The total tax under consideration across all seven disputes amounted to £170 million. The disputes related to different taxable periods and had begun at different times, but work on all the disputes was brought together in a single project.

The Customer Relationship Manager for the taxpayer led the work on the case, bringing together a team to work on each dispute including technical tax specialists, anti-avoidance

specialists, advisory accountants and solicitors. The CRM made sure that the customer knew that proposals to resolve the disputes would need to be considered by the TDRB and Commissioners.

For each dispute, the team completed the fact-finding stage of their investigation and considered the taxpayer's tax analysis of the transactions. They worked together to debate and agree HMRC's position on the issues and met the taxpayer and their agents to check understanding of the facts and test the strength of the arguments on both sides. For the two most difficult and complex disputes, which related to areas of the law not previously tested in litigation, the team took advice from the Solicitor's Office and Leading Counsel on the strength of HMRC's position and chances of success in litigation.

HMRC's approach to the four disputes about avoidance schemes was determined by the strategy set for the schemes by the Anti-Avoidance Board (AAB). The AAB agreed that users of the schemes should be challenged and that HMRC should not accept that the schemes produced the tax advantage they sought.

At the end of the process of fact-finding and testing understanding of the arguments, all of the disputes in the case were still unresolved and a decision point was reached. To resolve the position, the taxpayer made a proposal to HMRC:

1. they would concede their arguments on all four avoidance disputes, although they thought they might well succeed in litigation on two of them
2. on the three technical disputes, they were prepared to concede the point in two of them, in recognition that the arguments were finely balanced, but believed HMRC should concede the other because they had advice from Leading Counsel that their arguments were much the stronger.

The proposal now needed to be considered by the TDRB and Commissioners. For each of the disputes, the TDRB had a paper setting out the facts; the arguments on both sides; views on the strengths of the arguments and the nature of any legal advice received; and the fit with the LSS. For six out of seven disputes, the taxpayer proposed to accept HMRC's view. The contentious point was in relation to the technical dispute which HMRC was asked to concede.

HMRC's analysis of the technical dispute was that the position was more balanced than the taxpayer suggested. Legal advice suggested that HMRC's position was not strong, but sufficiently robust that the courts might find either way. Since the issue was finely-balanced, a decision to concede our arguments was compatible with the LSS. The CRM considered that the offer was a good one and recommended acceptance.

The TDRB considered the case at a full meeting of all its members. It reviewed the papers in advance and the CRM attended to answer questions. TDRB saw merit in accepting the taxpayer's offer, but was concerned about the implications of a decision to concede the technical dispute for our position in other cases. The TDRB asked the case team to evaluate the wider implications more fully and to consider whether the issue should be referred to the Contentious Issues Panel to set a strategy to be applied in all the cases where it arose.

Further work by the case team showed that conceding the technical dispute in question could have major implications for other cases where the same point arose and might potentially lead to a significant loss of tax. The handling strategy set by the Contentious Issues Panel was that HMRC should not concede.

In the light of that further work, when the case was referred back to them, the TDRB recommended to the Commissioners that the taxpayer's proposal should be rejected. At their meeting, the Commissioners agreed with the recommendation, on the basis of the briefing papers, the record of the TDRB discussion and discussion with the CRM.

This outcome means that HMRC will continue to press the taxpayer to accept HMRC's view on all the disputes and if agreement cannot be reached on that basis, will press ahead with litigation.

Scenario 2

In another case, the taxpayer approached HMRC to agree how the new "patent box" tax relief applied to their business. From April 2013, the patent box legislation allows a lower corporation tax rate of 10% to be applied to income derived from the use of UK or European patents. As the legislation is new, the taxpayer wanted to work with HMRC in real time (that is, before putting in their tax return) to agree a basis for claiming the relief that HMRC would find acceptable.

The taxpayer's case as a whole fell within the remit of the TDRB because of the amount of tax under consideration. The patent box issue was also an early example of applying the new legislation and so presented novel features.

The taxpayer owned a large number of patents which were used in various parts of its complex organisation and the new patent box regime presented a potentially substantial benefit. If the taxpayer were able to quantify that benefit as far as possible, it would allow the group to take this into account in planning its future research programme. The taxpayer's agents came forward with broad early proposals for calculating the amounts eligible for the new tax relief, which suggested a range of possible outcomes.

The HMRC team was led by the Customer Relationship Manager and included the policy and technical advisers on the patent

box, transfer pricing specialists and the relevant trade sector adviser.

The HMRC team was able to challenge some of the taxpayer's initial assumptions and asked for further detailed work to be carried out. There followed several months of information-gathering and discussion during which HMRC ensured that it clearly understood the factual position, particularly how the taxpayer used patents in its business, and how it saw the legislation applying to its business. This included applying transfer pricing principles.

The team also reviewed publicly-available information, including relevant academic and technical research papers and patent databases, and benefited from extensive and detailed discussions with the taxpayer's own experts regarding the structure of the business and how their many patents were used.

Following this in-depth exploration, the customer put forward a revised proposal. The case team believed that the proposal took account of the relevant variables and uncertainties and that it should be accepted. The proposal was initially considered by the Transfer Pricing Board and agreed to be reasonable.

The case team then referred the proposal to the TDRB and from there to the Commissioners. The supporting papers described the comparators that had been considered to establish an appropriate methodology for the calculation, evaluated their relevance and set out the conclusions the case team had drawn from their research. After testing the findings in discussion with the Customer Relationship Manager, the TDRB agreed to recommend acceptance of the proposal. The Commissioners were also satisfied that the evidence and arguments supported acceptance.

Since this work took place in advance of the company filing its return, the agreement meant that the company would use the agreed methodology in their return to calculate the income eligible for the reduced patent box rate and that HMRC would be unlikely to challenge it unless new information emerged or there had been a material factual change.

Scenario 3

A large UK-based company had four open tax disputes with HMRC. Two disputes related to the company's use of marketed avoidance schemes designed to produce a tax advantage that was not intended; in another, HMRC was challenging the company's use of offshore structures to reduce its UK PAYE liabilities and the fourth was a technical dispute about whether an item of expenditure qualified for capital allowances. The disputes had arisen in three

different tax periods and the overall amount of tax in dispute was £140 million.

The four disputes had been open for some time and HMRC agreed with the taxpayer to work them together on a project-managed basis, with the aim of reaching decision points on the disputes as quickly as possible. The CRM led the case team for HMRC, working with technical specialists on avoidance, capital allowances and employment issues.

The facts underlying the issues had been established and agreed. Similarly the arguments supporting each side's position had been set out and discussed. The case team consulted lawyers on the offshore and capital allowances issues. Lawyers had also been consulted on one of the avoidance schemes in relation to a different case.

The Anti-Avoidance Board had considered both marketed avoidance schemes and decided that HMRC should not concede that the schemes succeeded in producing the tax advantage sought. HMRC also believed it had strong arguments to counter the offshore avoidance arrangements. On the technical issue, however, the legal advice was that the arguments were finely balanced and HMRC did not have a strong case.

The amount of tax in dispute in the case brought it within the remit of the TDRB and Commissioners and the CRM made sure the taxpayer understood the governance steps required.

The taxpayer made a proposal to HMRC to bring the disputes to a conclusion. They felt strongly that HMRC should concede the technical dispute, where they were sure they had the better of the arguments. They also suggested HMRC should concede its arguments on one of the marketed avoidance schemes. They were willing to accept that HMRC had the better arguments on the other two issues.

In their submission to the TDRB, the case team set out the arguments on both sides on the issues where HMRC was asked to concede its position. They acknowledged that HMRC's arguments on the capital allowances point had weaknesses, given the way the relevant legislation was framed. But all HMRC stakeholders were firmly of the view that the avoidance scheme should not be accepted as effective, in line with the steer from AAB. The team recommended that the customer's proposal should be rejected.

TDRB considered the proposal and the case team's recommendation. They agreed that it was unacceptable to concede HMRC's argument on the avoidance scheme. If the taxpayer remained unwilling to accept that the scheme did not work, the issue would have to proceed to litigation. The Commissioners took the same view.

In the following weeks, the case team held further discussions with the taxpayer to ensure HMRC's arguments and readiness to go to litigation on the avoidance scheme were clearly understood.

After a period of reflection, the taxpayer came forward with a revised proposal, under which they would concede their position on all three avoidance issues. They continued to believe that HMRC's arguments on the technical issue would fail if the matter were litigated.

The case team took the case to the TDRB for a further discussion. As before, the case team noted the weakness of HMRC's arguments on the technical issue and recommended that HMRC should accept the customer's view. TDRB tested the arguments in discussion with the CRM and technical specialist and concluded that HMRC's position was weak and, in line with the LSS, should be conceded. They agreed to recommend acceptance of the taxpayer's proposal to the Commissioners.

The Commissioners considered the TDRB's recommendation. They reluctantly accepted that, as the legislation stood, HMRC could not win the argument on the capital allowances claim and that the point should be conceded. They asked for the issue to be referred to the relevant policy team to consider whether the legislation should be strengthened.

Novel or unusual and sensitive cases

The TDRB remit provides for cases with unusual or novel features to be referred to TDRB. It also states that all sensitive cases or risks should go to the TDRB and Commissioners. These categories of cases are by their nature hard to define and decisions on whether a case exhibits an unusual or novel feature, or is sensitive, are for HMRC. The categories were included in the remit to ensure that this governance process applied to all appropriate cases, irrespective of size. The definitions below are to provide a broader view of what could fall within these categories but they are not binding, nor restrictive.

- A case may be referred to the TDRB if it has an unusual or novel feature.

This category of case was included in the remit to ensure that cases with unforeseen characteristics could be taken to the TDRB and Commissioners as necessary, even where they are not sensitive or the tax under consideration is not over £100 million. It was intended to cover scenarios where the proposals for resolution contain unusual or novel features that should be considered by the TDRB or Commissioners before a decision is taken. This would take into account, for example, the wider impact of any settlement, whether the correct amount of tax has been reached and what

behaviours the settlement could engender, in that taxpayer and others.

- A case or risk may be referred to the TDRB if it is sensitive.

A sensitive case or risk is where a decision to resolve a dispute might have a significant and far-reaching impact on HMRC policy, strategy or operations. They are likely in consequence to prompt significant national publicity.

This means that cases or risks that do not fall within the quantitative limits of the TDRB and Commissioners will be required to go to them for decision if the impact of that decision could be significantly wider than the resolution of the case itself.

Where a case is considered sensitive, all of the issues within it that are being considered for resolution will need to go to TDRB and Commissioners, irrespective of their individual size or complexity.

Annex 4: TDRB and Commissioner referrals in 2012-13

31 referrals to Tax Dispute Resolution Board from September 2012 to March 2013

Sent on to Commissioners

Taxpayer proposal endorsed and referred onward to the Commissioners	16 referrals
No consensus reached and referred onwards with no recommendation	1 referral
TDRB recommended rejection of the taxpayer proposal and referred onward to the Commissioners	5 referrals

Not sent on to Commissioners

Taxpayer proposal accepted by the TDRB Board and no referral required	2 referrals
TDRB remitted to the case team for further work before re-referral	7 referrals

Type of referral

£100 million plus cases	25 referrals
HRCP case	1 referral
Novel and unusual (2 cases)	2 referrals
Sensitive (1 case)*	2 referrals
Sample case L&C	1 referral

* This was one case that was referred to the TDRB twice.

Commissioners' Decisions

22 referrals under the new Commissioner arrangements from October 2012 to March 2013 (note the October Commissioners' meeting followed the September TDRB)

Taxpayer proposal accepted	11 referrals
Taxpayer proposal accepted with conditions	6 referrals
Taxpayer proposal rejected	5 referrals

Type of referral

£100 million plus cases	19 referrals
Sensitive case (1 case)	2 referrals
Sample case (from Enforcement & Compliance)	1 referral

Tax at issue in the cases (the amount of tax relating to decisions reached)

Total	£2,055 million
In proposals accepted	£1,368 million
In proposals accepted with conditions	£289 million
In proposals rejected	£398 million

The Commissioners decide whether a proposal for resolving a tax dispute is acceptable: the figures quoted here are for the value of the tax at issue in the disputes on which decisions were made. Any additional tax revenue to be accounted for as a result of the decision forms part of the amounts reported by the business area responsible for the case. These figures do not represent additional tax collected over and above business area figures.

Annex 5: Issues considered by CIPs and AAB in 2012-13

Anti-Avoidance Board

During 2012-13, AAB considered handling strategies for 130 avoidance issues.

AAB sets the parameters within which cases may be settled. This ensures that cases are settled in accordance with the Litigation and Settlement Strategy and that taxpayers are treated even-handedly.

For example, AAB considered schemes used by companies to create a tax deductible loss (unrelated to any economic or commercial loss) by changing the currency of their accounts. AAB agreed parameters for settlement to result in a tax outcome reflecting a true and fair view of the economic loss based on recognised accounting principles.

AAB also approved the launch of operational projects for newly-identified avoidance schemes, such as those aiming to exploit allowances for the cost of business premises renovation. In January 2013 AAB, having considered the amount of tax potentially at risk from these schemes and the strength of the legal position, approved a project which put in place operational teams with specialist support to address this issue by challenging the users of the schemes on a consistent basis.

Contentious Issues Panels

BT CIP has decided HMRC's strategy for handling and agreed the approach for resolving 16 major contentious issues in accordance with the Litigation and Settlement Strategy. PT CIP has considered six issues.

For example, the Large Business Service (LBS) asked BT CIP to consider a sector specific request for a uniform approach to the classification of new capital expenditure for the purposes of claiming capital allowances. The issue involved very significant amounts of capital expenditure and affected the whole of the sector. BT CIP reviewed the work carried out by LBS to establish the position and the proposals that they had developed with the industry. The CIP tested the explanations and methodology and went on to suggest alterations to the approach to ensure HMRC's approach was LSS compliant.

Published offers

From time to time, HMRC formally publishes its position on disputed issues and invites taxpayers and their agents to resolve disputes in their specific cases on the published basis. We do this where the disputed point arises in significant numbers of

cases, as a means of handling large numbers of cases as efficiently as possible and ensuring transparency about our position. It is of course open to any taxpayer to pursue appeals in their own case to Tribunal rather than agree to settle on the basis published by HMRC.

In 2012-13, HMRC published two invitations to settle disputed points in this way.

- HMRC identified significant avoidance occurring through the artificial creation of trading losses. BT CIP reviewed the stock of cases and recent developments in tax law. It authorised the overall approach in which HMRC would be prepared to settle most cases by allowing tax relief for the actual amount invested, discounting amounts generated through financial engineering. The settlement opportunity was announced in December 2012 in general terms and AAB then agreed the specific handling strategies for the various types of schemes involved publishing further details in January 2013.




- The Employee Benefit Trust (EBT) Settlement Opportunity was first launched in April 2011, linking in with the introduction of the disguised remuneration legislation. Letters were sent to users of EBT schemes and their agents/promoters, with a deadline of 31 December 2011. There was some interest in settling cases on the proposed basis but the overall take up was disappointing. This prompted a new approach from April 2012.

Through extensive external communication and greater engagement between the team and agents/promoters, we published a series of Frequently Asked Questions to explain the policy and technical view that HMRC would take. We wrote directly to users following anecdotal evidence that many had simply been advised to ignore our earlier proposal.

Our overriding aim was to explain HMRC's approach and emphasise the benefit to employers of achieving certainty of the tax position. The Personal Tax Contentious Issues Panel played a key role in operational and policy leads agreeing the HMRC position across all relevant heads of tax, so offering taxpayers consistency and certainty.





The team has prompted greater take up of the EBT settlement opportunity, securing nearly 500 settlements so far with almost £650 million of yield across a wide range of users from small and medium enterprises to LBS taxpayers. The settlement opportunity will continue to provide the means by which a large number of EBT avoidance cases are finalised over the next few years as negotiations continue in other working cases.

Annex 6: Examples of significant litigation from 2012-13*

Supreme Court		
Case	Outcome	Detail
Aimia Coalition Loyalty UK Ltd v Her Majesty's Revenue and Customs	Ongoing	Whether the company running Nectar loyalty points scheme was entitled to input tax.
Futter/Pitt and another v The Commissioners for Her Majesty's Revenue and Customs	HMRC win on Hastings-Bass; mistake redefined 	Extent to which the Courts give relief for decisions made by trustees that had unforeseen tax consequences; so-called rule in Hastings-Bass; 'mistake'.
R (on the application of Prudential Plc and another) v Special Commissioner of Income Tax and another	HMRC win 	Whether legal professional privilege applies to tax advice provided by accountants.
WHA Ltd and Viscount v HMRC – Supreme Court Appeal 2009/0074	HMRC win 	Issue relating to the VAT status of car repairs. The Court judged that in cases involving a construct of contractual relationships, the matter must be assessed as a whole to determine the economic reality.




* Table correct at 20th June 2013





Court of Appeal / Court of Session

Case	Outcome		Detail
Anson v Her Majesty's Revenue and Customs	HMRC win		Court of Appeal confirmed there was no entitlement to double tax relief under terms of UK/US Double Taxation Conventions 1975 & 2001. Appellant is seeking permission to appeal to Supreme Court.
BAA Ltd v Her Majesty's Revenue and Customs	HMRC win		Whether input tax deductible on expenditure on professional services relating to the take-over of the business. Court agreed with HMRC that input tax not deductible.
The Brampton Property Group (and others ²⁵) v Alan O. King (An Officer Appointed By The Commissioners For Her Majesty's Revenue and Customs)	HMRC win		Judicial review challenge to HMRC's refusal of a late group relief claim.
Cheshire Office Park Ltd v Her Majesty's Revenue and Customs HMRC	HMRC loss		Appeal against refusal to refund NICs. Issue was whether car allowances paid to company employees and included in gross pay for NICs purposes could be disregarded from earnings as 'relevant motoring expenditure'.
Daniel v Her Majesty's Revenue and Customs	HMRC win		Taxpayer sought to challenge direction by the FTT Judge that decided the residence appeal should precede any judicial review proceedings. Case is ongoing in FTT re substantive hearing.
Eastenders Cash & Carry Plc & others v Her Majesty's Revenue and Customs	HMRC loss		Whether HMRC could lawfully detain goods if the HMRC officer reasonably suspected they were liable to forfeiture. Court said it could not. HMRC is now appealing to the Supreme Court.

²⁵ City and Country Properties Limited, Daejan Retail Properties Limited, Daejan Commercial Properties Limited, Daejan (FHNV 1998) Limited, Daejan (FH 1998) Limited and Inputstoc Limited

Court of Appeal / Court of Session

Case	Outcome	Detail
FCE Bank Plc v Her Majesty's Revenue and Customs	HMRC loss	Interpretation of Double Taxation Convention non-discrimination provision. Permission to appeal to Supreme Court refused.
First Stop Wholesale Ltd v Her Majesty's Revenue and Customs	HMRC win 	Whether HMRC has to give reasons for detaining goods and what type of reasons need to be given when seizing goods. No formal requirement to give reasons for the detention and no particular formality required for the notice of seizure. The reasons were clear to the owner from all the circumstances of the case.
Helena Partnership Ltd v Her Majesty's Revenue and Customs	HMRC win 	Issue as to charitable status of housing associations. Appellant refused permission to appeal to Supreme Court.
ITV Services Ltd v The Commissioners of Her Majesty's Revenue and Customs	(judgment awaited)	Dispute as to whether actors should pay NICs under Categorisation Regulations following 'concession' that musicians are not covered by Regulations.
MJP Media Services Ltd v Her Majesty's Revenue and Customs	HMRC win 	The Loan Relationships partial debt release scheme failed. Court of Appeal confirmed that FTT had made no errors of law.
First Nationwide Plc v Her Majesty's Revenue and Customs	HMRC loss	Anti-avoidance litigation relating to manufactured overseas dividends. HMRC lost in March 2012 and did not appeal to the Supreme Court.

Court of Appeal / Court of Session		
Case	Outcome	Detail
POWA (Jersey) Limited v Her Majesty's Revenue and Customs	HMRC win 	The Commissioners denied a claim for input tax on the basis that the Appellant's trades were connected to MTIC fraud. The appeal was dismissed by the First-Tier Tribunal and also by the Upper-Tier Tribunal. The Appellant renewed its application for permission to appeal to the Court of Appeal, but permission was denied.
Howard Schofield v The Commissioners for HM Revenue and Customs	HMRC win 	Lead case involving 220 known users of an avoidance scheme creating capital gains tax losses. Appellant's application for permission to appeal to the Supreme Court was refused.
Secret Hotels2 v Her Majesty's Revenue and Customs	HMRC win 	Court confirmed HMRC's decision that the company should be accounting for VAT on its margin in accordance with the rules for tour operators. Secret Hotels have been granted leave to appeal to the Supreme Court.
Simpson and Marwick v Her Majesty's Revenue and Customs	HMRC win 	Court found that the Upper Tribunal had been wrong to hold that HMRC had directed the appellant to issue a VAT-only invoice. The Court found no support in <i>Elida Gibbs</i> for the construction of s36 of the VAT Act 1994 adopted by the Upper Tribunal and upheld the literal construction advanced by HMRC. Also found that the effect of section 36 was not disproportionate.
R (on the application of Totel Limited) v HMRC and another	HMRC loss	When the First-Tier Tribunal was created in 2009, a right of appeal against a hardship decision by the Tribunal was removed. The Court of Appeal held that the removal of that right was outside the scope of the power at s124 of the Finance Act 2008.
Vehicle Control Services Ltd v Her Majesty's Revenue and Customs	HMRC loss	Court held that the company's income from penalty charges for contravening parking provisions in car parks was outside the scope of VAT.

