



HM Revenue  
& Customs

# Resolving tax disputes

Commentary on the litigation  
and settlement strategy



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This report replaces the July 2011 version.

# HMRC's Litigation and Settlement Strategy

## Scope and purpose of the strategy

1. HMRC's Litigation and Settlement Strategy (LSS) is the framework within which HMRC resolves tax disputes through civil law processes and procedures in accordance with the law. It applies irrespective of whether the dispute is resolved by agreement with the customer or through litigation.
2. The LSS is designed to facilitate resolution of disputes in relation to all taxes, duties and associated payments and the term 'tax' should therefore be interpreted accordingly.
3. 'Dispute' is given a wide meaning and covers all situations where:
  - HMRC needs more information to enable it to form a considered opinion on the correct tax treatment of a transaction
  - HMRC and the customer (or their agent) have differing views on what is the 'legally due tax at the right time'.

Disputes may arise in the context of an enquiry into a return, an audit, pre-return work (whether undertaken on a pre-transaction or post-transaction basis), or a challenge to HMRC's legal interpretation brought by the customer. In this document, 'dispute' refers to a disagreement with a customer on tax liabilities with respect to a particular risk in a return, transaction or arrangement. It does not mean disagreements with a customer over several, unrelated risks, which are treated as separate disputes.

4. 'Risk' refers to the possibility that an incorrect tax treatment may be sought or have been applied to a transaction or entry on a return by a customer. Where the same risk applies to a number of separate customers, it is then called an issue.
5. 'Litigation' refers to the resolution of a tax dispute through a statutory appeal to an independent body, for example a tribunal or a court. It also includes tax related common law claims to the courts or applications for judicial review. For the purposes of the LSS it does not cover statutory reviews, litigation to recover debts, or employment or commercial litigation to which HMRC is a party.
6. The LSS applies to all tax disputes resolved through civil procedures and to all decisions taken by HMRC in relation to such disputes. Decisions needed to give effect to the principles of the LSS in individual cases or for issues affecting a number of customers are taken within appropriate HMRC governance arrangements.

## Minimising the scope for disputes

7. A key part of HMRC's overall customer strategy is to help reduce the likelihood of situations arising which may give rise to a dispute.

Disputes are costly for both HMRC and its customers and therefore HMRC is committed to supporting its customers to get their tax right without the need for a dispute.

There are many strands of existing HMRC activity which play a significant part in helping to minimise disputes, for example well-framed legislation, guidance, rulings and clearances processes, HMRC's risk based approach to compliance work, relationship management for large and complex customers.

## Engaging in disputes

8. HMRC seeks to secure the best practicable return for the Exchequer. To do this it must apply the law fairly and consistently. Entering into, taking forward and resolving disputes contribute to securing the best practicable return for the Exchequer.

The objective of securing the best practicable return for the Exchequer requires consideration of not only the tax at stake in the dispute itself but also – in circumstances where a precedent may be set, or where HMRC is seeking to influence customer behaviour – potential tax liabilities of the same or other customers.

In general, HMRC will not take up a tax dispute unless it is likely to secure the best practicable return for the Exchequer.

HMRC's programme of random enquiries is used to validate the risk-based approach to compliance work and consequently helps to inform choices to secure the best practicable return.

## Handling disputes

9. HMRC will seek, wherever possible, to handle disputes non-confrontationally and by working collaboratively with the customer. In the majority of cases, this is likely to be the most effective and efficient approach.

A collaborative approach by all parties requires them to be open, transparent, and focused on resolving the dispute.

Working non-confrontationally can offer benefits in terms of effective and efficient dispute resolution in all civil cases.

HMRC will foster a non-confrontational approach with the customer, but will not be deterred from efficient and effective dispute resolution by other means if collaboration is not forthcoming.

HMRC will seek to clearly articulate points in dispute and timescales for reaching key decisions will be agreed and adhered to wherever possible.

10. Where there are grounds to believe that evasion is involved, HMRC will consider whether a criminal investigation is appropriate.
11. In any dispute, HMRC will seek to establish and understand the relevant facts as quickly and efficiently as possible.

A non-confrontational approach is likely to help identify and establish relevant facts. For example, HMRC will aim, early on, to articulate the basis of its enquiries in terms of tax risks. Wherever possible, HMRC will also seek to clarify and confirm its understanding of the relevant facts with the customer.

Where necessary, HMRC will make use of its statutory information powers in order to obtain relevant facts and documents quickly and efficiently.

12. In complex cases, once sufficient facts have been established, taking early specialist advice, and ensuring that advice remains current, can bring important efficiency savings. However, no single piece of advice is necessarily decisive in determining HMRC's position.
13. HMRC will seek to work with the customer to understand fully the relevant facts and law, sharing and testing HMRC's own arguments, and fully understanding and testing the customer's arguments, before reaching a considered view on the strength of its case.

HMRC will ensure that respective arguments are fully shared. Only exceptionally would HMRC consider the exchange of copies of counsel's or other legal opinions as opposed to the substance of the arguments considered by such opinions. HMRC would not normally expect legal professional privilege to be waived.

14. HMRC will always consider whether something that initially appears to be an 'all or nothing' issue is in reality 'all or nothing' or is a case where there is a range of possible figures for tax due.
15. HMRC will aim to deal consistently with disputes to a professional standard whether or not the disputes are ultimately resolved by agreement or through litigation.

## Resolving disputes

16. Tax disputes must, in all cases, be resolved in accordance with the law. This means:
  - HMRC will not usually persist with a tax dispute unless it potentially secures the best practicable return for the Exchequer and HMRC has a case which it believes would be successful in litigation
  - HMRC must be satisfied that both the substance of any decision leading to resolution of the dispute and the way that resolution is put into effect are fully in accordance with the law
  - where there is more than one dispute between a customer and HMRC, each dispute must be considered and resolved on its own merits, not as part of any overall 'package'. As a matter of process, however, it may be that a number of disputes will be resolved at the same time (each on their own merits), for example as part of a process of bringing a customer's tax affairs up to date
  - in appropriate cases Alternative Dispute Resolution can help the resolution of disputes either by facilitating agreement between the parties or by helping the parties to prepare for litigation.
17. Tax disputes may be resolved either by agreement or through litigation. Where there is a range of possible figures for tax due, the terms on which HMRC will settle by agreement will also take into account which outcome secures the right tax most efficiently. This means:
  - in considering how to secure the right tax most efficiently, HMRC's objective of securing the best practicable return for the Exchequer will have regard to future as well as immediate revenue flows, costs and the deterrent effect on customer non-compliance
  - in considering settlement terms for one dispute, HMRC will take account of the potential read across to other open or prospective disputes as well as the impact which settling the dispute could have in releasing HMRC resources to work on other disputes
  - in order to ensure that overall current and future revenue flows and HMRC costs are not prejudiced, the terms on which disputes are resolved will take into account their likely impact on customer behaviour both generally and in relation to the customer concerned, including any question of avoidance, evasion, or a failure to take reasonable care

- in most cases, resolution by agreement is likely to offer the most effective and efficient outcome. However, HMRC will not compromise on its view of the law to secure agreement, and in that context there will be cases where litigation offers the most effective and efficient means of resolving disputes. In such circumstances, HMRC will seek to reach resolution of the dispute by litigation in an efficient manner
- where there is a range of possible figures for tax due, HMRC will not settle by agreement for an amount which is less than it would reasonably expect to obtain from litigation.

18. In relation to a dispute which is genuinely of an 'all or nothing' nature:

- where HMRC believes that it is likely to succeed in litigation and that litigation would be both effective and efficient, it will not reach an out of court settlement for less than 100% of the tax, interest and penalties (where appropriate) at stake. It follows that, if the customer is unwilling to concede in such cases, HMRC will seek to resolve the dispute by litigation as quickly and efficiently as possible
- where HMRC believes that it is unlikely to succeed in litigation it will, in the majority of cases, concede the issue. In such cases, HMRC will not attempt to 'split the difference' between its own and the customer's view of tax, interest and penalties (where appropriate) at stake. Taking a case to litigation where HMRC believes it is unlikely to succeed would need to be justified by the particular circumstances, such as a very large amount of tax at stake (in the case itself or from immediate precedent value where a large number of customers is affected), or a fundamental point of principle or behaviour at issue.

19. A decision to litigate (whether or not it relates to an 'all or nothing' dispute) does not mean that HMRC will stop taking steps to ensure an efficient and effective resolution to the dispute.

A decision to litigate should be implemented expeditiously. Where possible, litigation should be conducted collaboratively as it may reduce the costs or uncertainty of litigation for both parties.

HMRC will continue to be open to considering the impact of any new information and technical analysis which may be put forward by the customer.

# Commentary on HMRC's Litigation and Settlement Strategy

## 1. Introduction

### Using this guidance

The Litigation and Settlement Strategy (LSS) and this guidance describe a holistic approach to compliance work and no one paragraph or sentence should be read in isolation or taken out of context from the overall approach described.

This is practical guidance for HMRC staff on the application of the LSS. It is designed to provide context and background to the LSS. While it can also be used for reference when considering individual paragraphs of the LSS, users are encouraged to read the whole document. When considering how to resolve disputes, it is especially important that the whole of paragraphs 16 -19 are read together.

The LSS covers the lifecycle of a dispute and therefore applies from the very beginning of any compliance activity – after risk assessment has taken place. In many cases, the nature of the approach taken and the extent to which the parties work together can significantly influence the overall efficiency of HMRC's compliance activity.

The guidance applies across HMRC but does not aim to be comprehensive nor will every element of it be applicable in every case. For example, special considerations might apply to the resolution of disputes involving cases such as:

- National Insurance Contributions (NICs), where a dispute may affect a customer's contributory record as well as the amount of contributions payable
- Pay As You Earn (PAYE), where the outcome of a dispute may impact on an employee's tax liability
- Value Added Tax (VAT), where the outcome may affect other customers in the supply chain.

Similarly, there will be tailored guidance or standard operating procedures, applicable to processes in particular area of business in HMRC's groups and directorates.

This guidance should be read alongside other more detailed operational and policy guidance.

Reference in this guidance to a customer should be taken as including the customer's agent, unless it would be inappropriate to do so.



## Background

The LSS sets out the principles within which HMRC handles all tax disputes subject to civil law procedures. This includes most of HMRC's compliance activity.

The LSS encourages HMRC staff to:

- minimise the scope for disputes and seek non-confrontational solutions
- base case selection and handling on what best closes the tax gap
- resolve tax disputes consistently with HMRC's considered view of the law
- handle and resolve disputes cost effectively – based on the wider impact or value of cases across the tax system and across HMRC's customer base
- ensure that the revenue flows potentially involved make any dispute worthwhile
- where HMRC believes it has a good chance of winning in litigation, only settle by agreement for the full amount HMRC believes the tribunals or courts would determine, or where settlement by agreement is not possible, litigate
- in genuine 'all or nothing' cases, not split the difference between the differing amounts that HMRC and the customer believe is due
- where HMRC considers its chances in litigation to be weak generally concede the case rather than pursue.

The LSS reflects HMRC's key strategic objectives by considering:

- the overall effectiveness of disputes handling
- how to reduce the scope for disputes arising and settle those that do arise as quickly and efficiently as possible
- the efficiency of disputes handling.

The two key elements of HMRC's approach to tax disputes are:

1. supporting customers to get their tax right first time, so preventing a dispute arising in the first place
2. resolving those disputes which do arise in a way which establishes the right tax due in accordance with the law at the least cost to HMRC and to its customers. In most instances, this can be achieved through working collaboratively.

Resolving disputes 'cost effectively' does not mean HMRC making compromises on what it believes to be the right tax liability consistent with the law. It means establishing the right tax liability, fairly and even-handedly across all taxpayers, in a way which minimises unnecessary costs.

This means that the concept of cost-effective dispute resolution of a tax dispute in this guidance may differ from the generally understood concept of cost-effective resolution that is typically encountered in civil or commercial disputes.

The following factors are likely to be relevant to HMRC's consideration of what may or may not be cost effective in relation to resolving a particular tax dispute:

- the potential tax at stake in the current year or years, as well as any prior or future years, for that particular customer
- the potential tax at stake in any year or years for other customers (including the wider impact of any HMRC intervention, such as through behavioural responses)
- an early assessment of the potential impact (whether of the individual case or the capacity for the issue to create tax loss more widely) compared to the cost of pursuing or not pursuing the dispute
- an impartial assessment of the strength of HMRC's case
- any decisions made by governance bodies.

The LSS was introduced in 2007 and was significantly refreshed in July 2011, with minor amendments to the commentary in 2013 and this update in 2017.

The refreshed LSS is supported by this commentary which is organised around the paragraphs of the LSS and aims to explain in more detail the main elements of HMRC's approach to tax dispute resolution.

## Why tax disputes arise

Establishing what is the right amount of tax due in accordance with the law or when any tax is due may lead to disputes between HMRC and its customers. HMRC compliance activity, such as risk working, compliance checks, responding to a clearance application, and so on, are all examples of activity that may result in disagreements which need to be resolved.

Some of the main reasons why disputes become entrenched are because:

- the parties have not established or fully understood the relevant facts
- one or both parties have made assumptions about particular facts
- there are differences of opinion between the parties about which law, or how the law, applies to the relevant facts
- the parties have not discussed or fully understood the other's position.

## A framework for fair and even-handed resolution of tax disputes

Effective handling and resolution of tax disputes maximises revenue flows by ensuring that the right tax is established and the tax base is protected, for example, by deterring non-compliance, which includes avoidance, across HMRC's customer base.

A dispute involves costs for both HMRC and the customer and can be very expensive, both in terms of resources and agent or legal fees. Minimising the scope for disputes and reducing the costs to HMRC of resolving disputes will also reduce the customer's costs and may improve their experience of being in a dispute with HMRC.

In resolving tax disputes in a way which establishes the right tax due under the law at the least cost to HMRC and to its customers, HMRC also needs to apply the law fairly and even-handedly. Line management procedures, processes for risk working and compliance checks, and cross-HMRC governance arrangements all support a fair and even-handed approach to tax dispute resolution.

To ensure this, a single framework for how tax disputes are to be handled and resolved which applies consistently across HMRC is required; this is provided by the LSS.

### **Status of this guidance**

Where there remains any doubt as to the application of the LSS because of this guidance, you should rely on the wording of the LSS.

## 2. Scope and purpose (paragraphs 1-6)

### Paragraph 1

HMRC's Litigation and Settlement Strategy ('LSS') is the framework within which HMRC resolves tax disputes through civil law processes and procedures in accordance with the law. It applies irrespective of whether the dispute is resolved by agreement with the customer or through litigation.

#### **Tax disputes resolved through civil procedures**

The LSS applies only to tax disputes to be resolved through civil procedures and does not apply to criminal prosecution cases.

#### **Tax disputes to be resolved consistently with the law**

The law provides a statutory basis for tax appeals to the tribunal to be determined by agreement between HMRC and the customer – notably section 54 Taxes Management Act 1970 for direct taxes and section 85 Value Added Tax Act 1994 for indirect taxes.

For all disputes, irrespective of how the dispute is resolved, the LSS makes it clear that the resolution of the dispute must be in accordance with the law. This applies both to the amount of tax agreed to be due, and to the rationale in law as to why and when that tax is due. HMRC is unlikely to agree terms for resolution of a dispute which do not conform with the correct tax treatment or its published guidance on the treatment of the risk within the dispute.

At the simplest level, for example, if HMRC believes that the law requires income tax of £125,000 to be due, and not income tax of £100,000, it cannot settle for income tax of £100,000. Similarly, if HMRC believes that the law gives entitlement to relief for a Capital Gains Tax loss of £300,000, and not for an income tax loss of £300,000, it cannot settle on the basis that relief for an income tax loss of £300,000 is due.

Where discretion is properly exercised under HMRC's legal powers of collection and management not to pursue an amount of tax, then the outcome is consistent with the law (see guidance set out in relation to LSS paragraph 15). The scope of this discretion is described in the [Admin Law Manual](#).

### Paragraph 2

The LSS is designed to facilitate resolution of disputes in relation to all taxes, duties and associated payments and the term 'tax' should therefore be interpreted accordingly.

#### **Definition of 'tax'**

The term 'tax' in the LSS is used as a short-hand for all taxes, duties, and associated payments administered by HMRC. The principles of the LSS therefore cover all disputes over substantive tax liabilities, interest and penalties, with the exception of cases handled via criminal proceedings. It also applies to compensation claims arising from tax-related judicial reviews.

## Paragraph 3

‘Dispute’ is given a wide meaning and covers all situations where:

- HMRC needs more information to enable it to form a considered opinion on the correct tax treatment of a transaction
- HMRC and the customer, or their agent, have differing views on what is the ‘legally due tax at the right time’.

Disputes may arise in the context of an enquiry into a return, an audit, pre-return work (whether undertaken on a pre-transaction or post-transaction basis), or a challenge to HMRC’s legal interpretation brought by the customer. In this document, ‘dispute’ refers to a disagreement with a customer on tax liabilities with respect to a particular risk in a return, transaction or arrangement. It does not mean disagreements with a customer over several, unrelated risks, which are treated as separate disputes.

### Definition of ‘dispute’

For the purposes of this guidance, ‘dispute’ is defined as including all areas of non-agreement between HMRC and a customer or their agent over a substantive tax liability, where that non-agreement has been raised through an enquiry from either side. This includes pre-transaction or pre-return clearance work, through a challenge made by HMRC to a customer, or through a challenge made to HMRC by a customer where HMRC has decided to take up or respond to the challenge. This means that in relation to disputes subject to civil law procedures, the definition covers compliance activity from start to finish.

This is clearly a broader definition than the generally accepted interpretation of ‘dispute’. It has the advantage of positively encouraging the reaching of agreement between HMRC and customers at all stages in the determination of tax liabilities, not just once non-agreement has crystallised into opposing positions.

Paragraph 3 makes clear that a ‘dispute’ should be interpreted throughout the guidance as covering each distinct risk on which there is non-agreement. So in a single case, or for a single tax return, there may be a number of disputes. This is to ensure that each risk in dispute is considered on its own merits, and resolved in accordance with the law, rather than allowing multiple risks to be considered together and traded off against each other in a package deal (see further guidance on this in [paragraph 16](#) below).

## Paragraph 4

‘Risk’ refers to the possibility that an incorrect tax treatment may be sought or have been applied to a transaction or entry on a return by a customer. Where the same risk applies to a number of separate customers, it is then called an issue.

### Definition of ‘risk’

‘Risk’ in terms of the LSS refers to the possibility that a proposed or actual tax treatment of a transaction or the presence or amount of an entry on a return may be incorrect.

Where a risk is present across a number of customers, for example, losses claimed by different customers in a marketed avoidance scheme, the broader risk is referred to as an issue.

## Paragraph 5

‘Litigation’ refers to the resolution of a tax dispute through a statutory appeal to an independent body, for example a tribunal or a court. It also includes tax related common law claims to the courts or an application for judicial review. For the purposes of the LSS it does not cover statutory reviews, litigation to recover debts, or employment or commercial litigation to which HMRC is a party.

### Definition of ‘litigation’

Litigation is a way of resolving a tax dispute. It is a formal judicial process, involving the tribunals or the courts, which are independent of HMRC. It does not include statutory reviews or Alternative Dispute Resolution (ADR) procedures.

Further [HMRC guidance on litigation and rights of appeal, judicial review and statutory reviews](#) can be found in the Appeals, Reviews and Tribunals Guidance on the GOV.UK website.

## Paragraph 6

The LSS applies to all tax disputes resolved through civil procedures and to all decisions taken by HMRC in relation to such disputes. Decisions needed to give effect to the principles of the LSS in individual cases or for issues affecting a number of customers are taken within appropriate HMRC governance arrangements.

### Responsibility for decision making

The LSS is a statement of HMRC’s policy and strategy for handling tax disputes in a way that is consistent with the law and with HMRC’s key objectives. It applies to the handling of all tax disputes being resolved through civil procedures across the department.

The LSS applies as much to the resolution of a dispute with a small business customer over their taxable profit or turnover as it does to the resolution of a dispute with a multinational corporation or wealthy individual involving a complex tax avoidance transaction. It applies whether decisions in the dispute are being taken by the commissioners for HMRC or an officer in a local office.

Paragraph 6 refers to ‘decisions taken by HMRC’ in relation to disputes, and this includes decisions about:

- how disputes should be progressed towards resolution (including questions over the appropriateness of litigation, ADR, or other routes to resolution)
- the terms on which HMRC should be ready to resolve the dispute (in the absence of a finally binding outcome from litigation).

[HMRC’s Code of Governance for resolving tax disputes](#) sets out the governance and assurance frameworks for decisions in tax disputes. Depending on the size and complexity of the case, such decisions may be taken by individual HMRC officers or teams, in accordance with local area of business procedures in HMRC’s groups or directorates. Where responsibility for decision making rests with more than one group or directorate, or where more than one area of business has an interest in the decision, such decisions need to be made by consensus on a partnership basis.

Where technical, policy or legal advice has been taken, that adviser or those advisers, together with other interested parties within HMRC, should be included in the decision-making process, so that all points of view are explored.

## **HMRC governance for significant tax disputes or issues**

Cross-HMRC governance procedures are in place to ensure that HMRC decisions for significant issues or in significant cases are made even-handedly and in accordance with the LSS.

Relevant cross-HMRC governance procedures, and links to further information on each of these, are set out in HMRC's Code of Governance for resolving tax disputes.

## 3. Minimising the scope for disputes

### Paragraph 7

A key part of HMRC's overall customer strategy is to help reduce the likelihood of situations arising which may give rise to a dispute.

Disputes are costly for both HMRC and its customers and therefore HMRC is committed to supporting its customers to get their tax right without the need for a dispute.

There are many strands of existing HMRC activity which play a significant part in helping to minimise disputes, for example well-framed legislation, guidance, rulings and clearances processes, HMRC's risk-based approach to compliance work, relationship management for large and complex customers.

### Supporting customers

HMRC supports customers to get their tax right as this is the best way of securing the right tax due under the law at the right time.

Paragraph 7 lists a number of ways in which HMRC actively seeks to reduce the scope for disagreement.

Where appropriate, HMRC should endeavour, where the legislation or other concerns allow, to share their assessment of the risks they are concerned about. This should include why those concerns arise and how they intend to approach resolution of the risk.

This sharing of information at an early stage can assist in the early resolution of the dispute(s) and facilitate cooperative communication both during the compliance intervention and afterwards.



## 4. Engaging in disputes

### Paragraph 8

HMRC seeks to secure the best practicable return for the Exchequer. To do this it must apply the law fairly and consistently. Entering into, taking forward, and resolving disputes contribute to securing the best practicable return for the Exchequer.

The objective of securing the best practicable return for the Exchequer requires consideration of not only the tax at stake in the dispute itself but also – in circumstances where a precedent may be set, or where HMRC is seeking to influence customer behaviour – potential tax liabilities of the same or other customers. In general, HMRC will not take up a tax dispute unless it is likely to secure the best practicable return for the Exchequer.

HMRC's programme of random enquiries is used to validate the risk based approach to compliance work and consequently helps to inform choices to secure the best practicable return.

### Role of disputes in supporting tax compliance

HMRC's strategy is to minimise the scope for disputes where possible and to encourage and help customers to get their tax right without the need for a dispute. At the same time, taking up tax disputes is a key part of HMRC's work to ensure and encourage compliance with the tax system. The choice of which cases to take up, and which challenges to respond to, is at the heart of HMRC's risk-based approach.

HMRC will charge penalties when people do not submit returns or pay the right tax at the right time, or where an inaccuracy in a document arose because the person acted carelessly or deliberately. The purpose of the penalty provisions is to seek to influence behaviour by supporting those who try to meet their obligations and penalising those who do not.

Where circumstances allow, suspending the penalty and agreeing changes to be put in place to prevent a repeat of the inaccuracy supports taxpayers to pay the right tax, only penalising those who do not agree to changes or fail to implement them properly.

Establishing that a penalty is due in cases of evasion handled through civil procedures, or in cases where there has been a failure to take reasonable care, are examples of HMRC entering into potential disputes in order to ensure and encourage compliance with the tax system. As indicated above, this guidance applies to disputes over penalties in the same way as to disputes over substantive tax liabilities. Further detail of the circumstances in which HMRC will charge penalties for inaccuracies and suspend them is set out in the [Compliance Handbook](#).

As part of HMRC's wider remit to maintain the tax base, HMRC will also defend litigation brought by customers who are seeking to challenge legislation or established practice.

### Deciding which disputes to take up

HMRC cannot, and should not, take up every possible risk it identifies. In general, HMRC will not take forward a tax dispute unless the overall revenue flows potentially involved, including any wider impact, justify doing so.

A decision is likely to require a consideration of:

- the potential tax at stake in the current year or years, as well as any prior or future years, for that particular customer
- the potential tax at stake in any year(s) for other customers – including the wider impact of any HMRC intervention, such as through behavioural responses amongst customers
- HMRC's view on the strength of its case
- an initial assessment of the potential impact, effort or cost benefit analysis of taking forward the dispute, or not taking forward the dispute as the case may be.

There may also be circumstances where HMRC takes forward a dispute where the amounts at stake across all cases are relatively low, which is why paragraph 8 specifically includes the words 'in general'. For example, this might include a situation where a particular policy principle is at stake which, if not defended, could potentially lead to a distortion of competition between businesses or, in the cross-border context, concerns by treaty partners of unfair tax practices.

Decisions regarding which disputes to take up should be taken in accordance with the guidance on [paragraph 6](#) of the LSS above.

### **How does a risk-based approach fit with the principle of agreeing the right tax due under the law at the right time?**

Decisions on whether to take up, and subsequently whether and how to pursue, or resolve, any risk will always be taken in the light of the potential revenue flows. Revenue flows include the likely impact on the future compliance behaviour of the customer concerned, as described in the introduction above and paragraph 16 below, as well as the likely impact on other customers and the tax base more generally. Ensuring that all decisions taken by HMRC are consistent with the law is a vital element in encouraging future compliance and supporting compliance across the tax base.

Where there may be differences between HMRC and the customer as to what is the right tax, HMRC needs to take a risk-based approach as to which cases it is worthwhile to pursue. Such judgment in particular cases will need to be exercised in accordance with the procedures applicable in the relevant area of business in HMRC's groups or directorates.

### **How does a risk-based approach fit with HMRC's priorities?**

The LSS supports HMRC to obtain the best practicable return for the Exchequer and to bear down on avoidance and evasion. It ensures that HMRC applies its limited resources to those risks where the overall revenue flows potentially involved justify doing so. The LSS ensures that HMRC does not generally concede disputes it is likely to win in litigation where the amounts involved in the case or more broadly would make litigation worthwhile (see guidance on LSS [paragraphs 17](#) and [18](#) below).

HMRC also segments the taxpayer population to assist in the risk-based approach. This allows HMRC to tailor its approach to the mix of risks presented by each segment of the population.

### **How do random enquiries fit with the LSS?**

The LSS supports a risk-based approach to selecting cases. To validate this risk-based approach a control sample is required to provide information about the risks presented by the general population of taxpayers. This control group is governed by the random enquiry programme, which selects a sample of returns for enquiry before there is any consideration of risk. Any risks found in the control sample are used to inform which risk criteria are used to select cases in future. The overall aim is to maximise the revenue flow from HMRC compliance activities.

## 5. Handling disputes (paragraphs 9-15)

### Paragraph 9

HMRC will seek, wherever possible, to handle disputes non-confrontationally and by working collaboratively with the customer. In the majority of cases, this is likely to be the most effective and efficient approach and will involve:

- a collaborative approach by all parties that requires them to be open, transparent, and focused on resolving the dispute
- working non-confrontationally, which will offer benefits in terms of effective and efficient dispute resolution in all civil cases
- HMRC fostering a non-confrontational approach with the customer, while not being deterred from efficient and effective dispute resolution by other means if collaboration is not forthcoming
- HMRC clearly establishing the point or points in dispute and timescales for reaching key decisions which will be agreed and adhered to wherever possible.

#### **What is ‘collaborative working’?**

HMRC already works collaboratively with many of its customers. Examples of this approach include:

- discussing risks and transactions on a ‘real time’ basis, including pre-transaction or pre-return
- applying an ‘openness and early dialogue’ approach which sets out the specific tax risk or risk identified and avoids unnecessarily wide-ranging opening enquiries
- early discussion of a particular risk which is under enquiry in order to understand fully the relevant facts and the law which might apply to those facts, for example a discussion of the particular risk to enable HMRC and the customer to get a shared understanding of what are the relevant facts or which laws may apply, which will enable HMRC to tailor any subsequent information request accordingly
- jointly agreeing a timetable with key milestones and target dates for:
  - establishing facts
  - providing information and documentation
  - reviewing documentation
  - reaching decisions
  - testing conclusions
- providing regular updates on progress towards key milestones
- establishing a clear understanding of the relevant facts
- agreeing the format that particular information needs to be provided in

- alongside establishing key facts, discussing, sharing and testing the technical arguments to assess relative strengths and weaknesses in analysis and determine whether further facts have to be established (but see guidance on LSS paragraph 13 about sharing copies of legal advice)
- establishing a decision tree, including agreeing the key questions which need to be answered in order to resolve a dispute
- exploring possible alternative interpretations of the facts and relevant law that might give a different outcome from those initially proposed by HMRC and the customer
- working with the customer or agent to agree any additional liability.

Collaborative working is the default approach for HMRC and use of the above techniques is embedded in HMRC's work with customers. Departure from collaborative working by HMRC is a rare exception and usually dictated by external requirements, for example the requirement not to disclose third-party information without a court order.

Where a dispute has become deadlocked, it is still possible for the parties to work collaboratively in order to try to unlock the process, for example by jointly agreeing to appoint a facilitator or third party mediator (see guidance on LSS [paragraph 16](#)). Similarly, parties should not stop working collaboratively simply because one, or perhaps both, consider(s) that a dispute can ultimately only be resolved by litigation. As such, the process of preparing for litigation should not automatically default to an adversarial process and, wherever possible, the parties should continue to work collaboratively in order ensure that the resolution of the dispute through litigation is as efficient and cost effective as possible.

Some examples of how HMRC and the customer could continue to work collaboratively even where a dispute is heading towards litigation include:

- agreeing the issues which need to be determined by the tribunal or courts
- seeking to narrow the points in dispute that are to be litigated
- agreeing facts wherever possible
- being open to discussing the potential relevance and impact of any new facts which come to light or alternative technical arguments which are identified
- agreeing a timetable for all steps to a final hearing in litigation which can form tribunal 'directions' without the need for a formal hearing to determine directions
- arranging periodic meetings to discuss the case and update on progress.

### **What are the benefits of collaborative working?**

Collaborative working can benefit both sides. These benefits can include some or all of the following:

- earlier certainty
- cost savings
- other efficiencies, for example time savings, fewer internal or external resourcing requirements
- more focused discussions

- improved working relationships
- better understanding of each other's position.

### **Is a collaborative approach to dispute resolution always possible or appropriate?**

By definition, it is not possible for HMRC or a customer to be unilaterally collaborative. Collaborative working requires both HMRC and the customer, and any agent, where applicable, to work together on a cooperative, non-adversarial basis in order to resolve a dispute.

It may not be possible for HMRC to adopt, or continue to adopt, a collaborative approach in all circumstances. For example, where:

- a customer, or agent, is unwilling to co-operate, for example by providing information relevant to their particular tax risk or risks and which is in their possession or power, or discuss matters openly
- there are persistent, unexplained delays or missed deadlines which could impact the likelihood of the dispute being resolved in an efficient or cost effective manner
- it appears that a customer, or agent, is seeking to deliberately mislead or otherwise act dishonestly towards HMRC. Although an enquiry into past evasion should not automatically rule out a collaborative approach where the customer or agent is willing to cooperate and work collaboratively with HMRC to agree what their rights are and how to pursue them.

Even in such cases, HMRC should continue to be open to working collaboratively if, subsequently, there is a change in the customer's, or agent's, behaviour or approach. However, HMRC should seek to progress the dispute by whatever means are most efficient and effective in the circumstances. This is likely to include making use of HMRC's statutory information powers (further technical and operational guidance in this area is set out in the [Compliance Handbook](#)).

### **Fostering a non-confrontational approach**

In cases where there is a Customer Relationship Manager (CRM), he or she will have an important role to play in fostering a collaborative approach – among the wider HMRC team, as well as the customer's team and representatives – to resolving any disputes. This includes setting the tone of the engagement with the customer. If there is no CRM, the relevant case worker is responsible for encouraging a collaborative approach.

### **Articulating the points in dispute**

The case worker or CRM should ensure that the nature of the tax risk is communicated clearly to the customer or, where relevant, agent and understood by them. The terms of this explanation should be tailored to the customer's circumstances and, in particular, their likely knowledge of and expertise in specific taxation matters.

Where any clarification is sought by the customer, this should be provided promptly by the case worker or CRM wherever possible, although there may be instances where HMRC is unable to provide certain information in relation to the tax risk, for example for confidentiality reasons, HMRC may not be able to disclose the source of certain information which may have been provided by a third party.

However, in all cases HMRC will seek to share sufficient detail of the risk so that the customer can understand the risk and enable further discussion so that the parties can work together in order to resolve it.

Clearly setting out the point or points in dispute in this way should help to focus subsequent discussions between the parties and help both sides to establish what facts are likely to be relevant in order to resolve the dispute, as well as what information and documentation is likely to exist to help evidence those facts.

In marketed avoidance cases, this may be on the basis of an agreed sample from a number of users of the scheme with others not sampled accepting that their documentation is similar. Communication in general, rather than on the sample cases, is then likely to be confined to observations on the sampled documentation rather than documentation in any particular case.

### **Agreeing timescales**

Once explanations of the point or points in dispute have been provided and understanding agreed, it may be helpful for the parties to jointly agree preferred timescales or deadlines for next steps. The case worker or CRM will be responsible for discussing and agreeing these with the customer.

In larger cases, a more detailed timetable might be helpful, although the detail of any timetable will obviously depend on the nature of the particular point(s) in dispute and what both parties consider would be helpful to document.

It may not be appropriate, or even possible, to agree a firm timetable for all stages of a dispute at the start of the process as later stages may depend on the outcome of earlier stages or even on the outcome of work being undertaken in relation to other cases, such as in avoidance arrangements where a technical issue present in a number of cases is being project-managed centrally. However, even here, it can be helpful for both parties to outline expected timescales.

Before agreeing a firm timetable with a customer, the case worker or CRM should confirm that all other HMRC stakeholders involved in the case or the decision-making process, for example technical specialists, Solicitor's Office and Legal Services, have sufficient resources to meet the proposed deadlines.

### **Impact of statutory time limits**

During some disputes, HMRC may need to take action due to particular statutory time limits. Where there is a likelihood of underassessment this could include needing to:

- issue a 'protective' enquiry notice for a subsequent year, where a specific tax risk in a prior year has not been resolved and could have an impact in the later year
- issue an assessment for a prior year
- lodge claims in court in certain National Insurance matters.

Wherever possible, any such action should be taken in a collaborative and non-confrontational manner.

Where HMRC issues an appealable decision, for example a closure notice or assessment, which is subsequently appealed by the customer, this should not affect the collaborative working relationship between HMRC and the customer. In particular, it should not prevent the parties from continuing to discuss and explore any potential basis for resolving the dispute by agreement, without the need for litigation.

## **Should reasons be given with closure notices?**

In the Supreme Court judgment in HMRC versus Tower MCashback LLP 1, Lord Walker citing Henderson J in the High Court, confirmed that:

"There is no express requirement that the officer must set out or state the reasons which have led him to his conclusions, and in the absence of an express requirement I can see no basis for implying any obligation to give reasons in the closure notice. What matters at this stage is the conclusion which the officer has reached upon completion of his investigation of the matters in dispute, not the process of reasoning by which he has reached those conclusions."

However, in the same judgment, Lord Hope stated that it is "desirable" for HMRC's conclusion in a closure notice to be "as informative as possible". In particular, he said:

"The aim should be to be helpful, both to the taxpayer and to the tax tribunal which will have to case manage any appeal. The officer should wherever possible set out the conclusions that he has reached on each point that was the subject of enquiry which has resulted in his making an amendment to the return."

The closure notice is one of the most important documents in tax litigation and it is vital that all relevant parties, including the customer and the tribunal, have the same understanding of what HMRC's conclusions are. HMRC should always ensure that any conclusions set out in a closure notice are clear and unambiguous. Ambiguity in a closure notice may be prejudicial to HMRC.

In certain circumstances, HMRC may foresee different amendments being required to a return, depending on the facts found or the application of the law by a court or tribunal. Specialist advice should be sought if HMRC considers that alternative conclusions could be found.

As stated above, while it may not be necessary to formally set out the reasons for the conclusion, it is best practice to articulate separately the reasons leading to HMRC's conclusion(s) and record them.

As a matter of best practice, HMRC should always aim to be informative and clear about its actions. Clear communication is key to ensuring an efficient and effective dispute resolution process.

## **Continuing collaboration during litigation**

Where a dispute is not resolved by agreement and is proceeding to litigation, HMRC will, as set out in paragraph 19 of the LSS, continue to be open to considering the impact of any new information or analysis since this may provide a basis for resolving the dispute by agreement without the need for litigation.

## **Paragraph 10**

Where there are grounds to believe that evasion is involved, HMRC will consider whether a criminal investigation is appropriate.

## **Possibility of criminal investigations**

Customer behaviour is an important factor in determining the most appropriate way to resolve a dispute. In cases where HMRC has good grounds for believing that evasion is involved, it will consider whether a criminal investigation is more appropriate than pursuing a resolution through civil procedures.

The LSS does not apply to criminal prosecution cases.



## Paragraph 11

In any dispute, HMRC will seek to establish and understand the relevant facts as quickly and efficiently as possible.

A non-confrontational approach is likely to help identify and establish relevant facts. For example, HMRC will aim, early on, to articulate the basis of its enquiries in terms of tax risks. Wherever possible, HMRC will also seek to clarify and confirm its understanding of the relevant facts with the customer.

Where necessary, HMRC will make use of its statutory information powers in order to obtain relevant facts and documents quickly and efficiently.

### **Establishing and understanding the relevant facts**

Tax law does not apply in a vacuum – it applies to specific sets of facts and circumstances. This means that the relevant facts must be established before a firm decision can be made on the tax consequences of a transaction or risk.

Relevant facts are those which have, or could have, an impact in determining the appropriate tax treatment. HMRC seeks to establish only the facts required to address the specific tax risk identified. In practice, this means that HMRC will often need to consider the possible tax law consequences in parallel with establishing the facts, to make sure that requests for factual information are relevant.

No two customers, or their circumstances, are identical and there are often features which distinguish cases that at first appear to be similar.

HMRC's approach to mass-marketed avoidance arrangements may differ. This is because a sample of cases can be selected and the information on the arrangements obtained from that sample is assumed to be applicable to all of the users with those arrangements. This can be a very efficient method of investigating risks in mass-marketed arrangements. Customers will be informed if they are not required to provide information due to the essential facts of their case and operation of the arrangements being common to all.

HMRC should establish the facts relevant to the tax risk in question, rather than looking for particular evidence that supports an initial assumption about a risk. HMRC should then consider and critically examine those facts together with any relevant legislation to determine the tax treatment of a transaction or issue, including facts which do not support that treatment and alternative legislative applications.

It is important to distinguish a fact from a belief or assumption. Most facts should be supported by evidence. Historically, a significant proportion of cases in dispute that were not suitable for HMRC to defend before the tribunals or courts were those with insufficient evidence documented in HMRC's case file (see also guidance on LSS [paragraph 15](#) about working cases to a professional standard).

There may be risks which turn on the customer's understanding of why something was done. The customer can present this evidence at tribunal or court in a witness statement or orally at a hearing. An example of this may be evidence presented by a customer, by way of explanation, showing a commercial purpose for a series of transactions to which the tax consequences were incidental. Establishing and understanding the relevant facts includes understanding what evidence may be presented at a tribunal or court. The tribunal will weigh potentially competing evidence in order to make findings of fact on the basis of the balance of probability.



Witness evidence can be equally as valid to a tribunal as documentary evidence and should be explored as part of establishing the facts and not dismissed as irrelevant simply because it is not formally documented. Witness evidence may even be given greater weight than documentary evidence, particularly if a witness is cross-examined and found to be a credible and truthful witness by the tribunal.

In avoidance cases, it is often important to establish that transactions have in fact been implemented in the way needed to give the tax advantage claimed (see guidance on verifying or implementation below). Many areas of tax protect against avoidance with 'unallowable purpose' tests which limit relief if one of the main purposes for a transaction is to reduce tax even if there is also a commercial purpose. Witness evidence can be of great use when establishing the purpose or purposes behind a transaction.

### **Establishing facts as quickly and efficiently as possible**

A common challenge in disputes is for HMRC to determine the most efficient and effective way of establishing the relevant facts and identifying the relevant information required to reach a decision on what is the right tax due under the law.

Even after identifying a tax risk, HMRC may not know which facts are going to turn out to be relevant in resolving that risk. Where the risk is a generic one, for example, whether a customer's accounting records or systems are not sufficiently robust, opening questions may need to be widely drawn. But where the risk relates to the tax treatment of a particular transaction, a widely drawn request for information can lead to a significant amount of non-relevant information being provided. This can be time-consuming and costly, not only for the customer, who will need to search for and provide the information, but also for HMRC, which will need to review everything provided, much of which may have limited or no relevance to helping resolve the dispute.

Wherever possible, HMRC should aim to discuss and agree the relevant facts and how these can be established with the customer – for example through obtaining original documentation, site visits, discussions with relevant individuals – to develop a robust tax analysis. This discussion should be based on a high degree of disclosure and cooperation from the customer and an acceptance by HMRC of the practical constraints – including cost, time and accessibility – that may limit what can reasonably be provided.

HMRC should also explain all the legislation it believes may be applicable and why the facts requested are relevant to determining the legislative provisions which apply.

Overall, HMRC's approach to establishing facts will depend on the nature and extent of the tax risk posed by the customer or transaction in the dispute. A best practice approach to establishing facts is described below. However, it is recognised that there can be a reluctance from some taxpayers to provide information. This may be exacerbated by any lack of understanding as to why HMRC requires the information. This makes it all the more important that HMRC explains why the information requested is required.

In some cases, there may also be a dispute over whether particular information or documents are relevant to an enquiry. Where possible, HMRC should seek to reach agreement with the customer on what is relevant. In the absence of agreement, the key test for any request is whether, in HMRC's view, the information or documents are reasonably required for the purpose of checking the tax position.

Where needed, HMRC will consider using statutory powers to obtain information. In cases where there is agreement on the documents (or categories of documents) to be produced, that agreement will be reflected in the content of the information notice.

In certain cases the person receiving an information notice may appeal against it. (See guidance on information powers set out in the Handbook for further information).

## **A best-practice approach to establishing facts**

The approach outlined below seeks to balance the following three factors:

1. the need for HMRC to have a good understanding of the facts before it reaches firm conclusions on what it believes to be the right tax
2. the need for requests for information to be well targeted, confined to the relevant facts, and framed with a view to making the fact-finding process as cost effective as possible for both HMRC and the customer
3. the need to ensure that tax avoidance is critically examined both to satisfy HMRC that the relevant tax planning has been implemented as described and to consider other approaches, for example a 'purposive' construction of tax law or abuse of law principle, for which HMRC will normally require pre-planning information.

While widely drawn information requests are appropriate in certain cases, in the majority of cases it will be more efficient and effective for HMRC to try to work collaboratively with the customer and set out neutrally, and where possible agree:

- what facts need to be established in order to address the tax risk and resolve the dispute. In complex cases, this could take the form of agreeing a decision tree which sets out the relevant factual questions
- where certain facts are not clear or known, the best way of establishing those facts, and what information or documentation is likely to be available, and necessary, to help evidence the facts. In some cases, particular documents or other evidence might be essential in order to establish particular facts, whereas in others there may be various different routes to establishing the relevant facts. For example, where adequate business records have not been retained, the caseworker may be able to review the customer's private financial affairs to ascertain the correct level of profit.

The best approach for doing this will vary from case to case, but could include:

- initial meeting to discuss the potential tax risk or issue
- presentation by the customer, for example a summary of the transaction, timeline, background
- meeting with particular individuals, for example the owner of the business or those involved in implementing a transaction
- on site meeting, for example, where the risk concerns a particular business asset, such as a piece of plant and machinery
- providing an initial tranche of documentation where this is readily available, for example a copy of a sale and purchase agreement legal documents for a transaction.

In large or complex cases, the benefits of a well-targeted fact-finding process are particularly significant. In such cases, it is often helpful to have an initial high-level discussion of the issue, and the potential technical arguments, to ensure that requests for information are suitably framed and limited to facts likely to be relevant to resolving the dispute.

## **Verifying that transactions have been implemented as suggested**

HMRC will often wish to verify that a tax planning or avoidance transaction has in fact been implemented as suggested. How this is done will depend on the risk involved.

Areas HMRC may wish to explore will include:

- what information has already been provided or is offered by the customer
- whether the customer is able to set out details of any review they have undertaken to establish the facts. For example, the taxpayer could outline the following in terms of the process followed:
  - who carried out the review
  - individuals spoken to within the company – their roles in the company and role in respect of the particular transaction
  - individuals spoken to from advisers involved with the transaction and their role with the transaction
  - questions asked of those individuals
  - systems interrogated and the search parameters, for example, whose emails were reviewed and for what reason
  - files reviewed
  - the period covered by the review
- whether a reputable agent or senior accounting officer has carried out an appropriate implementation review and can report to HMRC on the outcome of this due diligence activity which may include a copy of the report and any corrective action taken.

## Paragraph 12

In complex cases, once sufficient facts have been established, taking early specialist advice and ensuring that advice remains current, can bring important efficiency savings. However, no single piece of advice is necessarily decisive in determining HMRC's position.

### Specialist advice

Specialist advice covers a broad range of tax technical, policy, process, operational or legal advice that might be sought in relation to a particular risk.

HMRC manuals provide a significant amount of guidance on technical and operational matters. However, in complex cases, tailored specialist advice may be required and, wherever possible, that advice should be obtained as early as possible for the following reasons:

- where HMRC's arguments are not strong and its chances of success are poor, HMRC can withdraw from the dispute early
- if there are any specific policy risks, questions where specific information is needed to determine facts, or risks that could impact other cases, these can be identified early so that appropriate further advice may be obtained and action taken with relevant stakeholders informed
- where HMRC has a strong case, early advice ensures that HMRC directs its enquiries towards those areas of most value.

Getting effective specialist advice means confirming the relevant facts with the customer quickly to allow the specialist to provide an early opinion. However, it is not always obvious what the relevant facts are, so it may be beneficial to consider whether obtaining some initial specialist advice could help direct the fact-finding process.

If obtaining specialist advice could affect a timetable that has already been agreed with the customer, for example due to the availability of specialists, this should be communicated to the customer as soon as practically possible and an updated timetable agreed as appropriate.

It is important that the advice being relied on is current, up-to-date and based on all of the potentially relevant facts. Further specialist advice may be needed where, for example:

- the dispute has been ongoing for a number of years and specialist advice was obtained relatively early in the dispute
- further potentially relevant facts have come to light
- new technical arguments are put forward by a customer
- it appears that a specific new fact, which was not considered by the specialist, is critical to the analysis
- there have been further relevant developments in the law relating to the particular dispute, for example a new decision or dicta in a case subsequent to the previous advice provided.

No single piece of specialist advice is necessarily decisive in determining HMRC's position. However, any previous advice that sets out HMRC's view of the tax treatment should normally be followed, in order to ensure even-handed treatment. If, after considering the relevant advice, circumstances and facts, there is still uncertainty about how to proceed then the case should be discussed among HMRC stakeholders and where necessary escalated for a considered decision or view on the appropriate way forward (see Paragraph 6).

In some cases, the case worker may need further information to explain HMRC's decision to the customer. For example, details of the information the specialist used to base their decision on. In such cases, it might be helpful for specialists to attend a meeting or call with the customer so they can answer specific questions or address any points raised.

## Paragraph 13

HMRC will seek to work with the customer to understand fully the relevant facts and law, sharing and testing HMRC's arguments, and fully understanding and testing the customer's arguments, before reaching a considered view on the strength of its case.

HMRC will ensure that respective arguments are fully shared. Only exceptionally would HMRC consider the exchange of copies of Counsel's or other legal opinions as opposed to the substance of the arguments considered by such opinions. HMRC would not normally expect legal professional privilege to be waived.

### Sharing and testing views and arguments

HMRC does not have a monopoly on understanding how tax law applies to a particular set of facts. Where HMRC has worked collaboratively with a customer to establish the relevant facts relating to a particular risk, HMRC will also want to work collaboratively to fully understand the tax law that might apply to determine the appropriate treatment.

Where a tax return has been filed, a discussion is likely to start with the tax treatment adopted by the customer. This discussion will explore the analysis and relevant law which the customer considers supports the treatment adopted. Where a tax return has not been submitted, for example during the discussion of a transaction in real time, it may be appropriate to start with an open discussion between HMRC and the customer about the technical provisions that could apply.

In either case, HMRC should be open about sharing its preliminary views on the potential analysis and law which may apply to a particular risk or transaction with the customer.

In cases where specialist advice is required, it will be helpful for HMRC to obtain an understanding of the customer's technical analysis before requesting the specialist advice, so that this can be considered in detail and any clarifications sought with a detailed response provided. However, it is generally not appropriate to consider jointly instructing counsel for advice, as counsel's role is to advise each party on the particular merits of their arguments, not to act as an arbiter.

Before reaching a considered decision, HMRC should seek to ensure it has:

- a full understanding of the customer's view as to which facts are relevant
- a full understanding of the customer's technical analysis
- clearly articulated (whether in writing or at a meeting) its preliminary view to the customer as to potential alternative technical analyses which might apply
- actively sought to test the relative strengths and any weaknesses of the respective technical analyses which might apply (both with the customer and also internally with other HMRC team members)
- obtained any specialist advice required
- made an informed assessment as to the strengths and, or, weaknesses of the potential technical analyses which might apply.

In many cases, it can be helpful to have a meeting with the customer to discuss respective views and arguments. A meeting can help to avoid protracted exchanges of correspondence and can help both parties get a better understanding of the other's position.

To ensure the meeting is as productive as possible a detailed agenda should be agreed between both parties in advance. The agenda should confirm the specific areas and risks that will be discussed. This approach will give both parties the opportunity to adequately prepare for the meeting and make sure the appropriate individuals attend.

All HMRC team members and stakeholders have a role to play in assessing the relative strengths of any technical arguments.

The aim of ensuring that HMRC fully understands the customer's view and has fully tested its own arguments is to make sure HMRC does not pursue disputes where it lacks strong arguments. Equally, where HMRC decides to pursue a dispute, it helps to focus on the strongest arguments. This approach avoids a situation where good technical arguments are undermined by being mixed with weaker ones.

Having reached an initial conclusion, tested it and reached a considered decision, HMRC should either:

- advise the taxpayer that it accepts the analysis with the risk resolved or dispute dropped
- set out the basis of its technical arguments and analysis which it intends to pursue further, together with any explanations or clarifications required.

However, even after HMRC has reached a considered decision, for example that a particular technical analysis applies, it will continue to be open to considering the impact of any new information or analysis that may provide the basis for resolving a dispute.

Where HMRC's position on a tax dispute depends on the outcome of other disputes turning on the same issue, HMRC should bring this fact to the customer's attention.

## **Legal Professional Privilege**

Legal Professional Privilege (LPP) protects certain communications between a client and their legal adviser from disclosure in certain circumstances. A legal adviser must be a legal professional, such as a solicitor, barrister or legal executive, and they can be based in-house or be an employee.

The protection applies where communications occurred for the purpose of receiving legal advice (both oral and in writing) and is known as 'advice privilege'. There is also 'litigation privilege' which applies not only to communications between the legal adviser and their client but also to documents that are created for the dominant purpose of gathering evidence, or for use in legal proceedings. It can also apply to communications to and from third parties. In order for LPP to be maintained, the information must remain confidential and not have been disclosed to third parties.

LPP is a complex area and detailed technical and operational guidance is set out at in the [Compliance Handbook](#).

In order for both sides to be able to test fully the strength and weaknesses of their respective arguments, it will be necessary to share relevant technical analyses, some (or all) of which might be based on legal advice.

It is unlikely that HMRC will need to see a copy of any legal advice obtained by a customer. Some customers may decide to waive LPP and provide HMRC with copies of the legal advice they have obtained. However, HMRC should not interpret a decision by a customer not to waive LPP over legal advice as a sign of non-collaboration and care should be taken to find out whether the customer in possession of the advice is the person entitled to the protection of Legal Professional Privilege.

Regardless of whether or not a customer has provided HMRC with privileged material, HMRC is not obliged to reciprocate by waiving LPP in respect of confidential legal advice it has obtained and will only exceptionally consider doing so.

Rather than providing copies of any documents that might be subject to LPP, HMRC's approach will typically be to prepare and provide customers with a separate summary of its key arguments and technical analysis. If any such summary includes any reference to legal advice having been obtained, the following paragraph should always be included:

"This analysis has been confirmed by legal advice and is being provided on a 'without prejudice' basis. For the avoidance of doubt, in providing this to you, HMRC is not waiving Legal Professional Privilege in relation to any specific legal advice or documents which may have been used or referred to in preparing this summary. However, HMRC retain the right to produce this letter in evidence against you."

Before any such summary is provided to a customer, it should be reviewed and approved by the relevant technical specialist or specialists and HMRC Solicitors Office and Legal Services.

It may be possible that the legal advice HMRC has obtained is:

- specific advice based on the facts of a particular case
- generic advice regarding HMRC's view on the interpretation of particular areas of the law.

In either circumstance, it is possible that the legal advice obtained could help to inform HMRC's general approach to these matters or its interpretation of specific statutory provisions or case law. However, particular care should be taken before relying on any legal advice which is not based on the customer's specific facts and circumstances.

## Paragraph 14

HMRC will always consider whether something that initially appears to be an 'all or nothing' issue is in reality 'all or nothing' or is a case where there is a range of possible figures for tax due.

### **'All or nothing' issues**

An 'all or nothing' issue (also called a 'binary' or 'black and white' issue) is one which has only two possible outcomes, for example, a given amount of tax is either due, or it is not.

As set out at in [paragraph 18](#), where a dispute relates to an 'all or nothing' point where HMRC believes that there are only two possible outcomes consistent with the law, HMRC will not accept any out of court resolution which is not one of these possible outcomes or is an attempt to split the difference between the two possible outcomes.

However, sometimes a dispute which initially appears to be 'all or nothing' might, after further review, discussion or testing, turn out not to be genuinely 'all or nothing' but in fact be a case where there is a range of possible figures for what might be the right tax.

Wherever a dispute initially appears to be 'all or nothing', HMRC should test that initial conclusion (preferably with the customer) to explore whether or not:

- there is a range of right answers for how the law should be applied to the facts
- the dispute is capable of being broken down into two or more sub-disputes, each of which is capable of being separately resolved.

This will increase the chances of achieving an efficient, cost effective and legally correct resolution to the whole dispute.

Where an issue is project-managed centrally, such as in cases of certain avoidance arrangements, it is likely that any proposed basis for settlement will be subject to specific governance arrangements. In circumstances where a case was initially thought to be an 'all or nothing' dispute but an alternative basis for a settlement is found and approved in accordance with the relevant HMRC governance arrangements, then HMRC should communicate and accept this basis for settlement in equivalent cases with other customers.

## Paragraph 15

HMRC will aim to deal consistently with disputes to a professional standard whether or not the disputes are ultimately resolved by agreement or through litigation.

### **Working disputes to the same professional standard, however resolved**

The vast majority of civil tax disputes are resolved by agreement between HMRC and the customer, rather than by litigation.

However, even where it is anticipated that a case will be resolved by agreement, handling a case in a way that prepares for possible litigation is beneficial.

See also guidance set out in relation to LSS [paragraph 11](#) above.



## 6. Resolving disputes (paragraphs 16-19)

### Paragraph 16

Tax disputes must be resolved in accordance with the law.

HMRC will not usually persist with a tax dispute unless it potentially secures the best practicable return for the Exchequer and HMRC has a case which it believes would be successful in litigation.

HMRC must be satisfied that both the substance of any decision leading to resolution of the dispute and the way that resolution is put into effect are fully in accordance with the law.

Where there is more than one dispute between a customer and HMRC, each dispute must be considered and resolved on its own merits, not as part of any overall 'package'. As a matter of process, however, it may be that a number of disputes will be resolved at the same time (each on their own merits), for example as part of a process of bringing a customer's tax affairs up to date.

In appropriate cases, Alternative Dispute Resolution can help the resolution of disputes either by facilitating agreement between the parties or by helping the parties to prepare for litigation.

#### **Disputes must be resolved in accordance with the law**

As well as being able to reach agreement on disputes involving decisions that are not formally appealed, as set out above, (see guidance on LSS [paragraph 1](#)) the law allows HMRC to reach agreement with a customer where a dispute has been escalated by appeal to the tribunal without the need for it to be resolved by the tribunal. These provisions allow HMRC to reach an out-of-court resolution.

Whether an out-of-court resolution is of an appeal or not, HMRC should only do so on a basis which it believes could reasonably be determined by the tribunal. HMRC should also believe that the resolution gives the best overall return for the Exchequer, without going through the expense and uncertainty of taking the case to court.

The starting point for HMRC's view of what gives the best outcome to a tax dispute is what HMRC believes to be the likely outcome of litigation. What is a likely outcome of litigation is of course itself open to disagreement, and the following paragraphs are intended to help explain in more detail how this should be interpreted.

Broadly, where HMRC has reached a considered and definitive view of what is the right tax treatment of a particular transaction, on a full understanding of the facts and after having considered the full range of possible arguments, it will not settle out of court for any other tax treatment.

Where, having considered the facts and the range of arguments, HMRC is satisfied that there are alternative approaches which are each reasonably likely alternative outcomes to court proceedings, it may agree to settle out of court for one of the alternatives, though not necessarily for the lowest of the possible range of alternatives bearing in mind the need to maximise overall revenue flows.

HMRC will not however settle out of court for a result which it does not believe to be one of the range of likely alternative outcomes. In addition, HMRC will not agree less tax, interest or penalties than it believes is within the range of outcomes in the interests of achieving a quick settlement, even if doing so could be viewed as providing a good return on the time spent on that particular case.

## **Conceding risks where the potential revenue flow does not justify continuing**

Paragraph 8 of the LSS sets out that in general HMRC should not take forward a tax dispute unless the overall revenue flows potentially involved justify doing so.

However, at the outset of an enquiry or dispute, it may not be possible to assess the overall amount of potential tax at stake. Consequently, at that time, and in the absence of further facts or information, HMRC may be unable to make a meaningful assessment of the relative merits of taking forward the dispute.

Equally, HMRC's initial view as to the overall amount of potential tax at stake in a dispute may change during the course of the dispute, for example as further facts are established, more information is provided or as more detailed analysis is undertaken. This, in turn, could have an impact on HMRC's assessment of the relative merits of persisting with the dispute.

For these reasons, throughout any dispute, HMRC should regularly assess the relative merits, or otherwise, of persisting with the dispute in light of all the known facts. The principal factors HMRC will consider as part of this ongoing assessment process are likely to be the same as those at the start of the dispute (see guidance on LSS [paragraph 8](#) above).

In general, HMRC should only continue with a dispute where it considers that both:

- the overall likely revenue flows justify doing so
- it has, or potentially has, a case which it believes would be successful in litigation.

In particular, HMRC should not pursue minor or questionable points to avoid a nil settlement.

For the majority of cases, HMRC will only continue a dispute where the overall revenue flows justify doing so. However, there will be certain exceptions (which is why paragraph 14 specifically includes the words 'not usually') and this might include cases where, for example:

- while the amounts involved may individually, or collectively, be relatively small, there is a need to positively influence customer behaviour, for example dispute concerning a fixed penalty
- a particularly important point of principle is involved where it is necessary to defend the integrity of the legislation, or where not defending the point could potentially lead to a distortion of competition between businesses.

Decisions regarding which disputes HMRC should concede should be taken in accordance with the guidance on LSS [paragraph 6](#) above, the customer segment they are in and the potential for changing customer behaviour.

## **The way in which dispute resolution is put into effect must also be in accordance with the law**

The requirement that dispute resolution must be in accordance with the law applies as much to the way that resolution is put into effect as it does to its substance.

## **Cases involving multiple disputes**

A consistent approach across taxpayers is vital to securing good compliance on a sustainable basis. That rules out any sort of 'package deal' under which HMRC might be asked to concede one issue in return for the customer conceding another, irrespective of the merits, or where a range of issues are settled for a single payment that is not subdivided among individual disputes. Each separate dispute should be dealt with on its merits, but this should reflect any genuine interaction between one dispute and another.

Exceptionally, HMRC may take the view that litigation of a dispute, even if HMRC would expect to succeed, would not be cost-effective if pursuing the dispute 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 dispute, 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 a dispute to resolve a multi-dispute case would therefore be rare in practice and should be taken through the relevant formal case governance procedures. A settlement made on this exceptional basis would be 'in accordance with the law'.

More broadly, in certain circumstances, the commissioners for HMRC, or HMRC officers on their behalf, may exercise their legal discretion under the collection and management powers in The Commissioners for Revenue and Customs Act 2005. This legal discretion allows HMRC not to pursue an amount of disputed tax in the interests of securing the best net return for the Exchequer. Where this legally sanctioned discretion is properly exercised, the outcome is equally 'in accordance with the law'. The scope of this discretion is described in the [Admin law manual at ADML 3000](#).

For guidance on who is responsible for decisions regarding the resolution of disputes please see the guidance on LSS [paragraph 6](#) above.

### **Alternative Dispute Resolution**

Alternative Dispute Resolution (ADR), and more specifically facilitation or mediation, is a flexible dispute resolution tool available to HMRC which – in appropriate cases – can help HMRC and its customers resolve disputes (or reach key decision points) in a cost effective and efficient manner.

The LSS applies to the resolution of all disputes through civil procedures. Therefore any resolution of a dispute between HMRC and a customer – whether it's resolution involved ADR or not – must accord with the terms of the LSS and specifically be a resolution which HMRC considers could reasonably be reached by a tribunal.

## **Paragraph 17**

Tax disputes may be resolved either by agreement or through litigation. Where there is a range of possible figures for tax due, the terms on which HMRC will settle by agreement will also take into account which outcome secures the right tax most efficiently.

In considering how to secure the right tax most efficiently, HMRC's objective of securing the best practicable return for the Exchequer will have regard to future as well as immediate revenue flows, costs and the deterrent effect on customer non-compliance.

In considering settlement terms for one dispute, HMRC will take account of the potential read across to other open or prospective disputes as well as the impact which settling the dispute could have in releasing HMRC resources to work on other disputes.

In order to ensure that overall current and future revenue flows and HMRC costs are not prejudiced, the terms on which disputes are resolved will take into account their likely impact on customer behaviour both generally and in relation to the customer concerned, including any question of avoidance, evasion, or a failure to take reasonable care.

In most cases, resolution by agreement is likely to offer the most effective and efficient outcome. However, HMRC will not compromise on its view of the law to secure agreement, and in that context there will be cases where litigation offers the most effective and efficient means of resolving disputes.

In such circumstances, HMRC will seek to reach resolution of the dispute by litigation in an efficient manner.

Where there is a range of possible figures for tax due, HMRC will not settle by agreement for an amount which is less than it would reasonably expect to obtain from litigation.

### **Disputes where there may be a range of possible figures for tax due**

Some tax disputes are genuinely 'all or nothing' in nature, and guidance on how these can be resolved is given in relation to [paragraph 18](#) of the LSS. Paragraph 16 of the LSS deals with disputes where there may be a range of possible figures for tax due.

Examples of cases where there may be a range of possible figures for tax due include:

- compliance check cases where the true figure of turnover, recoverable inputs, taxable profit and so on is genuinely uncertain, for example due to incomplete or missing records
- disputes which turn on a legal interpretation where there is a range of respectable possible interpretations that a court or tribunal might take, including potential avoidance issues
- cases involving legislative provisions which specifically require or permit a just and reasonable apportionment to be made, for example Corporation Taxes Act 2007 section 441, in relation to the unallowable purpose element of a loan for loan relationship purposes
- cases involving avoidance where a realistic view has to be taken of what would have happened without avoidance being present, for example the 'Halifax doctrine' which establishes that where the abuse principle applies, the transactions have to be redefined so as to remove the tax advantage
- valuation or transfer pricing cases where there is a range of respectable comparables or possible valuation or pricing methods which might be endorsed by a court or tribunal
- partial exemption methodology disputes where there are several acceptable possible methodologies which could be used for determining a customer's VAT recovery position.

In such cases, the LSS says that HMRC will want to resolve the dispute, whether by litigation or agreement, in the way which is likely to secure the right tax most efficiently.

### **Finely balanced outcomes**

A finely balanced outcome is one where alternative outcomes are relatively equally likely and there may also be other outcomes which are less likely. Considerations which come into play in deciding which of the alternatives HMRC should decide on include:

- the absolute amounts determined by each alternative
- the past behavior of the customer and the likely impact on their future behavior
- whether there is the possibility of precedent value in choosing one alternative over another

If a case has no precedent value and the difference between the alternatives is not too great, HMRC may decide to choose to settle on the basis of the alternative that is most likely to be accepted by the customer -- thereby settling most efficiently. If the difference between the alternatives is significant, or there are other cases which may settle on similar lines, HMRC may choose to seek resolution for the alternative which delivers a greater amount of tax. Defending litigation if necessary in such cases, and having a favourable judgment would be an efficient use of resources.

## **Range of non-connected specific outcomes**

While resolutions may have a range of outcomes as discussed above, there are also disputes which may have discrete outcomes within a range, each of which are possible likely outcomes of litigation. For example in a corporation tax dispute where alternative outcomes of £100,000, £200,000 or £250,000 may be due on a single issue depending on the view of the facts taken, but no other amounts are 'likely outcomes'. While HMRC may decide to settle for any of these amounts (informed by the perceived likelihood of the outcome), HMRC should not settle for an amount which is not one of these 'likely outcomes'.

Factors to take into account include:

- the absolute amounts determined by each alternative
- whether there is the possibility of precedent value in choosing one alternative over another

## **Alternative arguments (lines of attack)**

Where HMRC has more than one argument and those arguments produce different results HMRC should generally decide on the 'likely outcome' which is likely to be what the tribunal would find. However, considerations similar to those given in 'finely balanced outcomes' above should also be factored into any decision, so that HMRC secures the tax most efficiently.

## **Legitimate expectation**

Overwhelmingly, tax disputes involve disagreements about the facts and law: what are the relevant facts? What inferences or conclusions are to be taken from them? What is the relevant law, what does it mean, and how it might apply? The resolution of those disagreements involves technical and legal analysis by the tax tribunals.

It is also important to recognise that disputes regularly arise in relation to HMRC's public law duties: for example, to act fairly, consistently, rationally and reasonably. This sort of dispute arises most often in relation to the exercise of a discretion or in relation to decisions taken that affect the customer. Issues of this nature which might affect the amount of tax due (in the past, now or the future) involve tax disputes to which this guidance applies just as much as other disputes about the technical tax position. The same range of factors is to be considered in assessing how to resolve disputes of this nature.

It follows that there will be cases where the form of the tax dispute means that if agreement is not reached then resolution is by judicial review in the High Court. These will be because the dispute turns entirely on whether or not HMRC must give effect to a legitimate expectation, for example by providing treatment in accordance with published guidance that we think does not apply to the particular case.

Accordingly, it is possible that to resolve a particular point, two disputes need to be resolved, one about the technical tax aspects and the other about whether a customer has a legitimate expectation of being given a particular treatment. Lack of agreement may, therefore, result in litigation before both the First tier tribunal (to deal with the technical tax aspect) and the High Court (as a judicial review) to consider the public law aspects. This is because the First tier tribunal does not have general jurisdiction to consider general public law matters, judicial review or the exercise of discretions by HMRC. Exceptions include where the relevant statutory provisions in the tax code specifically give the First tier tribunal power to consider an exercise of discretion.

Determining how to resolve a dispute of this nature involves considering both aspects in accordance with this guidance and the LSS.

Where both aspects relate to the same substantive issue then they should be treated as one matter with both aspects considered together to determine how best to resolve the dispute – this is because the legitimate expectation issue is really an alternative line of argument. Where the legitimate expectation issue relates to a different substantive issue then you are dealing with a case involving different issues and each must be considered on its own merits. In these circumstances, the guidance under paragraph 17 should be followed.

It is part of the handling and resolution of a tax dispute to consider any potential legitimate expectations that are said to exist and to consider whether those change the answer or our approach to the dispute.

To be clear, whether or not a taxpayer may have a legitimate expectation that we need to take into account, or give effect to, involves careful assessment of the factual and legal position. If you have any doubt about the existence of a legitimate expectation then you should seek specialist advice.

### **Double Taxation Agreements and Mutual Arbitration Procedure**

In disputes which involve cross-border transactions, a decision which is one that a UK tribunal could legitimately reach may involve an element of double taxation.

A customer affected by double taxation may have a remedy under a double taxation treaty, allowing the competent authorities of the relevant countries to agree compensating adjustments to remove part, or all, of the double taxation. These are negotiations between the competent authorities that do not involve the customer and so are separate to any resolution of the original tax risk or risks.

Where compensating adjustments cannot be agreed, the two competent authorities may agree to abide by the outcome of arbitration by an independent court set up for that purpose. However, the customer has no input to this process as the disagreement is between the two countries involved.

A resolution which is in alignment with what a tribunal could determine, may not be the final outcome, as the arbitration outcome may require the UK to make compensating adjustments to its assessments.

Such compensating adjustments, whether by agreement or as a result of arbitration, do not mean that the original resolution was incorrect, as a tribunal cannot take into account potential customer actions to invoke the provisions of a double taxation agreement nor what an international arbitration may determine.

### **Securing the legally due tax most efficiently**

Where the tax dispute relates solely to the facts and circumstances of the customer concerned, and there is a range of possible tax outcomes, HMRC will not generally take the case on to the tribunal unless a potential settlement offered by the customer fell outside HMRC's reasonable expectation of the range of possible findings that the tribunal might come to.

HMRC may however choose a figure at the higher end of the range of possible outcomes and defend any subsequent litigation in circumstances where it believes that is a cost effective way of securing better compliance.

Where a settlement decision is likely to affect a number of customers, HMRC will take into account the wider potential impact of a favourable tribunal decision before settling with any particular customer for a lesser amount. This means that any benefit of establishing a precedent through litigation, or of protecting the relevant tax regime, should be taken into account in assessing the cost effectiveness of litigation.

HMRC will also take into account the effect that continuing to apply resource to one dispute might have on its ability to pursue other disputes. As set out in the guidance on LSS [paragraph 15](#), generally HMRC should not take forward a tax dispute unless the overall revenue flows potentially involved justify doing so.

Exceptionally, customer behaviour may factor in the decision about pursuing an individual risk for earlier periods where HMRC's chances of success are good. Where a customer has:

- readily assisted HMRC in understanding the facts and circumstances surrounding all risks both during the fact-finding and afterwards
- eliminated the chance of any particular risk re-occurring.

Pursuing a risk for earlier periods may not be the most cost-effective method of securing current and future adherence to HMRC's understanding of the law and consequent tax flow.

This is likely to occur in a multi dispute cases, where the customer genuinely agrees to adapt their practices to conform to HMRC's understanding of the law and is seen to put those changes in place. Where this change in practice on behalf of the customer can be verified and is shown to be sustainable, HMRC not pursuing liability for earlier periods may meet the requirements for HMRC to pursue the maximum revenue at least cost.

Any decision not to litigate but to concede a dispute in order to resolve a multi-dispute case would therefore be rare in practice and should be taken through the relevant formal case governance procedures. A settlement made on this exceptional basis would be in accordance with the law.

## **Means**

Where means is genuinely an issue, in general, the guidance at EM6000+ should be followed.

Where a dispute is subject to a governance board decision and an offer in settlement of the dispute has been made which HMRC considers to be substandard, specialist insolvency advice should be sought as to HMRC's prospects of obtaining an increased payment from insolvency litigation. Where these prospects are considered to be poor, the governance board may agree to the substandard offer. This would meet the requirement for HMRC to pursue the maximum revenue at least cost.

## **Potential for litigation**

Resolution of disputes by agreement is likely to be the most cost-effective outcome in the majority of cases.

Where the potential revenue flows justify litigation, that route should be actively pursued with the aims of resolving the dispute as quickly and as cost effectively as possible.

## **Paragraph 18**

In relation to a dispute which is genuinely of an 'all or nothing' nature:

- HMRC will not reach an out of court settlement for less than 100% of the tax, interest and penalties (where appropriate) at stake if it believes it is likely to succeed in litigation and that litigation would be both effective and efficient. If the customer is unwilling to concede in such cases, HMRC will seek to resolve the dispute by litigation as quickly and efficiently as possible



- where HMRC believes that it is unlikely to succeed in litigation it will, in the majority of cases, concede the issue. In such cases, HMRC will not attempt to 'split the difference' between its own and the customer's view of tax, interest and penalties (where appropriate) at stake. Taking a case to litigation where HMRC believes it is unlikely to succeed would need to be justified by the particular circumstances, such as a very large amount of tax at stake (in the case itself or from immediate precedent value where a large number of customers is affected), or a fundamental point of principle or behaviour at issue.

### **Genuinely 'all or nothing' disputes**

Some tax disputes are genuinely 'all or nothing', but by no means all. In cases which proceed through successive layers of appeal in the tribunal and courts, it is not unusual for different legal interpretations to emerge. Discussions with customers and advisers, as well as discussions among tax experts and their advisers within HMRC, frequently elicit alternative ways of approaching a particular tax dispute. This reinforces the need to spend time working together with the customer and their advisers, as well as with HMRC colleagues, to identify the range of reasonable approaches to any particular tax dispute. This makes sure it is not prematurely categorised as an 'all or nothing' dispute.

If HMRC believes an issue to be genuinely 'all or nothing', then the LSS requires it either to press for full settlement, or concede in full. This reflects our policy that HMRC will only resolve disputes out of court on terms which HMRC believes are likely outcomes from litigation.

As set out in the guidance on LSS [paragraph 15](#), HMRC should not generally take forward or persist with a tax dispute unless the overall revenue flows potentially involved justify doing so.

### **What if HMRC believes it is likely to succeed?**

Where HMRC believes it is likely to succeed in litigation, on an 'all or nothing' dispute and the customer does not concede in full, HMRC will generally defend its position in the dispute in tribunal or court, as long as it is cost effective to do that.

'Likely to succeed' here means HMRC's own view of its prospects of success at tribunal or the higher courts. That view will be informed by any external legal or other advice obtained (where necessary), but will not necessarily be bound by the advice.

An assessment of HMRC's prospects of success in litigation should in all cases be taken in consultation with Solicitors Office and Legal Services. This assessment will take account of not only the respective strengths of each party's position, but also the risks inherent in taking a case to court (litigation risk).

### **Full settlement**

Full settlement means all liabilities, including interest and penalties.

### **Expeditious resolution**

If there is no prospect of an acceptable resolution by agreement under the LSS, HMRC should make sure it does not unnecessarily delay proceedings.

### **What if HMRC believes it is unlikely to succeed?**

In a genuinely 'all or nothing' dispute where HMRC believes it is unlikely to succeed, it will usually concede. HMRC cannot, however, guarantee that this will always be the case.



Examples of cases in which HMRC may decide to proceed to litigation despite believing it is unlikely to succeed include those where:

- it believes that clarification of the law is necessary in order to set a precedent
- there is such a large amount of revenue at stake that it cannot simply concede the issue without an express adverse judgment
- the principle involved could affect not only other customers on the same point but other areas of the tax system, where HMRC could not give wider effect to its conceding of the case in point without creating greater uncertainty for other customers.

### **Splitting the difference**

Splitting the difference does not give a result consistent with the law, so is not something HMRC can entertain.

In connection with the reference in guidance on LSS [paragraph 16](#) to ADR, it should be noted that facilitation or mediation is not about 'splitting the difference' or compromising, but about supporting the parties in reaching agreement that is in accordance with the law, where they are able to do so. It follows that HMRC will not be able to compromise on a genuinely 'all or nothing' dispute simply because that was being addressed as part of a mediation.

## **Paragraph 19**

A decision to litigate (whether or not it relates to an 'all or nothing' dispute) does not mean that HMRC will stop taking steps to ensure an efficient and effective resolution to the dispute.

A decision to litigate should be implemented expeditiously. Where possible, litigation should be conducted collaboratively as it may reduce the costs or uncertainty of litigation for both parties.

HMRC will continue to be open to considering the impact of any new information or technical analysis which may be put forward by the customer.

### **Handling of cases in litigation**

Decisions to litigate include both deciding to defend a case in the tribunal and deciding to pursue an appeal through the higher tribunals and courts.

HMRC will continue to handle cases efficiently and collaboratively, where possible, after litigation has started.

Where it is possible for litigation to proceed collaboratively, HMRC will seek to support expeditious resolution of the dispute, for example through agreement of joint statements of facts or areas of agreement.

It is possible that even after the start of the formal litigation process there is scope for an out of court resolution of the dispute, including through ADR, and HMRC will be open to considering that. However, once a case is in litigation, HMRC may consider that ADR is not appropriate and that swift resolution of the dispute via a judgment is the best method to determine and secure the tax that is legally due in the most efficient way.