

# **Code of governance for resolving tax disputes**

## **Code of governance for resolving tax disputes**

This document sets out HMRC's governance arrangements for decisions on how tax disputes should be resolved. These arrangements are one aspect of HMRC's wider governance framework, on which there is more information in Annex A.

### *Contents*

**Section 1: How we aim to resolve tax disputes**

**Section 2: Governance of decisions on resolving disputes**

**Section 3: How we decide our position on disputed points affecting more than one taxpayer**

**Section 4: Reviewing the processes used in settled cases**

**Annex A: HMRC's overarching governance**

**Annex B: Governance model flow chart**

**Annex C: Terms of reference for Tax Disputes Resolution Board**

## **Section 1: How we aim to resolve tax disputes**

Differences of view (or 'disputes') between a tax authority and taxpayers on the correct amount of tax owed – or the timing of payment – are a normal feature of tax administration across the world. They arise in cases of all sizes – this may be because the law is complex or because the way the law is applied in a particular set of circumstances is not straightforward.

Most disputes can be resolved collaboratively and by agreement once the facts have been established and the points at issue discussed, including cases where there is a formal appeal against the view we have taken. Only a very small minority of disputes need to be resolved by legal action, either in a tribunal or a higher court.

### *Litigation and Settlement Strategy*

HMRC's Litigation and Settlement Strategy (LSS) was first published in 2007 and refreshed in 2011. It sets out the basis on which we will reach agreement in a tax dispute and emphasises the benefits of a collaborative approach in achieving a resolution. The arrangements described in this code provide assurance that the principles of the LSS are applied consistently in practice to the resolution of tax disputes.

As spelt out by the LSS, we will only resolve a tax dispute consistently with:

- the law, whether by agreement with the customer or through litigation; and
- our objectives of efficiently determining and collecting the correct tax to maximise revenue flows, while reducing costs and improving the customer experience.

More information on the LSS is available here:

<http://www.hmrc.gov.uk/practitioners/LSS.pdf>

In addition to the LSS, we ensure that appropriate decisions are made through:

- extensive technical and operational guidance;
- training programmes which ensure our staff have the right qualifications;
- assurance of decisions by line managers; and
- quality assurance programmes.

HMRC's Tax Assurance Commissioner is responsible for:

- seeing that tax disputes are resolved efficiently and on a basis that determines the correct tax in accordance with the LSS and achieves outcomes that are even-handed across different customer groups;
- ensuring that we have appropriate governance arrangements in place to meet those objectives;
- ensuring that those arrangements are observed in practice in individual cases; and
- monitoring and evaluating the effectiveness of our processes for resolving tax disputes and our governance arrangements, and implementing improvements.

The Tax Assurance Commissioner has no role in the tax affairs of specific taxpayers and no line management responsibility for caseworkers, maintaining clear separation of responsibilities.

## **Section 2: Governance of decisions on resolving tax disputes**

Our governance framework operates on these principles:

- our tax professionals have the technical and collaborative working skills to make decisions in routine cases, supported by their line managers;
- each HMRC line of business has processes for referring larger, more complex cases and sensitive cases to decision-making bodies, made up of senior tax and other professionals from across HMRC;
- our approach to resolving a major disputed point arising in several cases is decided by cross-HMRC boards, to ensure consistency;
- our governance processes should have no adverse impact on customer experience; and
- our review programme for settled cases checks that processes are being adhered to in practice.

The flow chart in Annex B illustrates the different elements of our governance model and more detail is set out below and in Section 3.

The table below outlines the decision-making process for resolving tax disputes according to the characteristics of the case. Cases for which HMRC Commissioners are the decision makers are first considered by the Tax Disputes Resolution Board (TDRB). The TDRB is the successor to the High Risk Corporates Programme Board but has a broader remit to consider cases arising across HMRC. The Board is made up of Directors from business areas across HMRC, including from the legal profession, and makes recommendations to the Commissioners as to the appropriate basis for resolving one or more disputed points in a case. More details about the TDRB can be found in Annex C.

Nature of case	Decision maker	Oversight	Assurance	Consistency across cases
Routine case raising no new or complex issues worked within established guidance	Caseworker, applying established guidance to facts of specific case	Line management	Line of business quality assurance	Where a disputed point arises in multiple cases, individual cases are decided taking account of our agreed approach to that point (see Section 3)
More complex cases	Caseworker and relevant technical specialists by consensus. Legal advice sought where appropriate	Line management. If consensus cannot be reached, case referred up line-management chain, first to deputy directors then, if need be, to directors	More than one person involved in decision. Involvement of all relevant business areas provides internal challenge	

Nature of case	Decision maker	Oversight	Assurance	Consistency across cases
All sensitive cases (see Note) or where the tax at stake is at least £100 million	Three tax-expert Commissioners, including Tax Assurance Commissioner, having considered recommendations from TDRB	No proposal to resolve a dispute by agreement can be accepted if the Tax Assurance Commissioner does not agree. If there is no agreement on an appropriate basis on which to resolve a dispute, the case is referred for further work including legal action, if necessary	Tax Assurance Commissioner is decision maker. Aggregate information from these cases published in annual report	Where a disputed point arises in multiple cases individual cases are decided taking account of our agreed approach to that point (see Section 3)
Sample of cases where tax at stake is at least £10 million but less than £100 million	Commissioners, having considered recommendations from TDRB	As above	As above	

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

### Section 3: How we decide our position on disputed points affecting more than one customer

Deciding our approach on a disputed point that arises in multiple cases – and applying it consistently – is an important part of the even-handed and fair administration of the tax system. Individual cases are worked in line with the agreed approach, but decisions relating to those cases are still made according to the arrangements set out in Section 2.

The key bodies that decide our position, depending on the nature of the point, are set out below.

Nature of point in dispute	Decision-making body	Role of board	Oversight
Major contentious issues arising in business tax regimes	Business Tax Contentious Issues Panel (BT CIP)	<ul style="list-style-type: none"> <li>• Decides strategy for managing major contentious issues</li> <li>• Agrees approach for resolving such issues</li> </ul>	If consensus cannot be reached, point referred to Commissioners
Major contentious issues arising in personal tax regimes	Personal Tax Contentious Issues Panel (PT CIP)	<ul style="list-style-type: none"> <li>• Decides strategy for managing major contentious issues</li> <li>• Agrees approach for resolving such issues</li> </ul>	If consensus cannot be reached, point referred to Commissioners
Avoidance	Anti-Avoidance Board	<ul style="list-style-type: none"> <li>• Approves and monitors strategies to handle tax avoidance issues</li> <li>• Makes strategic decisions about HMRC's anti-avoidance work</li> </ul>	Recommends handling strategies for major contentious tax avoidance issues to PT and BT CIPs, depending on regime in question



Specific arrangements apply in the specialist area of transfer pricing, set out below:

Transfer pricing	Transfer Pricing Board	<ul style="list-style-type: none"> <li>• Sets strategic direction for transfer pricing work</li> <li>• Approves approach to resolving disputes</li> <li>• Considers cases where legal action may be necessary</li> <li>• Makes recommendations to TDRB in cases where criteria set out in Section 2 are met</li> <li>• Makes decisions on high profile or contentious transfer pricing enquiries and those with £25m-£100m at stake</li> </ul>
	Transfer Pricing Panels	<ul style="list-style-type: none"> <li>• Make decisions on transfer pricing enquiries in individual cases (including whether to open an enquiry)</li> </ul>

## **Section 4: Reviewing processes used in settled cases**

We are introducing an internal programme to review settled cases. This will be overseen by the Tax Assurance Commissioner, and its findings will be reported to our Audit and Risk Committee, which may recommend follow-up actions.

The objective of the programme is to learn lessons for the future and improve our processes, not to re-open cases or review decisions. It will consider whether the right processes were followed in working cases in which a dispute arose, including, for the future, whether the governance arrangements outlined in Sections 2 and 3 were adhered to.

The programme will be carried out by our Internal Audit function and has two key elements, to:

- make sure business areas are quality-assuring work as they should; and
- review samples of cases of different sizes from different business areas.

The review of processes used will consider, for example, whether:

- there is a clear risk assessment;
- there is appropriate documented evidence to support the decisions;
- appropriate authorisation took place when it should;
- where HMRC has agreed a strategy for handling a disputed point (for example, the approach to an avoidance scheme), the strategy has been adhered to or any deviation from it has been accounted for;
- business areas with an interest in the cases have been consulted at the right time; and
- there is a consistency of approach across different business areas.

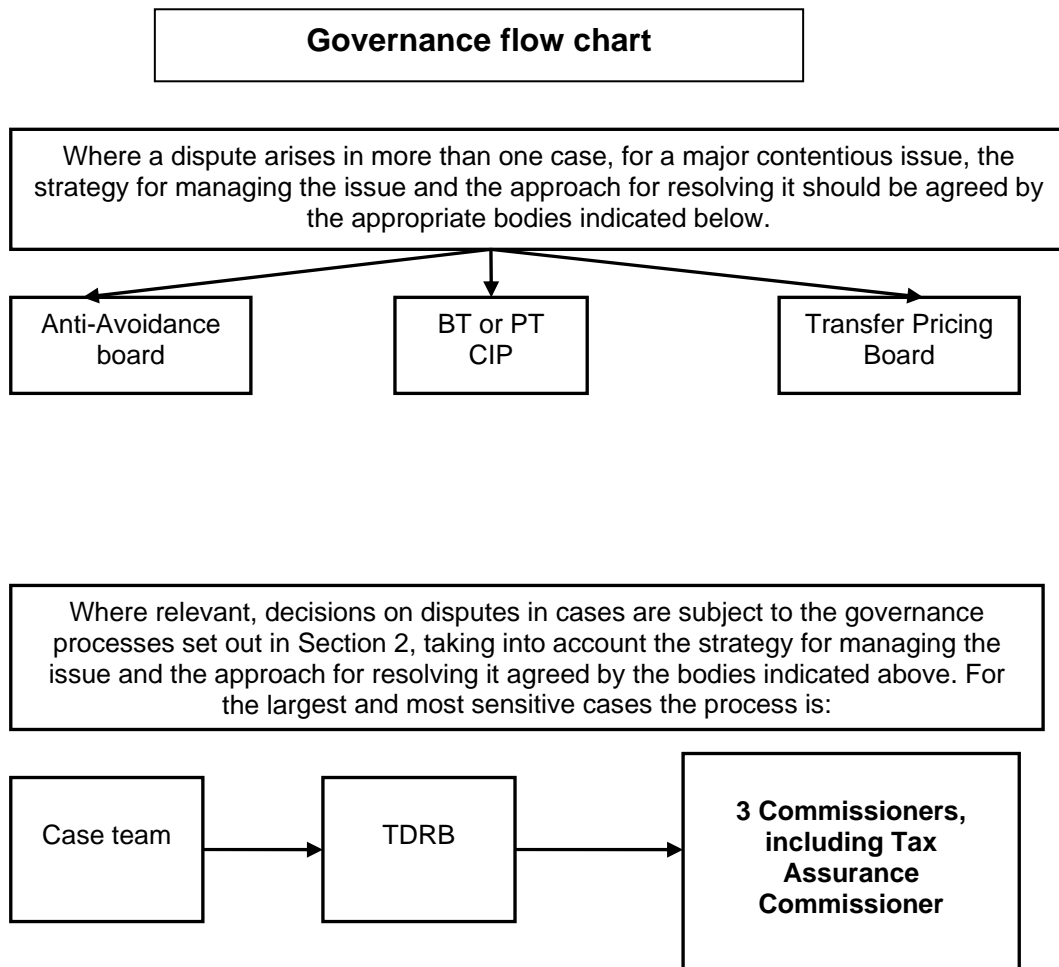
Aggregate findings from the review programme will be published as part of our annual report on our tax disputes work.

## **Annex A: About HMRC**

HMRC was established by the Commissioners for Revenue and Customs Act 2005 (CRCA). We are a non-Ministerial Department, which means that Ministers cannot direct day-to-day or operational decisions. Our status ensures that the administration of taxes is, and is seen to be, impartial and independent from political influence. In this way, Ministers and Parliament are protected from charges of improper intervention in the operation of the tax system. HMRC nevertheless remains accountable to Parliament through the Treasury Ministers who have Ministerial accountability for HMRC and through its Chief Executive who is the Principal Accounting Officer.

HMRC is led by the Commissioners for Revenue and Customs, who derive their powers and functions from the CRCA. Led by the Chief Executive, the Commissioners are responsible for the collection and management of revenue, which includes direct and indirect taxes, duties and national insurance contributions. The Commissioners also have ultimate responsibility for every decision made in HMRC, although Officers make day-to-day decisions on their behalf. Officers make their decisions within an overall governance framework established when the Department was formed.

## Annex B: Governance model flow chart



## **Annex C: Tax Disputes Resolution Board**

1. Remit and Procedures
2. Definitions of Key Terms
3. Composition

### **PART 1 - Remit and procedures**

#### **Introduction**

The Tax Disputes Resolution Board (TDRB) has been authorised by the Commissioners for Revenue and Customs to fulfil the following roles:

- making decisions and recommendations about proposals for resolving significant tax disputes; and
- the selection and oversight of cases within the High Risk Corporates Programme (HRCP).

The TDRB also fulfils an important internal advisory function.

The remit of the TDRB extends to significant tax disputes to be resolved by civil procedures, in any business area.

#### **Operational principles of the TDRB**

The following principles should underpin the operation of the TDRB:

- HMRC should have strong governance processes, proportionate to risk, which provide assurance to the Department's stakeholders, staff and customers that decision-making in significant tax disputes is robust and even-handed, in accordance with the Litigation and Settlement Strategy (LSS);
- HMRC's tax professionals should be able to understand and consistently apply those governance processes;
- HMRC's tax professionals are empowered to play the fullest part possible in the progression and resolution of significant tax disputes

and feel their work is supported by the TDRB and other HMRC governance boards; and  
HMRC's governance processes should be proportionate, effective and efficient and should not adversely impact compliance delivery and customer experience.

### **The remit of the TDRB**

#### *Trigger points for referral to Commissioners via the TDRB*

1. **'£100 million cases'**: The TDRB shall make recommendations to the Commissioners about the resolution of any dispute in a case where the tax under consideration in the case (considered as a whole) is at least £100 million, unless the matter can be resolved without reference to the TDRB under the terms of paragraphs 12 – 14 below.
2. **'£10-£100 million cases'**: The TDRB shall make recommendations to the Commissioners about the resolution of any dispute in a sample of cases where the tax under consideration in the case (considered as a whole) is at least £10 million but less than £100 million.
3. **'£500 million adjustments'**: The TDRB shall make recommendations to the Commissioners about the resolution of any dispute on an individual risk, where the maximum potential adjustment is at least £500m, notwithstanding that the individual risk would not otherwise be within its remit by virtue of paragraphs 1 – 2 above or 4 – 6 below.
4. **'Sensitive cases'**: The TDRB shall make recommendations to the Commissioners about the resolution of any dispute in a case which is sensitive.
5. **'Sensitive risks'**: If an individual risk in a case is sensitive the TDRB shall make recommendations to the Commissioners for the resolution of any such dispute.

6. **‘Cases involving unusual or novel features’**: Subject to paragraphs 1 - 5 above, the TDRB may make decisions about the resolution of any dispute in a case which is referred to it on the grounds that the case involves unusual or novel features. The TDRB may choose to make recommendations to the Commissioners for the resolution of any such dispute.

*TDRB advisory function*

7. The TDRB may provide guidance and advice in relation to any case or individual risk where it appears necessary or prudent to the TDRB to do so, whether or not the case or individual risk would otherwise fall within the remit of the TDRB.
8. The TDRB should be consulted in all instances of doubt or difficulty as to whether and/or when a referral to the TDRB should be made. This would include large cases on the borderline of the monetary thresholds referred to in paragraphs 1 and 3 above.

*HRCP*

9. The TDRB shall determine which cases are suitable for inclusion in the HRCP.
10. The TDRB shall monitor the progress of project-managed cases within the HRCP and, to the extent not already covered by paragraphs 1 – 6 above, shall make decisions about the resolution of any dispute in those cases, unless the matter can be resolved without reference to the TDRB under the terms of paragraphs 12 or 13 below.

*Decisions to resolve disputes or risks to be unanimous*

11. Any decision of the TDRB in relation to the resolution of a dispute in a case or individual risk shall be made unanimously by all present at the relevant meeting of the TDRB. Where the TDRB cannot reach a unanimous decision, the TDRB shall refer the case or individual risk to the



Commissioners or, where appropriate, request that further work is undertaken by the case team.

*Circumstances where referrals do not need to be made to TDRB*

12. If a customer proposes to agree the full amount of the maximum potential adjustment on an individual risk and pay 100% of the tax together with any associated interest and/or penalty, the decision to accept the customer's proposal does not need to be made by the TDRB unless that proposal also forms part of a wider proposal to resolve the case and the case is within the remit of the TDRB. (This paragraph does not cover individual risks which are non binary or where there are a range of possible outcomes.)
13. A decision about how to resolve an individual risk in a case within the remit of the TDRB does not need to be made by the TDRB if all of the following apply:
- the decision relates to an individual risk where the tax under consideration is less than £5 million and the amount of the maximum potential adjustment is less than £25 million;
  - the proposal for the individual risk is not related to discussions concerning the resolution of other individual risks in the case;
  - there is full agreement between all the relevant HMRC partners; and, where appropriate, the Transfer Pricing Panel or Board has been consulted, and has agreed the basis of resolution;
  - the resolution of the particular individual risk is in line with any strategy agreed by the relevant Contentious Issues Panel or Anti-Avoidance Board as the case may be;
  - there are no unusual or novel features;
  - neither the case nor individual risk are sensitive; and
  - the individual risk is not in litigation or related to litigation in other cases.
14. Exceptionally, the Director with operational accountability for the case may consider that the TDRB's principles are best delivered without reference to

the Commissioners for a decision. In such a case the Director should keep a record (copied to the TDRB secretariat) of the circumstances and, as required, be ready to explain to the Commissioners' satisfaction why a referral was not necessary. This exception cannot, however, apply to any cases within the HRCP.

### *Referrals*

15. Referrals to the TDRB shall be made on behalf of the Director with operational accountability for the case. In particular, a Director is responsible for identifying cases or individual risks for consideration by the TDRB on the grounds that the case or individual risk involves unusual or novel features or is sensitive.
16. Referrals by the TDRB to the Commissioners shall generally be made at the point where there are firm proposals for resolving a case or individual risk.
17. The TDRB may exceptionally refer a case or individual risk to the Commissioners for their consideration prior to any firm resolution proposals being made.

## **Part 2 – Definitions**

**Dispute** has the same meaning as ascribed to it in the LSS. In summary:

'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, including a dispute in relation to pre-transaction or pre-return clearances work;
- a challenge made by HMRC to a customer; or
- 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.

A dispute would not normally cover risk assessment work including situations where customers are asked to provide information before an evaluation can be made of the extent of any risk to HMRC (typically, for example, where an analysis of items in the accounts are requested). Equally a dispute would not include clearance applications in circumstances where further explanation or clarification is required before a decision can be made.

**Individual risk** means a particular transaction (or series of transactions) or an item in a return or declaration which causes risk to past, or present or future revenue flows.

A **Case** is the sum total of all of the individual risks that are not finally concluded at any one time in relation to a particular business (which, for the avoidance of doubt, includes all of its group associates) or individual or other entity. It does not matter in which part of HMRC an individual risk is being dealt with as all individual risks are aggregated for the purpose of determining the value of a case. Where there is only one individual risk in relation to a particular customer that single individual risk will constitute the whole case.

**Tax under consideration** is the amount of tax or duty attributable to an individual risk after taking into account the impact of losses or other reliefs. It is calculated without regard to the strength of the arguments or the prospects of success and is the amount that would arise if the individual risk were conceded in full to HMRC. It should include any penalty which, in HMRC'S view, is potentially payable.

It should also include, where appropriate, the Future Revenue Benefit (FRB) that might arise if the individual risk were resolved in HMRC's favour. Again account must be taken of the impact of losses and other reliefs. Any FRB calculations must be sensible and realistic and any assumptions about levels of profitability and behavioural shift must be evidence-based. FRB projections

should not extend longer than five years. Tax under consideration should be measured at the point of referral. However, where there has been a re-evaluation or recent closure of an individual risk, the advice of the TDRB Secretariat should be sought if as a consequence of those changes a case falls outside the remit of the TDRB.

Whilst interest is not normally included in the calculation of tax under consideration, it should be taken into account where it is a significant factor in the evaluation of the overall amount at risk to HMRC. Typically this would involve enquiries or claims to repayment extending back over earlier years (for example, Fleming claims). Where interest is itself a significant element within any dispute it may be appropriate to refer to the TDRB. The advice of the TDRB secretariat should be sought in all such cases.

**Maximum potential adjustment** is the adjustment to expenditure, receipts, profits, losses, income or gains that would arise if the individual risk to which it relates were conceded in full to HMRC. It is calculated without reference to the strength of the arguments or the prospects of success and is the gross amount of the potential adjustment taking no account of losses or other reliefs.

**Resolution** of any dispute means any decision to resolve that dispute on a particular basis, and includes a decision to take steps that are likely lead to the commencement or cessation of litigation. Resolution proposal should be construed accordingly.

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

### **Part 3 – Composition of the TDRB**

#### **1. Chair**

The Chair of the TDRB is the Director of the Large Business Service.

#### **2. Permanent Members of the TDRB**

The permanent members of the TDRB are:

Director Large Business Service

Director Corporation Tax, International and Anti-Avoidance (CTIAA)

Director Personal Tax Product and Process

Director Solicitor's Office

Director Specialist Investigations

Director Value Added Tax

Deputy Director Local Compliance, Large and Complex

Deputy Head Anti-Avoidance Group

Head CTIAA Technical Team

Deputy Director Specialist Personal Tax

Head of High Risk Corporates Programme Team, Solicitor's Office

High Risk Corporates Programme Leader

#### **3. Quorum**

The TDRB shall not be authorised to make a decision unless there are a minimum of six permanent Board members present at a meeting. Further, no decision is to be taken on any case or individual risk where a permanent member (or their nominated deputy) who is a significant stakeholder in relation to that case or individual risk is absent.

#### **4. Conflict of interest**

Before any case or individual risk is discussed, any person who is present at a TDRB meeting will declare any conflict of interest. In this context a conflict of interest is deemed to include any prior contribution to resolution discussions with the customer or the HMRC team as to the basis on which a case or individual risk might be resolved. Conflicts of interest are to be clearly noted.