

## Comment

## Examining the tax assurance commissioner's latest report

## Speed read

The tax assurance commissioner's latest report contains statistics that confirm what practitioners are seeing when advising clients: it is becoming harder to settle disputes with HMRC. There have been marked reductions both in the number of referrals to governance boards and in the proportion of referrals that are authorised for settlement; the rejection rate has gone up from 23% three years ago to 52% this year. While HMRC's success in litigation justifies a tightening of what it is willing to settle for, taxpayers have also moderated their offers. These trends are therefore unexplained, but they mean that taxpayers with disputes need to pitch settlement offers very carefully.



**Chris Davidson CBE**

KPMG

Chris Davidson is a director in KPMG's tax management consulting group. Drawing on his 40 years' experience, he advises corporate and private clients on all aspects of managing relationships with HMRC, both proactively and reactively, including disputes, tax risk and governance, low-risk ratings and escalation routes. Email: [chris.davidson@kpmg.co.uk](mailto:chris.davidson@kpmg.co.uk); tel: 020 7694 5752.

It looks as though the tax assurance commissioner's latest report, published by HMRC last month (see [www.bit.ly/2ay4BZf](http://www.bit.ly/2ay4BZf)), will be Edward Troup's last. This is the fourth such report and it contains some fascinating detail which throws a light on how HMRC is approaching the task of settling large disputes, especially when viewed as the fourth in a series of reports that plot the development of the role of tax assurance commissioner.

### The tax assurance commissioner

Troup was appointed back in 2012, when his official title was second permanent secretary (i.e. that was his Civil Service grade) and the first tax assurance commissioner. (The role had only been created earlier in 2012, when Lin Homer arrived at HMRC, and Troup was the first occupant of the role.) That was a time when there had been significant criticism of the way HMRC arrived at settlements, especially with large business. There had been accusations of sweetheart deals and the Public Accounts Committee had had a significant amount to say on the subject. There was never any evidence that inappropriate settlements were being reached. (The evidence of a review by Sir Andrew Park on behalf of the National Audit Office reached the opposite conclusion, finding that the settlements Sir Andrew reviewed were all good ones for the exchequer.)

I was at the centre of at least some of this in HMRC at the time, in the Large Business Service, and from mid-2011 as head of Anti-avoidance Group, and I never had any concerns that special deals were being done. Nevertheless, confidence needed to be re-established. Virtually the first decision Lin Homer took on arrival at HMRC was to shake up the governance process, in order to provide assurance that settlements were appropriate. This started in earnest later in

2012 and has been improved over the last four years.

Troup has done such a good job that he has been promoted: he is now the executive chair at HMRC, a full permanent secretary in Civil Service grade terms. More pertinently, he can no longer say that he is at one remove from the cases that go through HMRC's governance process, as he used to be able to. He is now directly accountable for all the staff in HMRC that are involved in investigating and settling cases, from the tax officers on the lowest rungs to the director generals.

There is now, therefore, the potential for a perceived conflict between Troup as the top of the pyramid and Troup as the person providing assurance that the pyramid is delivering the right settlements. Consequently, HMRC is expecting to appoint someone else to take on the tax assurance commissioner role later this year. This will demonstrate that the assurance role is independent of the line management chain in which the settlements are investigated and discussed with taxpayers, not least because public discomfort at some of the outcomes continues to rumble on.

### What does the latest report tell us?

Having given the process a tick in principle, how is it working in practice? The latest report contains some worrying statistics that bear out what practitioners are seeing when advising clients. In short, it is becoming harder to settle disputes with HMRC. Two things in particular are worth focusing on:

- a reduction in the number of referrals to governance boards and the tax assurance commissioner, from around 60 in previous years to 43 last year; and
- a reduction in the proportion of referrals that are authorised for settlement, from over two-thirds two years ago to less than half in the latest year.

The reduction in referrals is intriguing and it is interesting to speculate about what the reasons are.

Perhaps there are fewer cases falling within the criteria requiring reference to one of the senior rungs of the governance ladder: HMRC has already cleared out much of the old stock; and large businesses have settled most of their issues, so they no longer hit the thresholds requiring senior governance approval. That may sound odd but it is the way that governance works. If I have £100m of tax in dispute across several issues, Troup needs to be involved in approving the settlement of any single issue; if I have settled some of them, the remainder may no longer total £100m and I drop down a rung.

Perhaps taxpayers are throwing in the towel, given the statistics HMRC published on the same day as Troup's report, showing that it is winning over 90% of avoidance cases that it litigates (see panel opposite). That ought to cause a jump in the number of settlement proposals, though. So perhaps there has been a change in the remit that has not yet been explained; the latest report notes that there has been a review and that an updated remit will be published in future.

The reduction in taxpayers' rate of success in settlement offers and other referrals (e.g. where the taxpayer maintains the filing position) is very marked. This is by far the most worrying trend that Troup's report reveals. In his first report in 2013, he reported that more than three-quarters of the settlement proposals referred to the Commissioners had been accepted: 17 accepted (six with conditions), as against five rejected. This year, the equivalent figures are 20 accepted, 22 rejected. The rejection rate has climbed each year from 23% to 28% to 45%; and now stands at 52%. This is quite stark and requires some explanation, but no such explanation has been included in Troup's report. When the first report came out, it was plausible to suggest that the governance was doing its job and that some taxpayers had not understood that the

litigation and settlement strategy (LSS) was being enforced properly; hence, the inappropriate offers made in a minority of cases being weeded out. That was the interpretation that seemed most plausible to me and was consistent with my own first-hand experience of participating in the governance when I was at HMRC.

Can it really be credible, though, that taxpayers have got so much worse at pitching their settlement offers within the parameters set out in the LSS? That's not consistent with what I have seen at KPMG in the last couple of years. So it looks as though HMRC has simply tightened its interpretation of what it is willing to settle for. There is certainly justification for HMRC becoming more optimistic, as it sees its success rate in litigation continue to soar. It will now, therefore, be taking the view that it should reject some offers that it might have accepted in the past.

That is how the LSS operates. If HMRC judges on the basis of what it knows today – that a settlement offer is a likely outcome of litigation and that anything better for the exchequer is unlikely – it should accept the proposal to settle. If HMRC later revises its judgment on the basis of new information, it may conclude that a better outcome in litigation is now likely, and the LSS would then justify holding out for that better offer. Taxpayers will equally have been advised that their prospects in litigation are significantly worse than they previously perceived them. Well-advised taxpayers will surely have moderated their settlement proposals accordingly, so that what they offer aligns with the LSS. This is all part of the ebb and flow that is to be expected. It does not even start to explain why the rejection rate has increased so dramatically. Something odd is happening and it would be useful for HMRC to explain it.

### Where does this leave taxpayers with unresolved disputes with HMRC?

Some taxpayers may choose to do nothing, in the hope that the pendulum will swing back and HMRC will not be able to maintain its success rate in the courts. HMRC will doubtless use its new powers, including follower notices and accelerated payment notices, in avoidance cases, to put pressure on taxpayers who adopt this approach. What about those who do not want to wait but prefer to bring their disputes to resolution? They need to choose between heading for litigation, taking a realistic view of their prospects of success, given HMRC's overwhelming record of winning in the courts, especially in avoidance; and engaging collaboratively with HMRC in an open and constructive dialogue.

The key to making dialogue work is to test HMRC's analysis rigorously, with the aim of understanding its perspective, and thereby finding a way to navigate HMRC's red lines to produce a settlement proposal that has the case team's support. This may require a different way of thinking – it's not about what appears rational from a commercial perspective but what best aligns with HMRC's perspective. Obviously, the overall proposal needs to be commercial too, but it's the detail that matters to HMRC. None of this guarantees that the senior governance will accept the settlement, but it maximises the chances, as anything less is very unlikely to lead to resolution given the approach the senior governance is taking. That may be a pessimistic analysis and one conclusion could be that the only hope is to litigate. However, even if you expect it will end in litigation, my advice is to open up a parallel line of communication with HMRC to try to find a way to settle by agreement. You have two chances of getting to an acceptable outcome: through dialogue or through litigation. Make sure you maximise both chances. ■

### Tax avoidance litigation decisions in 2015/16

The following is a list of litigation decisions in 2015/16 where HMRC considered tax avoidance was involved.

Case	Date of decision	HMRC outcome
<i>Next Brand Ltd</i> [2015] UKFTT 175 (TC)	23 Apr 2015	Won
<i>Samarkand Film Partnership No. 3 / Proteus Film Partnership No. 1 &amp; Others</i> [2015] UKUT 211 (TCC)	29 Apr 2015	Won
<i>Foulser / Foulser</i> [2015] UKFTT 220 (TC)	30 Apr 2015	Won
<i>Cater Allen International Ltd / Abbey National Treasury Services Plc</i> [2015] UKFTT 232 (TC)	28 May 2015	Won
<i>Newey (t/a Ocean Finance)</i> [2015] UKUT 300 (TCC)	2 Jun 2015	Lost
<i>Pendragon Plc &amp; Others</i> [2015] UKSC 37	10 Jun 2015	Won
<i>P&amp;O Steam Navigation Company</i> [2015] UKUT 312 (TCC)	19 Jun 15	Won
<i>The Brain Disorders Research Ltd Partnership / Hockin</i> [2015] UKFTT 325 (TC)	2 Jul 15	Won
<i>Abbey National Treasury Services Plc</i> [2015] UKFTT 341 (TC)	14 Jul 2015	Won
<i>Reed Employment Plc &amp; Ors</i> [2015] EWCA Civ 805	28 Jul 2015	Won
<i>Massey (t/a Hilden Park Partnership) / Hilden Park LLP</i> [2015] UKUT 405 (TCC)	28 Jul 2015	Won
<i>GDF Suez Teesside Ltd (formerly Teesside Power Ltd)</i> [2015] UKFTT 413 (TC)	11 Aug 2015	Won
<i>Lloyds Bank Leasing (No. 1) Ltd</i> [2015] UKFTT 401 (TC)	14 Aug 2015	Won
<i>Degorce</i> [2015] UKUT 447 (TCC)	24 Aug 2015	Won
<i>Huitson</i> [2015] UKFTT 448 (TC)	3 Sep 2015	Won
<i>JH Donald (Darvel) Ltd &amp; Others</i> [2015] UKUT 514 (TCC)	5 Oct 2015	Won
<i>Bowring</i> [2015] UKUT 550 (TCC)	12 Oct 2015	Lost
<i>Murray Group Holdings Ltd / Murray Group Management Ltd &amp; Others</i> [2015] CSIH 77	4 Nov 2015	Won
<i>DPAS Ltd</i> [2015] UKUT 585 (TCC)	5 Nov 2015	Mixed*
<i>Travel Document Service / Ladbroke Group International</i> [2015] UKFTT 582 (TC)	19 Nov 2015	Won
<i>Ardmore Construction Ltd / Perrin</i> [2015] UKUT 633 (TCC)	20 Nov 2015	Won
<i>De Silva / Dokelman</i> [2016] EWCA Civ 40	2 Feb 2016	Won
<i>Stagecoach Group Plc / Stagecoach Holdings Ltd</i> [2016] UKFTT 120 (TC)	10 Feb 2016	Won
<i>Hancock / Hancock</i> [2016] UKUT 81 (TCC)	18 Feb 2016	Won
<i>Executors of W Connell</i> [2016] UKFTT 154 (TC)	3 Mar 2016	Won
<i>UBS AG / Deutsche Bank (DB) Group Services (UK) Ltd</i> [2016] UKSC 13	9 Mar 2016	Won

\* Mixed result with the outcome found partially in favour of HMRC across a number of points under consideration.