

Tax Barrister Denounces 'Assessment by Computer Program'

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By Andrew Goodall

HM Revenue & Customs has defended its transformation strategy after a tax barrister claimed that the move to a centralized administration, with liabilities assessed "according to computer program," is detrimental to the rule of law.

Changes driven by a laudable desire for greater efficiency, professionalization, and technical change have led to "the increasing detachment of tax administration from wider public values," David Southern of Temple Tax Chambers told attendees at a conference hosted by the Journal of Tax Administration in London February 26. The journal is sponsored by the Chartered Institute of Taxation and the University of Exeter Business School.

"This process has been detrimental to the rule of law," Southern said. When he joined the Inland Revenue in 1982 it was "still the era of the district inspector of taxes, a much-respected [local] figure," he recalled.

'Abundant Common Sense'

"There was a district tax office where taxpayers could go with their queries and speak to someone, and most issues would be resolved at [the] local level. If that was not possible, you went to the local general commissioners, [who had no] pretensions to knowledge of law or tax, but [had] abundant common sense and fairness," Southern said. "This long-forgotten era largely disappeared in the 1990s. The system was one of decentralized administration, carried on by generalist authorities. It has been replaced by a highly centralized system carried on by specialist offices."

The Inland Revenue merged with HM Customs & Excise in 2005 to form HMRC. "Lay involvement in the working of the tax system disappeared with the demise of the general commissioners," Southern noted. "First we had assessment to tax according to statute. Then we had assessment to tax according to inspectors' manuals. Now we have assessment to tax according to computer program."

An HMRC spokesman told Tax Analysts that like many other organizations, HMRC has taken advantage of technology to automate its processes for the benefit of both customers and staff. "HMRC is transforming into a smaller, more highly skilled organization offering modern, digital services. However, HMRC still provides help to customers through online support, telephone contact centers, and for vulnerable customers, face-to-face contact," he said.

Annual Allowance Calculator

Southern argued that it has become “very difficult for ordinary taxpayers to calculate their tax liabilities with any degree of accuracy or certainty — save by computer program, and it’s not then possible to see how the computer’s result accords with the [legislation].”

Before the introduction of income tax self-assessment in 1996, a taxpayer filed a return and the tax authority assessed the tax liability on the basis of the return, he noted.

Taxpayers using HMRC software to complete self-assessment returns are asked whether they are “liable to pensions tax.” This is a reference to the “annual allowance charge” and the rules are almost incomprehensible, Southern said. Most advisers recommend that taxpayers wishing to check whether they have exceeded the allowance go to HMRC’s online calculator.

“I’ve tried to use this,” Southern said. Some of the results produced by the calculator appear to be “wholly random,” he claimed. “So it really is very difficult to see whether you’ve completed your self-assessment tax return correctly. If you’ve completed it incorrectly or inaccurately, then there’s a consequent risk of penalties.”

“HMRC is doing a great deal to help and support individuals and small businesses when completing their tax returns,” the HMRC spokesman said, adding that “we monitor any issues that arise with our online calculators and correct them promptly.”

Late Filing Penalties

Southern argued that Parliament confers on HMRC powers that are “then programmed into computers so that the results are automatic, and not the result of any decision-making process, save in generic terms.” The ever-increasing volume of tax legislation is becoming increasingly irrelevant, he claimed, because some of those powers are exercised “in a way which makes them into rules.”

Paragraphs 1-5 of schedule 55 to the Finance Act 2009 set out penalties for failure to make tax returns. “Under paragraph 3 there’s an automatic penalty of £100 if you fail to submit your tax return by [the deadline]. Under paragraph 4 there’s a daily penalty of £10 if the failure lasts more than three months. However, according to the legislation, this penalty only arises if the failure continues after a period of three months following the filing date; HMRC decides that such a penalty should be payable and HMRC gives notice specifying the date from which the daily penalty is payable,” he explained.

“In June 2010 HMRC decided that the penalty should be payable in all such cases,” Southern said. “So before the three-month time limit had elapsed, taxpayers who hadn’t filed their returns would be sent a standard letter saying that such a penalty would become payable from three months after the filing date. A computer was programed to send out penalty notices in all such cases.”

Southern argued that HMRC had interpreted the legislation as if it said that, “in the event of failure to file a return by the filing date, where that failure lasts more than three months, the taxpayer shall incur the daily penalty.”

“It’s difficult to see how the programming of a computer to treat all such future cases in this way could be said to constitute a decision, or the giving of notice of the date from which such penalty shall run — unless HMRC is simply allowed to substitute a rule where Parliament has appeared to confer a power,” he said.

But when the Court of Appeal considered the issue in 2016, in *HMRC v. Donaldson*, it decided “that the taking of a generic decision in this way was consistent with the Parliamentary intention,” Southern observed. “This is really tantamount to saying that if a particular procedure is a more convenient and efficient way of doing things, that is what Parliament intended.”

The court decided that “a generic policy decision of the kind taken by HMRC in June 2010” satisfied the requirement in paragraph 4. “It seems to me that it is inherently unlikely that Parliament intended that HMRC should be required to make a decision by exercising a discretion on an individual taxpayer-by-taxpayer basis,” Lord John Dyson, then master of the rolls, said in the [published decision](#).

HMRC said Dyson’s statement supported its approach to automation. “The self-assessment penalty rules are designed to encourage taxpayers to comply with their obligations, and reassure the majority who do comply that they will not be disadvantaged by those who do not,” the spokesman said.

Tax Morale

Southern’s message will strike a chord with many U.K. tax professionals who have concerns about the potential impact of the [Making Tax Digital](#) project.

“HMRC is caught in a bind here. On the one hand, it wants to access all the benefits it can from technology, and automating processes can obviously help,” said Jason Piper, senior tax manager at the Association of Chartered Certified Accountants.

“For many taxpayers, it’s what they’d like — the analogy has been drawn with a smartphone; it doesn’t matter that you can’t understand how it works, as long as it does a good job,” he told Tax Analysts.

“But like all analogies, you shouldn’t take it too far. Tax isn’t like choosing a smartphone — it’s a compulsory state obligation, and one that needs to be dealt with fairly and transparently if taxpayers are going to stay properly engaged,” Piper said.

“It doesn’t help that the underlying rates and rules are getting more, not less, complicated, budget by budget. But if there are problems with the automated processes which get exposed by appeals from well-advised taxpayers, that can only dent the confidence that everyone else has in the system — and that confidence is vital if tax morale is to be maintained,” he added.