

## **Tax Appeals Modernisation**

The Ministry Of Justice recently published a consultation paper setting out its proposals for implementing Part 1 of the Tribunals, Courts and Enforcement Act 2007. The Act contained provisions for a new judicial and legal framework for tribunals, including the creation of two new tribunals, the First-tier Tribunal and the Upper Tribunal into which most existing tribunal jurisdictions (including those for tax) will be transferred. The reform of the tax tribunal system was, however, already under consideration, not least because of the merger of the Inland Revenue and HM Customs and Excise in 2005, which reinforced the necessity for a coherent and unified system for tax appeals.

Chapter 11 of the MOJ consultation paper deals with the modernisation of tax appeals which will, therefore, involve not just a transfer into the new two tier structure but also the bringing together of the different jurisdictions within the tax system following the 2005 merger.

### **Current Tax Appeals Tribunals**

There are currently four Tribunals hearing appeals against decisions made by HMRC:

- **General Commissioners of Income Tax:** The General Commissioners hear the simplest appeals against HMRC direct tax decisions. There are around 2000 of them spread across some 400 geographic divisions in the UK. They are lay people appointed by the Lord Chancellor but they appoint Clerks (who are usually solicitors) to provide administrative support and legal advice. The Clerks are paid fees by the Tribunals Service, which also provides some administrative services.
- **Commissioners for the special purposes of the Income Tax Act:** The Special Commissioners deal with appeals in more difficult direct tax cases and are legally qualified. There are currently 25 Special Commissioners of whom 6 are salaried – the remainder are paid fees. The Special Commissioners cover the whole of the UK although most hearings are held in London, where the Tribunals Service provides administration, with some in Edinburgh, Belfast and other locations where necessary.
- **VAT and Duties Tribunal:** The VAT and Duties Tribunal hears appeals against HMRC decisions on indirect taxation matters (mostly VAT, excise and customs duties). There are 35 legally qualified chairmen and 87 part time lay people. The 25 Special Commissioners also sit as VAT and Duties Chairmen. Members are either salaried or paid fees. The Tribunals Service provides administration services. There are three main hearing centres in London, Manchester and Edinburgh but hearings are also held elsewhere.
- **The Section 706 Tribunal:** This tribunal solely considers appeals relating to s706 ICTA 1988 (anti-avoidance provisions), and the equivalent provisions in s704 of ITA 2007. It meets infrequently and its members are appointed by the Lord Chancellor.

### **The new system**

The new First Tier Tribunal will be large, with approximately 190 judges and 3,600 members. However it will be divided into Chambers (five are proposed) because clearly different skills will be required for dealing with the work of the different existing tribunals which will come together under the new system. One of the proposed five Chambers will be for Taxation. The new Upper Tribunal will also be divided into Chambers – in this case three – of which one will be Finance and Tax. The Upper Chamber will become the appellate body for the first-tier taxation Chamber –taking over from the Chancery Division of the High Court. As a result of this, the consultation envisages that High Court judges from the Chancery Division may sit in the Upper Tribunal Chamber to enhance the status of the chamber and also to “ensure the exchange of expertise in finance and tax matters, which will feed through in due course into the courts”.

### **How will the new tribunals work for tax purposes?**

A key issue in moving the tax appeals system over to the new tribunals is likely to be the need to ensure that the new system is flexible. The consultation document recognises that a large number of tax cases are

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on simple points and do not necessarily require legally qualified personnel to deal with them (such cases would, under the present system, be mainly dealt with by the General Commissioners). Consequently, the consultation document sees a continued role for non-legally qualified individuals within the new system, which might extend as far as having non-legally qualified members of the Upper Tribunal. As well as dealing with the more straightforward cases, though, it is seen as important that those cases which are more complex or “sensitive” are identified quickly so that they can be dealt with appropriately.

It is envisaged that most cases will go initially to the first tier tribunal, with an onward right of appeal to the Upper Tribunal. Any such appeal would only be possible with the permission of the Tribunal and (as under the current system of appeal to the High Court) would be on a point of law. Once a case had been heard in the Upper Tribunal, appeal would be to the Court of Appeal (or the Court of Session in Scotland), again on a point of law. There would be no intermediate appeal from the Tribunals to the High Court as at present. The document notes that “it is the Lord Chancellor’s intention...to prescribe that appeals...to the Court of Appeal will only be permitted in cases of general importance or for other compelling reason” (this will mirror current practice on second-tier appeals).

The consultation document notes that a few cases will be heard directly by the Upper Tribunal without an initial hearing at the first tier level. There is likely to be a prescribed list of types of case to which this would always apply – for example, group litigation cases and lead cases. It will also be possible for taxpayers to request that their case be heard directly by the Upper Tribunal where it gives rise to an important point of law or where it is “likely to reach the Court of Appeal in any event”. According to the consultation paper the Tribunals Service is working with the Tax Appeals Modernisation Project Stakeholder Group to develop these proposals into a detailed design for the new tax appeals system.

### **Costs for Tax Appeals**

Under the current tax appeals system neither the General Commissioners nor the Section 706 Tribunal have the power to award costs. However the Special Commissioners can award costs where a party has acted wholly unreasonably. The VAT and Duties Tribunal does have the power to award costs to a successful party but whilst taxpayers are able to seek costs if they win it has been HMRC policy not to do so in the majority of cases. One aspect of the modernisation of the system will be the introduction of a uniform approach to costs for all appeals heard in the first tier Tax Tribunal. Across tribunals as a whole the most common approach is for each party to bear its own costs but not to be at risk for those of the other side and it was felt that this would be appropriate for most straightforward tax appeals. For many taxpayers this would also mean no change as the General Commissioners cannot award costs under the present system. Therefore, it is proposed that no costs will be the default position for the new system. However the Government is seeking views on whether this position should be modified where either side behaves unreasonably or where the issues involved are substantial or complex.

*4 Eyes Ltd believes that this will have a negative effect on the ability of a taxpayer to dispute a decision of HMRC at the VAT Tribunal. Even relatively simple matters commonly cost c£10,000 to take to tribunal. Whereas HMRC are ‘deep pocket’ litigators who may be happy to take small points to tribunal, many businesses already perhaps subject to enforcement action can find it extremely difficult to raise these costs and in the event that they are successful, deserve to be compensated.*

### **Administration and procedure**

The Tribunals Service (an executive agency of the MOJ) will provide administration for all tax appeals cases and will also provide venues for hearings. It is intended that many tax appeals will be heard locally within reasonable distance of taxpayers’ homes or businesses so a network of hearing centres is planned. The Tribunals Service is discussing the appropriate rules of procedure for tax appeals with the tax modernisation stakeholder group referred to above but it is intended that there will be one standard approach for the new system. The Group comprises representatives of key stakeholders, including the legal and accountancy professions, Low Incomes Tax Reform Group and the Confederation of British Industry (CBI). The General Commissioners and the Clerks are also represented on this Group.

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### **Timing**

The Tribunals, Courts and Enforcement Act 2007 enables the functions of the relevant tribunals to be transferred to the new two tier tribunal system in April 2009. HMRC is currently conducting a separate consultation on Tax Appeals against decisions made by HMRC which includes proposals for transition to the new system.