



# TAXREP 48/15

## (ICAEW REPRESENTATION 131/15)

### COURT AND TRIBUNAL FEES: CONSULTATION ON FURTHER FEES PROPOSALS

ICAEW welcomes the opportunity to comment on the consultation [\*Court and tribunal fees: consultation on further fees proposals\*](#) published by the Ministry of Justice on 22 July 2015.

This response of 24 September 2015 has been prepared on behalf of ICAEW by the Tax Faculty. Internationally recognised as a source of expertise, the faculty is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world.

Appendix 1 sets out the ICAEW Tax Faculty's *Ten Tenets for a Better Tax System*, by which we benchmark proposals for changes to the tax system.

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## COURT AND TRIBUNAL FEES: CONSULTATION ON FURTHER FEES PROPOSALS

### INTRODUCTION

1. ICAEW welcomes the opportunity to comment on the consultation *Court and tribunal fees: consultation on further fees proposals* published by the Ministry of Justice on 22 July 2015.
2. Our comments are confined to the proposals as they affect tax appeals in the First-tier Tribunal (Tax Chamber) and the Upper Tribunal (Tax and Chancery Chamber).
3. We should be pleased to discuss any aspect of our comments and to take part in all further consultations on this area.
4. Previously ICAEW was an active participant in the Tax Appeals Modernisation Stakeholder Group which considered all aspects of the new tax tribunal system prior to its launch in April 2009.

### SUMMARY

5. ICAEW does not agree with the fee proposals for the Tax Tribunals set out in this consultation document.
6. We do not disagree with the general principle of asking users of a tribunal to contribute towards its cost in some cases. However, we have a serious concern that charging fees that are payable up front in the tax tribunals, which are supposed to provide protection for the ordinary citizen against decisions by the state, will prevent access to justice by deterring taxpayers from taking even meritorious cases to the tribunal. This is of particular concern in the FTT, for cases involving relatively small amounts, and for low income or unrepresented taxpayers, and is the reason that costs are not awarded in tax tribunals save in exceptional cases.
7. We also think the proposals present considerable practical difficulties and will increase the costs of running the tax tribunals out of proportion to the fees collected.

### RESPONSE TO CONSULTATION QUESTIONS

8. We are responding specifically to questions 16 and 17 regarding tax appeals in the First-tier Tribunal (FTT) and the Upper Tribunal (UT).

#### **Question 16: Do you agree with the proposed fee structures we are proposing in the First-tier Tribunal (Tax Chamber) and the Upper Tribunal (Tax and Chancery)?**

9. ICAEW does not agree with the fee proposals for the Tax Tribunals set out in this consultation document.
10. We do not disagree with charging fees for major or complex cases, where the taxpayer can afford it. However, we have a serious concern that charging fees will prevent access to justice, particularly in the FTT.

## Access to justice

11. At paragraph 8 of the consultation it is stated: “Access to justice is crucial to the maintenance of an effective and functioning democracy”, and at paragraph 119 that a key aim of the proposal for fees to be charged in the tax (and other) tribunals is that “fees are not a barrier to justice”. We agree with these statements but do not think that the current proposals fulfil that aim.
12. All our members who have made comments about these consultation proposals have voiced strong concerns about the barrier to justice which will be presented by charging fees, particularly for those involving small amounts, such as late filing penalties.
13. Tax appeals are different from appeals between two private parties. The citizen is appealing against a decision made by a government body, which is different from a litigant choosing to pursue a case through the courts. It is important that citizens should be able to challenge decisions of a government body and should not be deterred from taking their cases.
14. It is for this reason – to protect access to justice – that the FTT has a no costs regime. In the consultations leading up to the launch of the new tribunal system, there was agreement that in the FTT (Tax Chamber) no award of costs would be made for or against the appellant, except in limited circumstances including complex cases where the appellant agrees to costs. If costs awards were likely to be a barrier to justice for the tribunal users, the same must apply to the imposition of fees.
15. It is important to bear in mind the history of the tax tribunals. Prior to 2009 most tax cases were dealt with by the General Commissioners, who were unpaid volunteers, and the costs of the hearings were far less than under the present FTT. The General Commissioners’ system had its shortcomings but was generally regarded as accessible to taxpayers and we would have thought relatively cheap to run. The fact that the FTT is more expensive to run than the General Commissioners should have been factored in to the decision to establish the FTT in 2009, and we think it is wrong in principle that taxpayers who wish to challenge decisions of the state should now be expected to pay to do so.
16. We think that an issue fee of £50 for a basic or paper case in the FTT is likely to deter a taxpayer from taking an appeal involving a small amount such as a £100 late filing penalty. If such an appeal goes to a hearing, a £200 hearing fee is even more likely to prove a deterrent. A £500 hearing fee for a standard case is also likely to be a significant deterrent.
17. As well as the impact on individual appellants of charging fees, there is the wider point that cases where the amounts are small may nevertheless involve issues likely to be significant to a large number of taxpayers. An example would be late filing penalties where the taxpayer has a reasonable excuse; FTT cases have built up a useful body of decisions about what constitutes a reasonable excuse, often disagreeing with HMRC’s interpretation. These useful judgements will no longer be available if taxpayers are deterred from taking such cases to the tribunals.
18. The government has decided not to impose fees in the Social Entitlement Chamber or the Mental Health Tribunal, in order to protect low-income and vulnerable individuals in challenging government decisions. We think that the same principles should apply to the FTT (Tax Chamber) which deals with many low-income and unrepresented taxpayers challenging HMRC decisions involving relatively small amounts.

## Basis for charging fees

19. We are not opposed to fees for major or complex cases, where the taxpayer can afford it, but as explained we are very concerned that fees should not present a barrier to justice.

20. We propose that there should be no fees for paper, basic or standard cases. For complex cases, the fees could be tied to the costs regime.
21. In the UT, where cases are likely to be complex and involved substantial amounts, the proposed £100 issue fee and £2,000 hearing fee appear modest, especially in comparison with the FTT fee scales. In order to ensure that a proportion of total costs from users is recovered in line with the government's wishes, we suggest that if our proposal in paragraph 20 is adopted then to compensate consideration is given to charging higher fees in the UT.

### **Practical difficulties**

22. Charging an issue fee for appeals in the FTT presents a practical problem, because it is the tribunal, not the appellant, that determines whether a case is paper, basic, standard or complex. The Tribunal Service decides the case category on the basis of the appeal form. Therefore, when a taxpayer lodges an appeal they cannot know to which category their case will be assigned, and so will not know what initial fee they will incur.
23. The Tribunal Service would, we assume, have to collect the fee after the appeal has been lodged and the case categorised. This will create additional work – and therefore costs – for the tribunal. We seriously question whether the system would be workable.
24. It creates uncertainty for the taxpayer, who does not know what fee they will be charged. This uncertainty is likely to be an additional deterrent to the taxpayer taking their appeal to the tribunal.
25. The tiered structure and the case allocation system, together with the uncertainty this creates for the taxpayer, means that the fee charging structure does not meet the objective of being “as simple as possible” (paragraph 119 of the consultation).

### **Fee remission**

26. The consultation states (paragraph 119) that the usual HM Courts and Tribunal Service fee remission scheme will apply. This is welcome but does not remove the problem of fees presenting a barrier to justice.
27. The income and capital limits are set at a level which means many individual taxpayers and small businesses, although of modest financial means, will not qualify.
28. The application process for fee remission involves a lengthy form and a two-stage means test. Appellants appealing against, for example, a late filing penalty of a few hundred pounds, may not consider it worthwhile to go through the process.
29. The fee remission scheme does not remove uncertainty for the appellant about whether they will be charged a fee, as they will not know that until after they have made the application and the Tribunal Service has made a decision. Therefore, the remission scheme will not, contrary to the statement at paragraph 119, remove the barrier to justice.
30. Operating the fee remission scheme will give rise to additional costs for the tax tribunal, which is contrary to the aim of the fee proposals.

### **Power to reimburse fees**

31. We welcome the proposal for the tribunal to have the power to order that the losing party reimburse the fees paid by the successful appellant (paragraph 116).

32. However, we do not think this will remove the barrier to justice because the appellant has to pay the fee in the first place. It does not remove uncertainty for the appellant because they cannot predict whether, even if they win their case, the tribunal will use its power to order reimbursement.

**Other ways to reduce tax tribunal running costs**

33. We appreciate that the government wishes to keep the cost burden of the tribunals on the taxpayer to a minimum. Charging fees is only one option. And as indicated above, aspects of the current proposals are likely to be counter-productive by increasing the time and resources spent by the Tribunal Service on matters such as collecting fees after case allocation, and operating the fee remission scheme. We recommend that the government looks at other ways to reduce costs.

34. ICAEW members who are also tribunal judges or members have told us that last-minute cancellation of cases is common. This is costly and time consuming for all parties. In particular, we understand that cancellation may be due to HMRC withdrawing an assessment or decision shortly before the listed hearing or failing to provide documents on time. The government should look at the reasons for case cancellations and how they might be avoided.

**Question 17: Are there any types of applications or cases which you feel should be exempt from the fees?**

35. This is covered in the section above, Basis for charging fees.

## APPENDIX 1

### ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. **Certain:** in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.
4. **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. **Properly targeted:** when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. **Constant:** changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. **Subject to proper consultation:** other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. **Regularly reviewed:** the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. **Fair and reasonable:** the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. **Competitive:** tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see via [www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax](http://www.icaew.com/en/about-icaew/what-we-do/technical-releases/tax)).