Tax Faculty

Tax Representation

TAXREP 20/04

Statutory Appeals and Statutory Review – Proposals for rationalising procedures

Response by the Tax Faculty of the Institute of Chartered Accountants in England & Wales to the consultation document dated February 2004 issued by the Department for Constitutional Affairs

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Statutory Appeals and Statutory Review – Proposals for rationalising procedures

INTRODUCTION

1. The Tax Faculty of the Institute of Chartered Accountants welcomes the opportunity to comment on the consultation document issued by the Department for Constitutional Affairs on 13 February 2004, **Statutory Appeals and Statutory Review – Proposals for rationalising procedures.**

2. We confine our comments to tax appeal procedures.

3. This representation paper covers:
   - our general comments
   - some comments which relate specifically to the procedures of the General Commissioners of Tax
   - our answers to the specific questions posed in the DCA paper.

4. We refer throughout to the Department for Constitutional Affairs as 'the DCA' and to their February consultation paper as 'the DCA paper'.

5. We would be happy to take part in further discussions with the DCA on any of the issues we have raised

WHO WE ARE

6. The Institute of Chartered Accountants in England and Wales is the largest accountancy body in Europe, with more than 128,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.

7. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department of Trade and Industry through the Accountancy Foundation. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy (which includes taxation).

8. The Tax Faculty is the focus for tax within the Institute. It is responsible for technical tax submissions on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter **TAXline** to more than 11,000 members who pay an additional subscription.

GENERAL COMMENTS

9. The DCA paper proposes that procedures for appeals from tribunals and similar bodies to the higher civil courts should be rationalised by introducing standard time limits and a permission stage in all cases.

10. We can see that uniformity of time limits and procedures could potentially lead to a more efficient system, with greater clarity and certainty for those who use it. We therefore have no difficulty with the proposed reforms provided they have no drawbacks.

11. However, uniformity should not leave prospective appellants at a disadvantage compared to the system as it currently stands. The Partial Regulatory Impact Assessment ('PRIA') says that the proposed reforms 'will not undermine equity and fairness'. We do not think this is correct in the case of appeals from the General Commissioners. In the next section (paragraphs 20 to 26) we give our detailed comments on why these reforms are not appropriate to the General Commissioners' system in its current form.

12. Regarding time limits for making appeals, we do not object to the principle of a uniform period. But we consider that 28 days may be too short in some cases, and we see no reason why the time limits for statutory appeals and statutory reviews should not be the same, if uniformity is the objective.

13. Regarding leave to appeal, we can see that for taxpayers who have a hopeless case but who want their 'day in court', the refusal of permission to appeal could save them the cost and stress of a hearing in a higher court. This could be to their benefit and would save court time and costs. But as far as we are aware there is very little evidence of weak or unmeritorious tax appeals making their way to the higher courts, other than appeals by taxpayers in person. If a taxpayer in person is aggrieved we think it important that they are given the opportunity to argue their case, and not left feeling that the law has stopped them putting a case before a judge. For this reason we do not believe that a permission filter is appropriate for appeals from the General Commissioners.

14. As indicated above, we think that taxpayers in person raise important issues. Tax deprives a citizen of a proportion of his assets by transferring it to the State. Accordingly, tax is itself an infringement of the basic human right of peaceful enjoyment of one's assets, albeit that it is an infringement for the common good. At the end of the day collection of tax depends on the consensus of the citizenship that it is a reasonably fair impost. We think that the right of appeal where a person feels he is being taxed unreasonably is an important safeguard. The UK has a good record of taxpayer compliance compared with many other countries. There must be a risk that any limitation on the right of appeal would jeopardise this high level of acceptance of the fairness of the tax system.

15. On a specific human rights point, no permission should be required in penalty cases which may be criminal for the purposes of Article 6 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms. A right of appeal should be absolute in such cases.

16. We put forward the view that to a large extent tax appeals (from any of the tax tribunals) are different from most other tribunal appeals in that traditionally many, if not most, appeals are argued before the tribunal either by the taxpayer in person or by an accountant or tax adviser. However, accountants do not have a right of audience before the High Court. Accordingly, if a taxpayer wishes to appeal a decision by one of the tax authorities, and to be represented, he will need to engage a lawyer to pursue the appeal. The approach of the lawyer may well be different from that of an accountant. It is not uncommon for the lawyer to identify fresh legal issues that were not readily apparent to the accountant or tax adviser. Accordingly, where there is a genuine legal issue the appeal to the High Court will often be the first opportunity for the legal issue to be fully argued in legal terms. Again, we think it would be inappropriate for a judge to be able to prevent fresh legal issues from being aired in such circumstances, as the appeal to the High Court could well take a different course to the hearing before the Commissioners. An appeal can of course only be made on a question of law so it is not surprising if the High Court hearing involves far wider legal issues than were before the Special Commissioners.

17. Neither the DCA paper nor the PRIA provide much concrete evidence of the benefits and expected cost savings of the proposed reforms. The PRIA contains some very broad-brush estimates, based on data from the Court of Appeal. The estimate of what percentage of cases would be refused permission is based on Court of Appeal figures for the year ended 30 September – not only is this is old information, but there has been little attempt to analyse whether the High Court situation is likely to be governed by similar factors. Regarding possible cost savings, the PRIA itself says 'It should be stressed that this figure needs to be treated with extreme caution' and we are told that 'no figures of any kind are collected on the cost of appeal hearings in any court'. It does not appear that any allowance has been made for the additional High Court time costs of reading the papers in order to operate the permission filter. Frankly we do not believe that figures prepared in this way can be given much credence as grounds for deciding whether or not to introduce the proposed reforms.

18. The DCA paper says that only about 10% of statutory appeal provisions currently include a permission stage. To introduce a permission stage for the remaining 90% therefore represents a very significant change, which should not be undertaken without better evidence that it will not undermine fairness or equity.

19. Our comments in points 17 and 18 lead us to recommend that before proceeding further, more research is needed on the pros and cons of the proposed procedural reforms and their cost implications. If this information does not emerge from the current consultation exercise we would urge the DCA to undertake it.

COMMENTS RELEVANT TO THE GENERAL COMMISSIONERS

20. Tax appeals need to be split into two categories in considering this issue. Appeals before the VAT and Duties Tribunal and before the Special Commissioners will have been heard by a legally qualified person, as all chairmen of VAT Tribunals have to be legally qualified and so do Special Commissioners.

21. Appeals from the General Commissioners on the other hand have not been heard by a lawyer, other than in some cases by accident as some General Commissioners happen to be solicitors. Furthermore the proceedings before the Commissioners are summarised in a case stated by the Clerk to the Commissioners and, although in practice the taxpayer sees the case stated in draft and can suggest changes, he is not able to insist on them.

22. Accordingly, until the case is heard by the High Court the taxpayer has had no opportunity for the position to be considered by a legally qualified person. In such circumstances a permission filter would mean that a judge who has heard none of the evidence and none of the legal issues would be entitled to deny the right of appeal solely on the basis of the Clerk to the Commissioners' interpretation of what happened at the hearing. There is a considerable number of cases where the High Court has criticised the case stated or has referred a case back to the Commissioners for a further finding of fact. If the High Court, having heard legal arguments, can find itself unable to reach a decision on the basis of the case stated, there seems to be a very serious risk that an attempt to weed out cases on the basis of the case stated would result in cases not being able to proceed which would have been allowed to go to appeal had the case stated been drawn up differently. That seems to us inherently unjust.

23. In consequence we feel that a permission stage is inappropriate in relation to an appeal from the General Commissioners, as the High Court provides the first opportunity for the legal issues to be considered by a legally qualified person.

24. With regard to time limits, the proposed 28 days from the date of the decision is not appropriate for appeals against decisions by the General Commissioners. This represents a much shorter period than is currently available, and does not take into account the way the system currently operates. The potential appellant first has to ask for case stated, within 30 days of the notice of decision. The General Commissioners must usually produce a draft of the case stated within 56 days thereafter, following which there is a further 56 days for representations to be made on the draft. Then, 28 days is allowed for representations to be made on the representations. Only then is the case finally stated and signed. If the taxpayer wishes to proceed with the appeal, they must send the case stated to the High Court within 30 days of getting the final version.

25. This lengthy process is necessary because of the informal nature of appeals before the General Commissioners. There is no case management or compulsory exchange of papers prior to the hearing. It is quite possible, therefore, for an unassisted appellant to arrive at a hearing without witnesses or trial documentation. Such an appellant may need time to prepare a case and, if necessary seek professional advice, before they are in a position to proceed to further appeal. As noted in paragraph 16 above, even if an appellant has been

represented by an accountant, it may be necessary to consult a lawyer before going further. 28 days from the date of the General Commissioners' decision may be inadequate for many taxpayers to decide whether or not to appeal, and to make full preparations.

26. In our view, therefore, appeals from the General Commissioners should continue to follow the present pattern at least until the reformed system of tax tribunals is in place. Any reduction of time limits before that happens would be premature.

27. **ANSWERS TO NUMBERED QUESTIONS IN THE DCA PAPER**

Q1. *Do you agree that the permission filter, which already applies to all appeals between civil courts, should be extended to all those statutory appeals that do not currently have such a requirement in their legislation? If not please say why you think a permission stage is inappropriate.*
Q2. *Are there any specific statutory appeal provisions which should not be subject to a permission stage? If so please specify which provisions you consider should not be subject to a permission stage and why.*

We cannot comment on the merits of a permission filter for appeals other than tax appeals.

We do not consider it appropriate for there to be a permission filter for appeals from the General Commissioners or on matters relating to penalties which may be criminal in nature for Human Rights purposes. See paragraphs 21-23 and 15.

We can see more merit in a permission filter in relation to appeals from the Special Commissioners and the VAT Tribunal. However, we are not in favour of inserting a permission stage purely for the sake of uniformity.

If a permission filter is to be operated, taxpayers (particularly those who are unrepresented) will need to be confident that the higher court is taking a fair view of what is a 'weak or unmeritorious' appeal, and may need guidance on precisely what they need to provide (by way of papers etc) in order for the higher court to consider their application for leave.

Q3. *Do you agree that the permission stage, which already applies to judicial review applications, should also be applied to statutory reviews? If not please say why you think a permission stage is inappropriate.*
Q4. *Are there any specific statutory review provisions, which should not be subject to a permission stage? If so please specify which provisions you consider should not be subject to a permission stage and why.*

We are not aware of any provisions for statutory reviews in tax, and have no comment on this.

Q5. *Do you agree with a common time limit of 28 days for statutory appeals and six weeks for statutory reviews? If not please explain why.*

We support the principle of all uniform time limits – all other things being equal, these give clarity and help to streamline the system.

To comment firstly on the proposed 28 day time limit: for many tax purposes, the standard existing time limit is 30 days. We consider that maintaining consistency within the tax system is more important than obtaining consistency with overall civil appeals. The courts may have to deal with many appeals across a range of legislation, but appellants very rarely have to get involved in other appeal procedures. A 28 day time limit is fairly meaningless to taxpayers or tax advisers and we suggest that a 30 day period is more logical.

In the case of appeals from the General Commissioners, we consider that a 28 day time limit will be inappropriate. See paragraphs 24-26 above.

The present time limit for lodging appeals from the Special Commissioners is 56 days, and we are concerned that halving this to 28 days may not allow enough time to prepare complex cases.

We see no reason why the time limits for statutory appeals and statutory reviews should not be the same, if uniformity is the objective.

Q6. *If 28 days for statutory appeals and six weeks for statutory reviews are inappropriate for common time limits what do you consider to be more appropriate limits?*
Q7. *Are there any specific statutory appeals or reviews for which a different limit might be appropriate? If so which are these, and for each why is a different time limit appropriate and what should it be?*

28 days may be adequate in some cases but not in others. It is likely to be too short to allow proper preparation in complex cases and/or those where the taxpayer is unrepresented. And 28 days may cause confusion with the usual 30 day tax time limits. We do not have a firm view on the best option, but suggest 56 days may serve most purposes.

The time limits and process for appealing from the General Commissioners should not be changed, at least not until the tax tribunals are reformed.

Q8. *Do you agree with the proposals to allow third parties to intervene in statutory appeals provided that the court is satisfied that the third party is a proper person to be heard? If not please explain why not.*
Q9. *Do you agree that third parties seeking to intervene in a statutory appeal should have the ability to seek a pre-emptive order for costs? If not please explain why not.*

We are not convinced that there is a need for third parties to have a right to intervene. The Commissioners and the VAT Tribunal already have power to allow third parties to be joined in. It would be helpful for the DCA to provide a more detailed analysis of this proposal and why it has been made.

Taxpayers should not have to risk having to pay the costs of a third party as a condition of asserting his interpretation of the tax legislation. He is not at risk of having to pay the costs of Customs or the Revenue at Tribunal stage, and the risk of having to pay the costs of the tax authorities on an appeal to the High Court is already a significant deterrent from taking such appeals.

Unrepresented taxpayers, in particular, may be intimidated by the prospect of a third party such a government department not just intervening, but also seeking to have their costs covered regardless of the outcome.