

TAXREP 30/00

REVIEW OF TRIBUNALS

*Memorandum submitted in September 2000 to the Review of Tribunals by the
Tax Faculty of the Institute of Chartered Accountants in England and Wales
in response to a consultation paper issued in June 2000*

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REVIEW OF TRIBUNALS

INTRODUCTION

- (i) We welcome the opportunity to respond to the consultation paper issued on 9 June 2000.
- (ii) The tribunals covered in our response are those that our members are most closely concerned with, namely the General Commissioners of Income Tax, the Special Commissioners of Income Tax and the VAT & Duties Tribunals. For the purposes of this paper the Section 706 Tribunal has been subsumed under the Special Commissioners. We have not considered the Lands Tribunal.
- (iii) We submitted in June 2000 a memorandum (TAXREP 21/00) (available on our website at www.taxfac.co.uk) to the Lord Chancellor's Department in response to the consultation paper 'Tax Appeals' issued in March 2000. Many of the issues arising are common to the two consultation papers and as we considered them in some depth in TAXREP 21/00 we have cross-referred where appropriate in the answers below.
- (iv) By way of general comment we would simply refer to question D1 which asks whether a separate system of tribunals, distinct from the courts of law, continue to be an appropriate way of dealing with at least some cases. We consider that tribunals are invaluable as they are a relatively informal, easily-accessable and relatively inexpensive means of dispute resolution.

CONSULTATION QUESTIONS

A HELPING USERS THROUGH THE SYSTEM

Information

- A.1 What information do users need to decide whether to bring a case to a tribunal, how to gather their evidence, and how to present it effectively? (The review would particularly welcome views from users on good practice.)

Users need to be aware of, inter alia, the tribunal procedures including those for getting cases listed for hearing and covering the conduct of hearings, the sort of cases that the tribunal deals with, the results of past cases and the extent to which they create precedents, whether there is any right of appeal, how much it will cost, the regard in which the tribunal is held, what sort of people are on the bench and whether it is necessary to be represented and when and where the tribunal sits. By way of illustration we would refer to our questions and answers guidance note on General Commissioners issued in June 2000 (TAXGUIDE 4/00) (available on our website at www.taxfac.co.uk).

- A.2 How should that information and advice be provided: by original decision-makers; by tribunal staff; written and Information and Communication

Technologies (ICT) material; or by advisory services?

Tribunal staff are best placed to originate such information and ensure that such information is accurate.

- A.3 What arrangements should be made to ensure that good quality information and advice reaches the right sectors of our diverse community?

Good quality information should be freely accessible. As well as being available in hard copy from the tribunal offices, it should be distributed to professional bodies for passing on to members and at post offices, libraries, citizens' advice bureaux, etc. In addition such information should be able to be downloaded from the internet.

Practical help

- A.4 What other advice and support do users need if they are to prepare or present their own cases effectively?

Most users need assistance, on tribunal procedures, tax law and advocacy. Few ever need to use a tribunal and so have no reason to be aware of the procedures. Tax law is complex and most people do not understand it. Even where the case is one where the tribunal is being asked simply to make a finding of fact, most people do not have the necessary advocacy skills to argue successfully the merits of their case.

- A.5 Are there kinds of cases which users cannot be expected to prepare or present unassisted? What are they, and what are the problems they face when dealing with cases themselves?

In order to prepare and present successfully a case, in particular if it involves interpretation of tax law, it is sensible for taxpayers normally to seek advice from and be represented by an accountant or lawyer.

- A.6 What kinds of advice and assistance should there be to help with these?

We consider that users should where necessary seek professional help. This in many cases is relatively inexpensive.

Should there be limitations on the parties' right to advice or representation, for example to keep procedures informal?

There should be no limitations on the right to advice or representation. The right to justice is fundamental and should never be sacrificed for the sake of administrative convenience (as is happening in the Supreme Court by way of the reduction in the right to trial by jury): this includes the right of appellants to right to advice or representation. Whilst the informal way in which most tax tribunals conduct themselves is designed to, and does, put appellants at their ease, care needs to be taken not to confuse informality with sloppy procedures.

For example, allowing the inspector of taxes to open the case where an appeal is being heard before the Commissioners or allowing him to remain with the Commissioners between hearings is not acceptable.

- A.7 Since Franks, the general rule has been that tribunals should not normally have the power to award parties the costs of legal representation (except possibly when the other side has behaved unreasonably, or abused the tribunal's processes). Does this remain an effective way of controlling the use of legal representatives? Are there tribunals, or areas of work, where it is no longer appropriate, or has created problems?

We would not like to see a change in the general rule as regards costs. Although there is a perception that sometimes the revenue departments take cases that are not cost effective, that is to say, the tax at stake is not worth the legal costs, we feel that on the whole the rule works well and should be retained. This is expanded in our submission in June 2000 to the Lord Chancellor's Department on tax appeals (TAXREP 21/00).

- A.8 What information is available about how much it costs to bring or defend a case, and any costs of complying with the requirements of the tribunal's system or procedures?

We have no information on this matter.

B AN ACCESSIBLE SYSTEM OF TRIBUNAL JUSTICE

Procedures

- B.1 Are there tribunals in which it has now become difficult for the parties to act without legal assistance or representation? (This may have happened for a variety of reasons. It may not necessarily be a bad thing.)

As noted in A4, A5 and A6 supra, we consider that to have a chance of succeeding before the tax tribunals many taxpayers need to be professionally advised and represented. However, we recognise and welcome the fact that many tribunals do go out of their way to assist unrepresented taxpayers and would be concerned if people who are not represented were barred from appearing before the tribunals.

- B.2 Where there are problems, can the process be managed or reversed?

See reply to A6.

- B.3 How can practice and procedure be improved to make it easier for users to prepare and present their own cases? (The review would particularly welcome examples from users of good practice.)

See reply to A6.

- B.4 Are there barriers, for some users or for all, which make it difficult for them to attend or to participate in hearings, where that is appropriate?

Barriers may be, inter alia, social, intellectual, psychological, or simply that the timing of hearings, ie during the normal working day, may prevent appellants who work from appearing.

- B.5 What are the respective advantages and disadvantages of oral and written procedures?

In order to ensure fairness for all parties, procedures should always be codified in writing.

If the question is intended to refer to proceedings, then written proceedings will obviate the need for personal attendance by the appellants and may enable the tribunal to reach a more speedy decision based on the papers, but they do prevent the opportunity for cross examination and seeing the parties which may result in the whole truth being not available to the tribunal. Whilst there may be a perception that oral proceedings mean that the arguments are less considered as the parties have to think on their feet, professional cross examination in person is more likely to ensure that the whole truth is made available to tribunal members on which they can base their decision.

- B.6 Are there particular or general pressures pointing towards greater formalisation? How can they be managed and/or reduced?

The current level of formalisation is about right. People today have less time and so the administration and proceedings of tribunals need to be efficient. However, any increase in speed should not detract from the fundamental right to a fair and impartial hearing.

- B.7 Can the structure or procedures of tribunals be simplified, for example by separating cases which turn on facts from those with a significant element of law?

As we suggested in our June 2000 submission to the Lord Chancellor's Department on tax appeals (TAXREP 21/00), consideration should be given to expanding the remit of the General Commissioners to include VAT reasonable excuse cases. In this event, the Commissioners and administrators would need to be provided with appropriate (and adequately-funded) training.

- B.8 Do tribunals handle cases quickly enough? Do they have the procedural tools, and any necessary sanctions, to manage cases and hearings effectively and quickly, having regard to the nature of the work?

We are content with the handling of cases by the tax tribunals.

- B.9 Does the objective of a tribunal system, simple and informal enough for the citizen to be able to use it without assistance, remain realistic?

See reply to B1.

Service provision

- B.10 Are there other ways in which convenience and accessibility to the full range of tribunal users can be increased?

The main factors are covered above.

- B.11 Are there problems for:
- a. access;
 - b. the quality of the judicial process;
 - c. the support services; or
 - d. speed
- in the way hearings are currently set up and administered?

We are content with the set up and administration of the Special Commissioners and the VAT & Duties Tribunals. The administrative structure of the General Commissioners needs to be updated and the quality of the judicial process is variable. We expand on this reply in TAXREP 21/00.

- B.12 Are there any circumstances where access to tribunals should not be free?

No. Access to justice is a fundamental right, subject to the right of the tribunal to award costs against vexatious litigants as referred to in A7.

- B.13 Where access to a tribunal is not currently free, how does the imposition of a fee affect the user's rights and choices in bringing a case?

As access to tax tribunals is currently free, this question is not directly applicable to tax tribunals, and as mentioned above we consider that access should continue to be free. However, the quantum of professional fees does influence a taxpayer's decision to involve a tax tribunal: such considerations are of no consequence to the revenue departments.

C PREPARING FOR THE INFORMATION SOCIETY

- C.1 What are examples of good practice in the use of ICT in particular tribunals?

We have no comment on this item.

- C.2 To what extent are users and the advice services already taking advantage of ICT?

We have no comment on this item.

- C.3 What are the implications of the Modernising Government initiative for the future of the tribunal systems?

We have no comment on this item.

- C.4 In what ways can ICT improve, streamline and render more efficient the current tribunal system (for example, better document management systems)?

See reply to C5 infra.

- C.5 In what ways can ICT create new ways of administering and providing tribunal services (for example, using the Internet)?

As recommended in our June 2000 submission TAXREP 21/00, each tribunal should have a dedicated website including as a minimum details of procedures, and requests for hearings to be listed and communications with the tribunals administrative services generally should be able to be made via e-mail.

- C.6 What fundamental challenges for the provision of tribunal services are presented by the emergence of the Internet-based information society (for example, new types of problem or dispute and new ways of individuals interacting with the state)?

We have no comment on this item save to reiterate our comment in TAXREP 21/00 that we do not favour 'e-room' hearings.

- C.7 How can these developments be delivered for those who do not have direct access to ICT?

We have no comment on this item.

D A COHERENT SYSTEM OF TRIBUNAL JUSTICE

- D.1 Does a separate system of tribunals, distinct from the courts of law, continue to be an appropriate way of dealing with at least some cases? What are its advantages and disadvantages? What sort of cases does it handle best?

Tribunals are invaluable as they are a relatively informal, easily-accessable and relatively inexpensive means of dispute resolution.

- D.2 Could some of the cases currently decided by tribunals be more effectively handled elsewhere (in the ordinary courts, by a different tribunal or an ombudsman, by alternative dispute resolution, etc)?

On the whole we consider that the tax tribunals are appropriate for tax cases and in particular that the General Commissioners are the appropriate forum for handling minor cases.

- D.3 Are there areas of law where citizens have no, or insufficient, right of appeal, for which recourse to a tribunal would be appropriate?

As noted in TAXREP 21/00, the VAT & Duties Tribunals cannot hear an appeal on VAT unless it is within the classes permitted under section 83, VAT Act 1994. Other matters that are currently outside the jurisdiction of the tax tribunals are appeals which raise issues depending on the application of extra-statutory concessions and the application of certain secondary legislation. These and other matters can only be adjudicated on by way of judicial review. The jurisdiction of tax tribunals should be extended to include any dispute between a taxpayer and the revenue authorities.

- D.4 Could greater coherence be given to the current arrangements by amalgamating or grouping tribunals?

As noted in TAXREP 21/00, whilst the administration of the Special Commissioners and the VAT & Duties Tribunals is handled efficiently by a combined service, the different attributes of the tax tribunals mean that amalgamation of the tribunals themselves is unlikely to be beneficial.

- D.5 What kinds of grouping, for example by:

- a. area of law;
- b. nature of dispute - for example disputes between individuals; appeals against state decisions or actions; licensing; regulation of goods or services;
- c. first instance and appellate tribunals; or
- d. size of caseload

might be adopted?

See replies to B7 and D4.

- D.6 What would be the advantages, and disadvantages, of such groupings?

See replies to B7 and D4.

- D.7 Are there factors which would inhibit moves to a very simple, or even single, structure?

See reply to D4.

E A WELL-SUPPORTED SYSTEM

- E.1 Do the current systems of administrative support meet the needs of tribunals and users?

We are content with the set up and administration of the Special Commissioners

and the VAT & Duties Tribunals. The administrative structure of the General Commissioners is variable and needs to be updated. We would refer you to our June 2000 submission TAXREP 21/00.

- E.2 What are the advantages and disadvantages of government departments with policy responsibilities also providing administrative support and funding to the relevant tribunals?

As noted in TAXREP 21/00 the tribunals are supposed to be independent of the revenue departments and it would inhibit users' perception of the tribunals' ability to dispense justice if administrative support or funding were provided by the government department with policy responsibility. The fact that the Revenue currently provides administrative support for certain Divisions of General Commissioners is a case in point.

- E.3 Are tribunals seen to be clearly independent and impartial? If greater independence is needed, what is needed to achieve it?

See reply to E2

- E.4 What mechanisms are necessary to ensure that the tribunal system works effectively to identify possible problems (and possible solutions) in:
- the substantive law;
 - departments' systems for decision-making;
 - how decisions are notified to customers; or
 - other departmental systems for delivering services?

The mechanisms currently in place for the Special Commissioners and VAT & Duties Tribunals are satisfactory, save that the VAT reports are regularly corrected. This causes inconvenience to users, which is exacerbated by the absence of highlighting of the changes in the amended versions.

- E.5 What are the respective responsibilities of tribunal members and administrative managers within a tribunal system? Can the allocation be improved?

In a lay tribunal such as the General Commissioners the job of the Commissioners is to dispense justice and the jobs of the Clerk and the administrators are to advise on the law and ensure that the hearings take place and the right people and papers are present. In technical tribunals such as the Special Commissioners and the VAT & Duties Tribunals the job of the tribunal members is to dispense justice and the job of the administrators is to ensure that the hearings take place and the right people and papers are present. As noted in TAXREP 21/00, we consider that this allocation is appropriate.

- E.6 Are there sufficient career and development opportunities in the area of tribunal work to ensure an adequate supply of properly trained staff?

We have no comment on this item.

F AN EFFECTIVE FRAMEWORK FOR DECISION-MAKING

Structures

- F.1 What facilities do the tribunal members need to ensure that the system works effectively, that cases are effectively allocated within a tribunal, and there is sound and consistent decision-making?

Tribunal members need appropriate administrative support, and personal attributes and training (see TAXREP 21/00).

- F.2 What are the principles which should help to determine whether particular tribunal systems should have a further second-tier appeal stage attached to them? When, if at all, should appeals go straight to the courts of law? Should any rights of appeal be limited to points of law?

As recommended in TAXREP 21/00, we consider that appeals from any tax tribunal should be to the Supreme Court and that appeals from the tax tribunals to the Supreme Court should be as of right (human rights considerations may well render redundant the need to obtain permission). We do not think that any intermediate stage before going to the Courts would serve any useful purpose.

- F.3 Does the current:
- a. composition (including qualification and training);
 - b. organisation;
 - c. procedure; or
 - d. any other factor

make it difficult for some tribunals, or all, to make decisions which carry the necessary authority?

Special Commissioners and members of the VAT & Duties Tribunals have the necessary authority. The authority of the General Commissioners varies. In some Divisions it is undermined by a perception that they are 'too close' to the Revenue, for example where the Revenue carries out tasks such as sending out the hearing notices, and the appointment procedure of members and Clerks is perceived to be secretive. See also TAXREP 21/00.

Jurisdiction and remedies

- F.4 Are there particular tribunals whose jurisdiction is too wide, or too narrow?

See reply to D3.

- F.5 Are there areas where tribunals are undesirably limited by the remedies available to them?

We are content with the remedies currently available to the tax tribunals.

- F.6 Could the range of remedies available to those who have a dispute to be resolved usefully be widened e.g. to allow tribunals to refer cases to mediation, or to supervise negotiated settlements, or to embrace other forms of Alternative Dispute Resolution (ADR)?

We are content with the remedies currently available to the tax tribunals.

- F.7 Like other parts of the civil justice system, tribunals have to deal with many different kinds of dispute. Do their :
a. jurisdiction and remedies;
b. procedures;
c. management tools and processes
fully reflect that? If not, how can they be improved?

We are content with the remedies currently available to the tax tribunals.

The development of the law

- F.8 Are the jurisdictional boundaries between the tribunal system and the ordinary and higher courts as clear as they should be?

We are content with the current boundaries.

- F.9 Do they provide a practical, proportionate and sufficiently expert mechanism for the coherent development of the law?

In practice the Special Commissioner and VAT & Duties Tribunals do, but we are not aware that, strictly speaking, tribunal decisions can create precedents.

- F.10 In particular, can the appeal routes from tribunals be rationalised?

See reply to F2.

G GETTING THE RIGHT MEMBERS

- G.1 Do the current arrangements ensure an adequate supply of:
a. legally qualified tribunal members; and
b. non-lawyers in a tribunal;
c. with the right capacities and skills for the tasks; and
d. adequately representative of the community?

See reply to F3 and TAXREP 21/00.

- G.2 If not, what changes in any of:
a. responsibilities for appointment;
b. recruitment procedures;

- c. career structure for members;
 - d. qualifications for appointment; and
 - e. any other matters
- would improve on the current position?

See reply to F3 and TAXREP 21/00.

- G.3 In particular, what is the distinctive role of non-lawyers - both those with other professional qualifications and other lay persons - in the work of tribunals? How is that role to be specified, in appointment criteria and elsewhere? Do non-lawyers need distinctive appointment procedures?

Members of tax tribunals who are not lawyers are appointed usually because they have business experience or specialist knowledge. In broad terms, General Commissioners have the former qualification (this is expanded in TAXREP 21/00) and Special Commissioners and members of the VAT & Duties Tribunals have tax/VAT knowledge.

H PROPER TRAINING

- H.1 What sorts of training do tribunal members need to act effectively as chairmen and chairwomen or as members in their various roles?

*All tribunal members should receive regular training with an emphasis on the practical but with an element of the theoretical. This is expanded on in TAXREP 21/00 (Question 3) in the context of General Commissioners but the comments apply *pari passu* equally to other tax tribunals.*

- H.2 Who should be responsible for:
- a. setting broad policy and approaches for training;
 - b. determining the detailed content of training courses; and
 - c. delivering training?

The Lord Chancellor's Department should have overall responsibility for training tax tribunals – and ensuring that it is properly financed. See also TAXREP 21/00.

- H.3 How should the effectiveness and value for money of the training that is provided be tested?

The proof of the pudding is in the eating: we would therefore suggest that consideration be given to having impartial and independent assessors sit in on hearings.

- H.4 What training is needed for tribunal support staff? How is that best determined and delivered?

As in any organisation, all support staff should receive regular training with an emphasis on the practical but with an element of the theoretical.

I ADDING NEW JURISDICTIONS

- I.1 What principles should determine whether a specific right of appeal is required for any particular class of administrative decisions? Are there areas, or types of case where judicial review will be preferable?

We have no comment on this item.

- I.2 What principles should determine whether any such appeal is to be heard by the ordinary courts, or by a tribunal? And by an existing or a new tribunal?

We have no comment on this item.

- I.3 What arrangements are needed to ensure that any new appeal right is heard:
- a. by tribunal members of the right kind and level of expertise;
 - b. with appropriate procedures and information systems;
 - c. with effective administrative arrangements; and
 - d. with an appropriate system of further appeal, if necessary?

We have no comment on this item.

J TESTING HOW THE SYSTEM PERFORMS

- J.1 What arrangements should there be for setting standards of customer service, and of user satisfaction, for tribunal systems?

Standards should be set in consultation with tribunal members, administrators and users. Consultation should include informed consultative committees, such as the VAT & Duties Tribunals Users Group, and customer satisfaction questionnaires.

- J.2 What arrangements should there be for ensuring that these standards are met, and reporting on performance?

See reply to J1.

- J.3 Should there be arrangements for standards of consistency in the decision-making of tribunals?

We have no comment on this item, save that any arrangements should not compromise the independence of the judiciary.

- J.4 What arrangements should there be for ensuring that those standards are met, and reporting on performance?

See reply to J3

- J.5 What other arrangements or institutions are needed to help Government and users get a clear picture of how well the system is working and how it should be developed or reformed?

See replies to J1 and J3.

K THE SYSTEM AND ITS COSTS

Omitted, as questions are for consideration by government departments only.

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