

TAXREP 93/08

DRAFT TRANSFER OF TRIBUNAL FUNCTIONS AND REVENUE AND CUSTOMS APPEALS ORDER 2009

A Parliamentary Briefing prepared on 11 December 2008 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales about the draft Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.

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INTRODUCTION

1. The draft Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 was laid before Parliament in December 2008 and is intended to come into force on 1 April 2009.
2. The Tax Faculty prepared a Parliamentary Briefing for Ministers and MPs which highlights some key aspects of the Order together with our recommendations. This TAXREP contains the text of the briefing.
3. The Tax Faculty is an active participant in consultations on the reform of the tax tribunal system. We are represented on the Ministry of Justice's Tax Appeals Modernisation Project Stakeholder Group and on HMRC's Tribunals Reform Stakeholder Group.
4. We responded to the June 2008 consultation on the previous draft of this Order in our TAXREP 56/08. We are pleased to note that some of our recommendations have been reflected in the current draft Order, but others have not been adopted and remain relevant as detailed below.
5. Information about the Tax Faculty and the ICAEW is given in Annex A. We have also set out, in Annex B, the Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark proposals to change the tax system.

KEY POINTS SUMMARY

6. The ICAEW supports the idea of HMRC reviewing its decisions when taxpayers are in disagreement.
7. However, taxpayers and advisers need greater clarity as to how a review will be conducted, and what its scope and purposes are, in order for them to have confidence in the review process. The legislation as currently drafted does not provide a satisfactory level of confidence.
8. The ICAEW supports a reduction in the review period for cases affected by the transitional rules to 45 days. We are concerned that a review period of effectively 120 days (30 for HMRC to start the review and 90 to complete it) is likely to deter some taxpayers from seeking a review.
9. We are concerned that the requirement for a person to make an 'appeal' to HMRC and subsequently notify the Tribunal seriously undermines the perception of a Tribunal independent of the decision-making department – a principal recommendation of the *Leggatt Report*. The term 'appeal' should only be used in connection with representations to the Tribunal, not HMRC.
10. The ICAEW calls for either further, more detailed, provisions about the conduct of reviews, subsequent to the current draft Order; or for the Minister to make a statement about the framework and safeguards for the HMRC review process.

OVERVIEW OF THE ORDER

11. The Order is being made jointly on behalf of the Ministry of Justice and HM Revenue & Customs (HMRC), under provisions of the Tribunals, Courts and Enforcement Act 2007 and s124, Finance Act 2008.
12. The Order has three principal functions.
13. Firstly, it abolishes the existing tax tribunals and transfers their functions and judiciary (except the General Commissioners of Income Tax) to the new two-tier Tribunal system, which is planned to take effect for tax from 1 April 2009. It also makes consequential amendments to the Taxes Acts to reflect this transfer. For example, the Order changes the terminology throughout tax legislation to substitute as appropriate 'First-tier Tribunal' or 'Upper Tribunal' for the names of the existing tax tribunals. It also removes provisions about tribunal procedure, which will now be dealt with in the rules for the tax chambers of the new tribunals.
14. Secondly, it introduces into statute a new review procedure. The taxpayer will be able to request a review by HMRC of all appealable decisions made by HMRC once the new tribunal system is in force (i.e. on or after 1 April 2009). This new procedure, coupled with the new tribunal structure, also requires changes to the appeals procedure between the appellant, HMRC and the Tribunal.
15. Thirdly, it makes provision for payment and repayment of tax in line with tribunal decisions, and removes the ability of the VAT and Duties Tribunals to decide rates of interest.
16. Finally, the Order sets out transitional provisions for current cases that come before any of the existing tax tribunals when the new system comes into effect.

TRANSFER OF TRIBUNAL FUNCTIONS

17. The ICAEW supports the overall objectives of the current reform of the tribunal system, and we accept the need to align procedures for different heads of tax. However, it is important that the new system should be clear and easy for appellants to understand and use, and does not present any barriers to justice – for example, appellants must not be deterred by increased formality of proceedings, increased administrative requirements in presenting a case, or difficulty of getting to a tribunal centre.
18. We have no comments on this aspect of the draft Order. We hope that our concerns about the accessibility of the Tribunal will be reflected in the procedural rules and in guidance provided by both the MoJ and HMRC, all of which are the subject of consultations.

ADMINISTRATION OF APPEALS

19. The draft Order provides that for direct taxes, there will be a two-stage process: a person who disagrees with an HMRC decision will initially make the appeal to HMRC, and then notify the appeal to the Tribunal if he or she wishes to proceed to hearing. The initial appeal is made before the review (if there is one) takes place. For indirect tax, an appeal is made to the Tribunal, either in respect of the initial

decision or (if there is a review) in respect of the review decision. (The review process is discussed in the next section.)

20. One of the aims of reform was to align procedures for direct and indirect tax. It is therefore unfortunate that in fact we will have two different procedures, one for direct and one for indirect tax, regarding how and when an appeal is made. One of the benefits of a single Tax Chamber of the Tribunal is that where the same issue arises, for example for, income tax and VAT (a common occurrence where HMRC is contending that a person has understated his trading income), both matters can be disposed of in a single hearing. It will be confusing to taxpayers if they have to 'notify' an income tax appeal to the Tribunal but make a direct appeal to the Tribunal in relation to VAT.
21. We think it important that the tribunal should be seen to be wholly independent of HMRC, and this was one of the main recommendations of the Leggatt Report. We are concerned that this has been lost sight of in devising the administrative procedure for direct tax appeals. For this reason, we are strongly opposed to the concept of a person 'notifying an appeal to the Tribunal'. Requiring a person to make an appeal to HMRC and subsequently notify it to the Tribunal seriously undermines the perception of independence. The fact that it is now the appellant, and not HMRC, who passes appeals to the Tribunal for listing undermines the perception of the independence of the Tribunal. Appellants will still (as now) send their direct tax appeals in the first instance to HMRC, and the concern is that they will (as now) commonly perceive that HMRC is in charge of the appeals process.

22. Recommendations

- We repeat our previous recommendation for a two-stage process in which a taxpayer gives notice of his or her disagreement with a decision (the term could be 'disagreement' or 'objection' but not 'appeal') to HMRC at stage 1, and appeals to the Tribunal at stage 2 if the matter cannot be resolved. Thus the word 'appeal' would only be used in connection with appeals to the Tribunal.
- HMRC has responded to these concerns in its November 2008 document Tax Appeals against decisions made by HMRC Summary of Technical Responses by explaining the practical difficulties of changing terminology in this way, and noting that the counter-argument is that changing a well-known term like 'appeal' could itself lead to confusion.

REVIEW BY HMRC

23. The ICAEW broadly supports the idea of HMRC reviewing its decisions when the taxpayer is in disagreement. However, the ICAEW believes that the draft legislation will not provide taxpayers or financial advisers with a satisfactory level of confidence in the robustness of HMRC's internal review process.
24. An effective, robust, even-handed review could be helpful to taxpayers. We are pleased to note that a number of recommendations made in earlier consultations have been adopted:
- The review will be the taxpayer's right but will be at the taxpayer's option and not compulsory.

- HMRC is required to consider taxpayer representations.
 - HMRC is required to give reasons for its decision following a review.
 - All appealable matters can be reviewed (not just those for which an onward appeal right exists).
 - The taxpayer has an extended time limit to appeal to the tribunal where HMRC fails to respond at the end of the review period.
 - For VAT, third parties who could appeal also have the right to a review.
25. However, the draft legislation deals in very brief terms with the statutory framework for the way in which HMRC carries out the review; nor does it define the purpose of the review. For the internal review to be effective it is essential that it is meaningful and that taxpayers and advisers have confidence in it. We do not believe that the legislation as drafted will provide this.
26. Paragraph 30, Schedule 1 of the draft Order inserts new sections 49A–I in the Taxes Management Act 1970. These set down the right to a review, the time limits for conducting the review and notifying the appeal to the tribunal. Section 49E(2) says that: ‘the nature and extent of the review are to be such as appear appropriate to HMRC in the circumstances’. We are concerned that this appears to be saying that a review is whatever HMRC wants it to be in any particular case. The appellant has no statutory yardstick against which to measure the way HMRC is conducting his or her review and, therefore, no remedy if he or she thinks it is not being done properly.
27. We appreciate that HMRC may want some flexibility in devising the procedures for conducting reviews. We note that at para 2.12 of its response document HMRC says: ‘We consider that the wide variety of decisions made by HMRC ... means that a more specific statutory definition of the extent and nature of review is not practical’. It also says that details of the review process will be in published guidance.
28. We do not accept this. The difficulty with guidance is that it has no statutory force, and it can be changed or withdrawn. It should be possible to include key features of the review process in law. We accept that guidance is appropriate to expand on the details.

29. Recommendations

- Firstly, we think that the legislation should make clear what a review is, and what is its scope and purpose.
- Secondly, there should be a statutory requirement on HMRC:
 - For the review to be undertaken by someone unconnected with the case.
 - To notify the taxpayer that the review has started.
 - To give the taxpayer contact details for the reviewer.
 - To ask the taxpayer if he wishes to make any points to the reviewer to clarify or reinforce what he has previously told the officer (at present, the reviewer just has to take account of ‘any representations made by the appellant at a stage which gives HMRC a reasonable opportunity to consider them’).
 - To monitor the internal review process and publish statistics.

TRANSITIONAL PROVISIONS

30. Para 5, Sch 3 provides that for direct tax, where an appeal has been made to HMRC before the commencement date but not yet passed to the tribunal, the decision will qualify for an internal review. This is to be welcomed.
31. However, the time allowed for review in these cases is 90 and not 45 days. We are concerned that a period of 120 days (30 for HMRC to start the review and 90 to complete it) is likely to deter some taxpayers from seeking a review.

32. Recommendations

- We would prefer the review period to be 45 days where there is an appeal with HMRC at 1 April 2009, but with the option for HMRC to take 90 days where there is a good reason.
- The question also arises as to how taxpayers, who may have made an appeal some while before 1 April 2009, will know about the new review option. We understand that HMRC is planning publicity about this, but in our view it should be mandatory for every HMRC case-worker to tell affected taxpayers about the review option.

IMPLEMENTATION OF RECOMMENDATIONS

33. Now that the draft Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 has been laid before Parliament, it cannot be amended. It can either be accepted by affirmative resolution, or rejected.
34. This raises the question of how any recommendations might be implemented. ICAEW therefore calls for improved safeguards about the review process, either through:
- Making further, more detailed, provisions about the conduct of reviews, subsequent to the current draft Order - 124, FA 2008, gives a fairly wide power to make provision by statutory instrument 'for and in connection with reviews' and 'in connection with appeals against HMRC decisions'; or
 - The relevant Minister to make a statement about the framework and safeguards for the HMRC review process.

FURTHER INFORMATION

35. Please contact the ICAEW if you require any further information:

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11 December 2008

ANNEX A

THE ICAEW AND THE TAX FACULTY: WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales (ICAEW) 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.
2. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department for Business, Enterprise and Regulatory Reform through the Financial Reporting Council. 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, including taxation.
3. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations 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 of the ICAEW who pay an additional subscription.
4. To find out more about the Tax Faculty and ICAEW including how to become a member, please call us on +44 (0)20 7920 8646 or email us at taxfac@icaew.com or write to us at Chartered Accountants' Hall, PO Box 433, Moorgate Place, London EC2P 2BJ.

ANNEX B

THE 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 www.icaew.com/index.cfm?route=128518).