

## **TAXREP 21/00**

### **TAX APPEALS**

*Memorandum submitted in June 2000 to the Lord Chancellor's Department by the  
Tax Faculty of the Institute of Chartered Accountants in England and Wales  
in response to a consultation paper issued in March 2000*

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## **TAX APPEALS**

### **INTRODUCTION**

1. We welcome the opportunity to comment on the consultation paper issued in March 2000. The subject is of all the more interest to us as we issued earlier this month (June 2000) a 'questions and answers' guidance note on the General Commissioners (TAXGUIDE 4/00).
2. The involvement of our members with the appeals tribunals is largely as a user of the system. Therefore, although certain of our members are General Commissioners or are otherwise involved in the service, the viewpoint that we have adopted in this memorandum is that of the 'customer', whether as advisor or taxpayer.

### **GENERAL COMMENTS**

3. We support the thrust and many of the specific recommendations of the Tax Law Review Committee ('TLRC') of the Institute of Fiscal Studies, of which we are a corporate subscriber, in its reports on tax appeals issued in November 1996 and October 1999.
4. There are practices and procedures which should be rationalised and made consistent between the three sets of tribunals (General Commissioners, Special Commissioners and VAT & Duties Tribunals). However, care would need to be exercised if the General Commissioners were to be unified with the Special Commissioners and VAT & Duties Tribunals (TLRC October 1999 report, recommendation 3). Whilst it is appropriate that 'straightforward', for example reasonable excuse, VAT cases are heard by a revamped local tax tribunal, and that amalgamation of the administration of requests for hearings to be listed would enable cases to be allocated to the most appropriate tribunal, this raises the question of the extent to which it is acceptable to curtail a taxpayer's right to select which tribunal hears his case.
5. Of equal import is the different nature of the two types (i.e. Generals v Specials and VAT & Duties) of tribunals. The caseload of the General Commissioners has dwindled with the advent of self assessment. Whether or not this reduction is permanent, there is a need for a lay tribunal that can consider, on a face-to-face basis, 'factual' issues in a local context as opposed to 'technical' (i.e. legal) issues, with a professionally-qualified clerk present to advise on legal matters. There is a danger that unification of the factual tribunal, namely the General Commissioners, with the technical tribunal might result in detrimental changes to the nature of the former. A realignment of emphasis away from a local to a regional or central basis may stifle the valuable local bias and user-friendliness of the local tax tribunal and potentially lead to its being regarded as being of lesser status. This points to the need for someone to be charged with responsibility for the interests of the local tax tribunal.

## THE GENERAL COMMISSIONERS OF INCOME TAX

### SUMMARY

6. The following summarises our view.

- There is a continuing need for a locally-based, independently-minded, fact-finding tribunal.
- The panel should comprise lay people assisted by a legally-qualified advisor who preferably knows about tax.
- Hearings should be face to face, not in an 'e-room'.
- Whilst hearings should be local, administration could usefully be more centralised than hitherto.
- Quality assurance, a more businesslike approach and consistency of judicial decision-making and procedures are needed. This could be brought about by way of, for example, observers at cases and properly-funded and continuing training.
- The General Commissioners or any reconstituted local or factual tribunal needs to be, and be seen to be, independent of other government departments. The name of the General Commissioners should be changed to the 'General Tax Appeal Tribunal'.
- Public awareness of the role of and how to use the General Commissioners should be raised.
- There should be an appropriately senior appointee as 'champion' of the General Commissioners.

### GENERAL COMMENTS

7. There is a need for a local tax tribunal comprising lay people. Although the consultation paper states that since the advent of self assessment the General Commissioners have had less to do, this is because the unforeseen administrative difficulties involved in introducing self assessment have meant that the efforts of the Revenue have not been as much channelled into enquiry work as originally intended.
8. We anticipate that over the coming years there will be an increase in Revenue enquiries. We therefore believe that there will be a growing need for a lay panel to hear cases which essentially involve ascertaining facts. As part of that process, an important function of the local tax tribunal will be to judge the veracity of the taxpayer and witnesses. Of course, direct tax issues can be and often are complicated, but the main business of the General Commissioners or a reconstituted local tax tribunal is likely to be in the investigations and enquiries fields as taxpayers seek to:
- (1) Challenge the scope of section 19A, TMA 1970 notices;
  - (2) Bring long-running enquiries to an end under section 28A, TMA 1970; and
  - (3) Challenge determinations made by the Revenue.
9. One conclusion of the TLRC that concerns us is that regarding the composition of the General tax tribunal (TLRC recommendation 8). We agree that a General Commissioners-type panel should normally comprise three people chaired by a chairman qualified by specific training and experience rather than by way of designatory letters. However, we are not convinced that the

legal needs of a tribunal of this type, including the rules governing procedure, could be adequately met if there were no legally-qualified person present at hearings. Such a person is necessary to advise the panel and prepare the necessary papers in the event of an onward appeal.

10. Provided that General Commissioners continue to receive the support of a qualified lawyer (solicitor or barrister) so that legal advice is available to them whilst a hearing is in progress, they will remain the favoured tribunal before whom many taxpayers, especially those who are not represented, will choose to present their case. The reason for that is the relatively informal approach which the General Commissioners usually adopt.
11. Quite apart from any possible changes arising out of the current review, without doubt what is needed as a matter of urgency is a concerted publicity campaign, incorporating if not a rebadging then certainly a relaunching, to draw attention to the existence of a local tax tribunal. This would go further than TLRC recommendation 14 regarding information that should be provided by the revenue departments. At present even individuals who are active in the community and who one would expect to be aware of such a tribunal, and, indeed, would perhaps be minded to offer themselves as potential commissioners, are ignorant of the very existence of the General Commissioners.

## DETAILED COMMENTS

### Question 1

*What kind of judicial officers are now needed to handle the work currently dealt with by General Commissioners, in terms of their:*

- *qualifications*
- *training*
- *experience and expertise?*

#### *General*

12. The 'judicial officers' should be people who can command respect from and have knowledge of the local community, and be representative of the communities they serve. This will become all the more important as the responsibilities of the General Commissioners are extended outside the normal business context to include working families and other tax credits.

#### *Qualifications*

13. The more professional qualifications that are required of potential judicial officers, the harder it is to attract a desirable mix of people. In our guidance note on General Commissioners (TAXGUIDE 4/00) we described the current qualifications as being 'a good reputation, personal integrity, a manner which inspires confidence, the ability to identify and comprehend relevant facts reasonably quickly, the ability to think logically, reasonable powers of expression, the ability to advance views firmly but tactfully combined with a readiness to listen to and comprehend others' views and to modify personal views where it is proper to do so, the ability to work with others, awareness of personal prejudices and readiness to counteract them, the ability to reach a decision reasonably quickly having weighed all the relevant evidence and arguments, and some experience, understanding or knowledge of, and sympathy for, life outside his or her own immediate circle of family and work. They must also either have, or possess the ability to

acquire, a practical knowledge of taxation and should live or work in or near the area covered by the division.’. These qualities seem equally apposite to the judicial officers of any fact finding tribunal.

14. We consider that a professionally-qualified Chairman is not required where there is a legally-qualified advisor on hand.

#### *Training*

15. If post-appointment training is compulsory (as we recommend under Question 3), then little formal prior training is needed, subject to candidates having the qualities recommended in this paper.
16. As to potential Chairmen, we suggest that members should spend a period on the bench before being appointed Chairman to enable them to assimilate the procedures and characteristics of their tribunal.

#### *Experience and expertise*

17. Most of the skills set out in Q1.2 are those that judicial officers need to develop. We would expect a Chairman or a General Commissioner/judicial officer of some years standing to have developed such skills from both on-the-job and theoretical training received whilst a Commissioner. Candidates who do not have these skills should possess the capacity and demonstrate willingness to assimilate such skills. Whilst possession of some of the skills recited is likely to suggest success in business or other fields, we would not expect someone who applies to become a General Commissioner to necessarily know much about, for example, tribunals procedures.
18. Indeed, the extent to which a General Commissioner needs all the skills outlined as a prerequisite for serving needs to be qualified, for example:
  - (a) knowledge of appropriate law: whilst helpful, the primary skill that is required is the ability to discern the facts: it should be the role of the parties, or a judicially qualified clerk, to explain the appropriate law to the Commissioners;
  - (b) skill in chairing a tribunal or leading a team: whilst it is useful for those who do not wish to undertake such a role to be aware of the constraints of being a chairman, a Commissioner needs such a skill only if he will perform such tasks and there ought to be room for individuals who do not wish to be a chairman but can nevertheless be a useful part of a tribunal;
  - (c) providing consistent responses: this is desirable to the extent that situations are identical; it is more important to identify the individual facts and apply the law in a commonsense way to those facts than to try to assimilate the situation to another that is similar but not identical. The decisions of General Commissioners do not set a precedent and are not published. Accordingly whilst fairness normally implies consistency, where it does not do so the General Commissioners ought not to be inhibited from distinguishing the facts in the case under consideration from other cases; and

(d) skill in writing reasons: whilst Commissioners should arrive at their decisions on a logical basis, it is preferable for the Clerk to set out the decision in a written form. This is because it is the basis for any appeal and accordingly needs to be readily followed by the Courts and so is better prepared by a legally-qualified person.

## **Question 2**

***What kind of appointment procedures are most likely to bring these judicial officers forward?***

### *General*

19. Widespread knowledge of the role and function of the General Commissioners, a transparent and proactive appointment system and appropriate tangible as well as intangible recompense are likely to encourage suitable candidates to present themselves.

### *Appointment procedures*

20. We regard it to be of paramount importance that judicial officers should be appointed by means of a transparent procedure which is known to those who may be interested in putting themselves forward. This would ensure that the best candidates are attracted and recruited.
21. Media advertising coupled with a freely-available leaflet describing the functions that a Commissioner is expected to discharge may encourage applicants, as might a web based facility. Our guidance note on General Commissioners (TAXGUIDE 4/00) should assist, pending any changes arising from the present review.
22. As to who is responsible for appointments, rather than discard all that exists presently, we favour building on the strengths of the Lord Chancellor's Department's Judicial Group and the Advisory Committees, so that the quality of appointments is of consistent high quality and has the benefit of local knowledge.

### *Recompense*

23. Whilst in principle a person should perform the role of General Commissioner out of a wish to put back something into his community, not out of a wish to earn an income, and payment of General Commissioners could create a perception in the minds of taxpayers that they are likely to side with the State as paymaster, we favour the suggestion at Q2.4 that General Commissioners should be paid some modest sum to part recompense them for the time spent in discharging their duty. If some payment were involved it is likely to assist in creating a panel of Commissioners with more diverse backgrounds than is probably the situation at present. Payment on the basis of a daily rate, which can be broken down into ½ days and ¼ days, as for Recorders, would be appropriate. A modest payment to an employee's employer for the time that the employee spends on the bench may be an alternative. We do not consider financial loss allowances to be necessary at this stage.

### Question 3

#### *What kind of training will the judicial officers need, and how should it be supported?*

##### *General*

24. All judicial officers including clerks should receive regular training with an emphasis on the practical but with an element of the theoretical. A national training programme as envisaged in Q3.3 should be established. Training should be compulsory, consistent across the country and properly financed.

##### *Content*

25. The training of commissioners should include a practical facility with the process acquired via mock hearings, an extensive knowledge of how their tribunal should operate including familiarity with SI 1994/1812, a working knowledge of the Taxes Management Act 1970 and Human Rights (the European Convention and the 1998 Act), as well as training aimed at developing the attributes in Q1.2.

##### *Quantity*

26. We support the suggestion at Q3.3 for a compulsory induction course for all new judicial officers with opportunities to sit in as an observer on hearings, plus additional training for chairmen. We recommend periodic refreshers as the law and procedures change, and in particular when new duties, for example self assessment issues and social security matters in the form of tax credits and national insurance contributions, are added to the caseload.
27. Ideally a judicial officer should attend at least two training courses each year. We suggest that training should be half day courses to permit attendance by those whose responsibilities will not permit a whole day. Good times might be say 11.00am to 2.30pm with a working lunch to fit in with school hours or early morning or evening for those who work.

##### *Provider*

28. The Lord Chancellor's Department should be responsible for training. However, given that to date the Lord Chancellor's Department has not directly provided training but has left it to the National Association of General Commissioners in England, Wales and Northern Ireland, it may be appropriate for training to continue to be carried out by the National Association. Whoever provides the training should be given the authority necessary to provide nationwide compulsory courses, which will need quality assurance.
29. It is important that training of judicial officers is not carried out by the Revenue.

##### *Funding*

30. The interests of justice demand that training of the judiciary, whether lay or stipendiary, be funded by central Government. A training budget of £37,500 to train over 3,000 people, a training budget of £12.50 per person, is patently inadequate. It should be increased to enable

regular and appropriate training to be given to all Commissioners. We suggested in paragraph 28 above that officers should receive two half days of training a year. On the basis that a full day's professional course would normally cost at least £250, we suggest a budget of £250 per person per year.

32. At least in the short term, the National Association should also be given sufficient funding to produce and circulate a professional newsletter at least once a quarter to all Commissioners.

#### **Question 4**

***What kind of arrangements are needed to make sure that the judicial officers develop the right experience and expertise in their field of work?***

##### *General*

33. The degree to which it is possible to give Commissioners the kind of practical experience they require depends upon the extent to which the tribunal is used as the self assessment regime begins to make an impact in the field of enquiries. We suspect that the present shortage of work is temporary. While self assessment has done away with delay appeals, it has created new duties for the Commissioners such as in relation to section 19A Taxes Management Act 1970 notices and directions to close an enquiry. When these work through the system they are likely to prove more burdensome than delay appeals. Any changes to the arrangements for hearings need to balance optimal utilisation of Commissioners with easy access to justice for taxpayers.

##### *Requirements for Commissioners*

34. Ideally each Commissioner should be expected and should be entitled to expect to sit on a set number of occasions per annum subject to need. Under the present regime, the requirement that Commissioners should sit at a minimum of six hearings a year with 10 to 12 sittings being desirable is reasonable. The proposal in Q4.2 for 12 to 18 sittings a year is may inhibit those with work commitments from offering themselves for appointment. As the length of sittings can vary (for example a contentious appeal may take more than a day), perhaps minimum attendance should be measured in terms of a combination of sittings and days.
35. A Commissioner who causes himself to sit less than the minimum number per year should have his appointment terminated unless there is a good reason, such as illness.
36. If it continues to be the case that some Commissioners sit on only three or four occasions per annum owing to low workload, then some pooling of Commissioners is inevitable. This could be achieved by either amalgamating Divisions and/or members sitting in more than one Division (as is happening already to some extent) (see Q 10 below) and/or by natural wastage.
37. In that case great care will need to be taken so that geographically the tribunal is not placed beyond the reach of the citizens in the area served by the new amalgam. It is important that the Commissioners are (and are seen to be) a local body easily accessible to the local community. If a taxpayer has to travel some distance to have his appeal heard, that is bound to inhibit many from appealing, not only because of the travel costs involved but also because of the greater time away from a taxpayer's business that such travel involves.



## Question 5

***In particular, does some of the work now handled by General Commissioners need to be heard by a panel including a lawyer?***

38. Cases that come (and are likely to come) before the General Commissioners do not necessitate a panel including a lawyer, providing the panel has a legally-qualified advisor to hand at the hearing.
39. We are of the view that the General Commissioners should continue to be a lay tribunal and that Commissioners should not have to be legally qualified. Complex legal issues will normally be heard by the Special Commissioners. Even if the taxpayer wants such an issue to be heard by the General Commissioners they have the right to transfer jurisdiction. Where there are legal issues involved the Commissioners are likely to have the benefit of legal arguments from both the Revenue and the taxpayer. This ought to be sufficient in most cases. However, the fact that questions of law arise for consideration means that the panel in any particular case should have direct and immediate access to legal advice. For that reason we consider that, even if divisions are amalgamated, each administrative area of the tribunal should have at least one legally-qualified clerk who should be present with the judicial officers at all hearings.
40. The appellants should be informed that the clerk's role is to advise on matters of law: this is reassuring to taxpayers who are unrepresented.

## Question 6

***Can better ways than the current arrangements be found for matching the bench which hears a case to the requirements of the work? In particular, are better matches required in terms of:***

- ***qualification or expertise;***
- ***number of members (e.g. can some cases be heard by a single member);***
- ***procedures (e.g. in some categories are there cases which could normally be dealt with on the papers)?***

### *General*

41. It is important that an aggrieved taxpayer feels that he has had a fair hearing and is satisfied that he has had the opportunity to get his case over to an independent tribunal.
42. It is arguable that a central structure should be introduced to allocate cases according to criteria. Whilst this is possible in tribunals where the nature of the dispute can be readily identified or where the taxpayer invariably has legal representation, many cases go before the General Commissioners precisely because the real issue is different to that which the Revenue officer, or sometimes the taxpayer, has perceived it to be.
43. At present, the Clerk is responsible for structuring suitable panels of Commissioners to hear cases. There is a danger that a more centralised structure would be unable to combine knowledge of the attributes of the judicial officers and local circumstances to provide the optimal composition of judicial officers on a panel.

### *Qualification or expertise*

44. It is important that the taxpayer can see that the factual tribunal is made up of ordinary people like himself. Given that the General Commissioners are lay people and that it is their broad commonsense, experience and training as indicated earlier that is being sought, matching a Commissioner's personal experience of a particular matter or business issue to the question on which he is to adjudicate ought to be unnecessary.
45. The current system of allowing the taxpayer to opt for the General or Special Commissioners (in most cases) seems to work well, and therefore does not need 'fixing'. On the other hand, a 'factual' or local tax tribunal should have the right to transfer jurisdiction to a more technical tribunal where the judicial officers consider the issues to be highly technical in nature and beyond their competence to judge.

### *Number of members*

46. There is a clear difference between the legally qualified Special Commissioners and the lay General Commissioners. Cases before the General Commissioners should not be heard by a single member. A taxpayer will feel aggrieved if he thinks that that member has taken a dislike to him. This is far less likely if there are three members with dissimilar backgrounds. Two votes can modify a hard view, and an unsuccessful appellant can more readily accept a decision by a panel of two or three. There should be flexibility to have a smaller panel if both sides agree, but this should be the exception, for example, where a Commissioner is taken ill.

### *Procedures*

47. Much time could be saved in contentious cases brought before the General Commissioners if prior to a substantive hearing the parties were ordered to attend a meeting for directions as happens in the case of proceedings brought before the Special Commissioners.
48. It is misleading to look at the number of cases where the appellant did not attend without looking behind the figures. There are many reasons for non-attendance. In some cases the taxpayer does not appreciate the seriousness of the hearing. In many he has agreed with the Inspector that the matter should be adjourned. Whilst many bodies of Commissioners allow an Inspector to agree an adjournment without a hearing, others do not but in practice will follow the Inspector's recommendation that the hearing be adjourned, so personal attendance by the taxpayer at the hearing is known to be an unnecessary waste of time. In some appeal cases the taxpayer and the Revenue reach agreement before the hearing but other Revenue officers prefer a Commissioners' decision to a section 54, TMA 1970 agreement.
49. In principle, cases should not be dealt with on the papers without the approval of the parties. By definition if a case gets to the Commissioners it is because correspondence has been unable to resolve it. This may well be because a taxpayer finds it more difficult to get over points in writing than if he is given the opportunity to explain his case orally to a sympathetic listener. However, where the case is routine and the appellant confirms that he does not wish to attend, then such cases should be able to be dealt with on the papers.

## Question 7

***What kind of structure (e.g. President and Regional Chairman) might be needed to organise that match? Or manage training? Or for other purposes?***

50. The consultation paper suggests that a national president and/or regional chairmen might be needed to organise the match referred to in Question 6, i.e. matching the bench to cases, or organise training or for other purposes. At present, however much he diffuses his role, the Lord Chancellor seems to be the equivalent to a national president for the General Commissioners. There exist Chairmen of Advisory Committees and of Regional Committees. Each Division has a Chairman, who is responsible inter alia for the organisation of appointments and retirements of Commissioners and the Clerk and acting as a reference point for members of the Division and third parties, and a Clerk.
51. In principle, a national president (by whatever name) should have responsibility for the functions in Q7.4 and ensure that they happen properly and in a consistent manner. The problem at present is that whilst there are people in the Lord Chancellor's Department who are responsible for the General Commissioners, there is no obvious overall 'Champion' actively ensuring quality control. The National Association is the nearest thing to a professional body for General Commissioners and indeed it carries out certain functions appropriate to such a body but it has inadequate authority. For example, the National Association rather than the Government provides training, but there is no obligation on Commissioners to undergo training. The approach adopted hitherto explains why the General Commissioners are relatively unknown, and in some localities are seemingly an adjunct of the Revenue.
52. Q7.3 and Q7.4 seem to be offering two solutions, neither of which are likely to prove satisfactory by themselves. Q7.3 suggests that the National Association develops further its role. To be effective, the National Association would need to be given official status, funding and authority; however it would not be appropriate for it to, for example, carry out the duties presently carried out by Clerks. Q7.4 suggests a national president. This in conjunction with a properly co-ordinated regional and local structure and a strengthened National Association may enable the functions at Q7.4 to be carried out, but care would be needed to avoid too much over-centralisation and potential bureaucracy.

## Question 8

***What kind of administrative support does this work require?***

53. The General Commissioners tribunal certainly requires a good deal of administration, much of which in some Divisions at the moment is carried out by the Revenue. This gives rise to a feeling that the Revenue has too close a relationship with the General Commissioners and undermines the perception of impartiality which taxpayers need to have in order to be confident of a fair hearing.
54. An advantage of using a local solicitor as clerk covering both the advisory and the administrative functions is that he would normally have administrative facilities in his own firm. Another advantage of combining the legal/procedural advisory and administrative functions is that the clerk and Commissioners liaise frequently and develop good working relationships. Separating

the advisory and administrative functions may mean that a legal-advisor clerk may be in contact with the judicial officers only at hearings.

55. However, we recognise that in some areas there may be difficulty in recruiting suitable clerks who can cover both the legal and administrative functions.
56. Whilst we consider it important for the General Commissioners or a reconstituted factual tribunal to retain a strong local presence, it may well be appropriate for the administrative function to be centralised to some extent. Whilst it is arguable that this is unlikely to be as economical as where the clerk uses his own in-house facilities, we consider that administrative support will be important to ensure that the role of clerk is not perceived as an administrative burden which would make it an unattractive proposition to the sort of practitioners whom the Tribunals would wish to recruit.
57. On the basis that there would be fewer administrative centres than the present number of divisions (albeit with the flexibility for hearings in any location within reason) the number of clerks employed by each administrative area would obviously depend on the size or nature of the area in question. We would regard it as sensible and appropriate for the clerk (or where more than one, a chief clerk) to have ultimate responsibility for the administration of each administrative area.

### **Question 9**

***In particular, if the TLRC second report's recommendation of most General Commissioner work being heard by a general tribunal which does not contain legally qualified members is to work, what kind of training and legal advice arrangements would be required to enable the tribunal to function without a permanent legally qualified clerk, as the committee envisages? Does any legal adviser need to carry administrative responsibility?***

58. We have reservations about the TLRC's recommendation that a reconstituted General Commissioners should hear cases without a legally-qualified advisor being present.
59. We question whether a chairman 'qualified' as envisaged by the TLRC will have sufficient legal expertise to rule definitively on legal matters. Matters of law arise in all tribunal work, not only regarding those issues directly relevant to the subject matter of appeal but also in terms of other legal concepts impacting upon a range of issues to be settled at the tribunal. For this reason, and as face-to-face hearings are more appropriate for a factual tribunal, we feel that legal advice should be provided by a legally-qualified clerk, who should be present at the hearings, rather than obtained over the telephone or electronically.
60. If the chairman were a fully-fledged lawyer, the informality of proceedings before the Commissioners or the equivalent new local tribunal is likely to be compromised as the tendency would be for the taxpayer to be represented before it by a lawyer.
61. In terms of legal qualification we would recommend that the clerk advising on legal/procedural matters should be qualified either as a Barrister, Solicitor, Legal Executive or member of the Justices Clerks Association. Because of the need for an understanding of procedural justice and because questions of law will inevitably arise a legal qualification (as opposed, for example to a

qualification in the practice of tax) is likely to be a prerequisite. However, it would be desirable for clerks, wherever possible, to have experience of practice in tax.

62. Whilst desirable, such a clerk would not need to be involved in day-to-day administration.

### **Question 10**

***Do the long standing arrangements of spreading work over many divisions (currently 458) match current needs, and provide an efficient administrative structure? If not, how should matters be improved?***

#### *General*

63. At present, the caseload means that Commissioners are attending insufficient sittings. We would suggest a regrouping on a geographical basis of some of the existing General Commissioner divisions. This may enable consequent savings on administration costs due to increased economy of scale. However, as mentioned earlier, care would need to be taken to avoid disenfranchising the taxpayer because of difficult access to any hearing centre.

#### *Size of divisions*

64. We regard the local links of the General Commissioners as being of considerable importance. Given the present caseload, we agree that the present 458 divisions of General Commissioners is excessive. However, we do not think that the new responsibilities given to the general Commissioners by self assessment have had time to work their way through the system.
65. It may be appropriate to base administrative areas on the largest local authority structure in a given area, for example, a county council, London borough or metropolitan district. Owing to its specialist experience, we recommend that the City of London should remain as a separate division.
66. No attempt should be made to match the Inland Revenue's network of local offices as suggested at Q10.3. This would encourage a perception of undue familiarity between the Revenue and the Commissioners. Furthermore, as local tribunals, the Commissioners need to be convenient to the taxpayer. It would be unacceptable if, by centralising the Commissioners' work into a number of very large divisions (or worse, linking them to specialist Revenue offices in remote locations such as Centre 1 which deals with all PAYE taxpayers where the employer has a Scottish address), taxpayers were forced to travel great distances to have an appeal heard.

#### *Appeals*

67. We would suggest that appeals be lodged at a local or regional office. The lodging of appeals at a national centre, whilst superficially more attractive for taxpayers as it would be simpler because they would not have to work out which office to send the appeal to, would be more intimidating than the ability to appeal to a local or regional office.

### *Procedural standards*

68. Central accountability on procedural standards is desirable. Ultimate responsibility for training and regulating the conduct of clerks (both legal and administrative) should rest with the Lord Chancellor's Department.

### **Question 11**

***In particular, what arrangements will give an adequately local pattern of hearings, and at the same time allow the provision of efficient accommodation which matches current good practice in other courts and tribunals?***

### *Accommodation*

69. Local accessibility without having to travel too far to attend a hearing is crucial to the credibility of a factual tribunal such as the General Commissioners and to the maintenance of a good standard of justice. This should take precedence over the convenience of the administrators.
70. Thus, whilst the administration centre might be located centrally, for example in the county town, there should be no restriction as to the towns in which the tribunal may sit. As to the nature of the accommodation for hearings, we have no objection to hearings in rooms in town halls or hotels rather than in court buildings. The existing locations used by the General Commissioners seem to work reasonably well. A strength of the General Commissioners is their informality and this perception may be lessened where a court building is used.
71. If this tribunal were merged with a local VAT tribunal as envisaged by the TLRC then there would be automatic cost savings arising from having, for example, joint sittings.
72. Similarly, judicial officers should be drawn from all parts of the tribunal area, not merely the immediate locality of the administrative centre.

### *Use of information technology for adjudication (Q11.5)*

73. We do not currently favour a possibility of on-line virtual adjudication via some sort of 'e-room'. As noted above, hearings before a tribunal such as the General Commissioners are best conducted face-to-face and we therefore do not consider that an e-room would provide an appropriate forum to test evidence and find the relevant facts.

### **Question 12**

***What steps are necessary to underline the judicial independence of the tribunal from all parts of government?***

### *General*

74. It is very important that the Revenue is distinguished both in name and in deed from the General Commissioners. It is also important as indicated elsewhere in this paper that the Commissioners should attend to their own paperwork rather than leaving it to the Revenue.

### *Name*

75. As part of any modernisation which arises out of this consultation and as part of a high profile relaunch that we consider is long overdue, it is essential that the name of the General Commissioners is changed. We agree with the comments (at paragraph 2.2) made by the TLRC in its report issued in October 1999 concerning the reason why the name must be changed. The TLRC suggested the name 'The General Tax Tribunal' but we consider that 'The General Tax Appeal Tribunal' is more self explanatory.

### *Appeals (Q12.2)*

76. There are arguments for and against appeals being handled by the revenue departments. In practice, the Revenue are relaxed over what constitutes a notice of appeal, which is helpful to taxpayers. However, the need for the appeal tribunals to be seen to be independent of the revenue departments is paramount and provided that the tribunal administration adopts a light touch when dealing with inarticulate taxpayers, the case for separating the General Commissioners from the Revenue is overwhelming.

### *Departmental review (Q12.3 & 4)*

77. A consensual settlement between the parties to a dispute without a hearing is always preferable to a hearing. Parties to a hearing have generally attempted to resolve the issues between themselves before resorting to the Commissioners. However, one party's suggesting that the issue in dispute be set down for hearing often concentrates the mind of the other party (and may go some way towards explaining the seemingly large discrepancy between cases listed and cases where the parties have attended). We therefore question whether there is much to be gained from further formalising revenue department review.

## **Question 13**

### ***What kind of publicity does the public need about:***

- ***the tax appeal system itself;***
- ***how to conduct an appeal, in person or with a representative;***
- ***becoming a member of a tribunal?***

### *Public awareness*

78. There ought to be a greater awareness amongst professionals and lay members of the public as to their right to ask the Clerk to the Commissioners direct to list matters for hearing.
79. As noted above, we issued earlier this month a simple leaflet containing the sort of information suggested in Q13.2 & 3, i.e. what the tribunal does, how it is made up, how to prepare for a hearing, what will happen there, who will be there and in what capacity, and what outcomes are possible (TAXGUIDE 4/00). Producing and updating a leaflet of this nature should be the responsibility of the Lord Chancellor's Department. At the very least, the National Association should be funded to prepare an information leaflet (or update ours in due course).

80. The General Commissioners or any factual tribunal should also have a dedicated website. As well as including the information referred to above on the site, each administration centre should be fully accessible via the internet. It should be possible for taxpayers to apply to have a hearing and file via the internet administrative documents relating to the proceedings in question.
81. We also support TLRC recommendation 14 (paragraph 5.5 of the 2<sup>nd</sup> Report) that every assessment, decision or notice issued by the revenue departments against which the taxpayer has a right of appeal to a tax tribunal should state clearly that there is a right of appeal and the time within which the taxpayer must exercise his right; every such assessment, decision or notice should be accompanied by a leaflet on appeals; notice of appeal should be given directly to the tax tribunal and not to the revenue department; and the taxpayer, when appealing or within any particular time of appealing, need not specify whether he wishes the Special Commissioners or the General Commissioners to hear the appeal.

### *Case reports*

82. The privacy of a person's tax affairs is very important and in view of the local nature of the tribunal, such hearings should be confidential. This is in contrast to hearings of the Special Commissioners or the VAT Tribunals when a point of law is considered, where, although the decisions technically do not create a precedent, it is in the public interest to make the decisions publicly available.
83. Where case reports are issued, it is vital that they are accurate first time. Where they are revised, as happens to the VAT & Duties Tribunal reports from time to time, this is in itself unsatisfactory to users, but would be alleviated to some extent if the corrections were highlighted in the revised reports.
84. Notwithstanding the right of privacy, there should be a right for a representative of the Lord Chancellor's Department or the National Association to attend any hearing as an observer for quality control purposes.

## **THE SPECIAL COMMISSIONERS AND THE VAT AND DUTIES TRIBUNALS**

### **SUMMARY**

85. The following summarises our view.
- If there is unification, there should still be two distinct sets of tribunals, a local factual (general) tribunal and a technical tribunal.
  - Consistency in procedures should be subject to tailoring to accommodate the different attributes of the two sets of tribunals.
  - A general tribunal should not normally have power to award costs. A special or technical tribunal should adopt the regime presently operated in the case of VAT, namely, the power to award costs which is in practice not usually requested by Customs.
  - The panel should include lay experts where appropriate.
  - The jurisdiction of the general tribunal should extend to indirect taxes.



## DETAILED COMMENTS

### Question 14

***Should the current system of 3 tribunals (the General Commissioners, the Special Commissioners and the VAT and duties tribunals remain, or should there be a unified tax tribunal? What would be gained, and what lost?***

#### *General*

86. As noted above, we consider that there is a need for a local, lay, ‘factual’ tribunal as well as a tribunal covering technical, i.e. legal, matters. The TLRC recommended that the three existing sets of tribunals be reconstituted as a unified body comprising a local, i.e. general, and a central tribunal.
87. There are potential benefits of unification in terms of improved efficiency, but we are concerned lest it results in the local tribunal being perceived within any larger reconstituted body as being of lesser status and in a watering down of its current attributes of informality and cheapness. If the tribunals are unified we support the TLRC’s suggestion that within the larger body there should be two distinct sets of tribunals.
88. For the same reasons as the General Commissioners are the appropriate panel to hear certain direct tax cases, there would be merit in having the general or local tribunal deal with VAT as well as direct taxes. The composition of the panel would mean that when hearing, for example, VAT reasonable excuse cases, the approach and view-point of and constraints on businesses may be better understood.

#### *Appointment of tribunal members*

89. The Lord Chancellor’s Department has the experience and expertise in this area and therefore should be in charge of appointing not only Special Commissioners, but also VAT & Duties Tribunal members and General Commissioners.

### Question 15

***If there is a unified tribunal, do procedures need to be consistent throughout? For example, different regimes on costs now operate for direct and indirect tax cases – should these be the same, and if so on what terms?***

#### *General*

90. As the factual and technical tribunals have different attributes, we see no reason why procedures should not be tailored to meet their respective needs.
91. Given the different procedures for costs, it is important that taxpayers are able to elect which tribunal hears their case.

### *Qualification*

92. It would be appropriate to have common qualification requirements for the Special Commissioners and VAT & Duties Tribunals.

### *Procedural matters*

93. It would be inappropriate for the revenue department to lodge a statement of issues on the taxpayer's behalf unless agreed with the taxpayer. However, if before every contentious case there was a meeting before the tribunal for directions this would assist in promoting clarity of issue and facts.
94. There should also be a set and timetable aimed at minimising the time between applying for a case to be listed and the hearing. The timetable should be properly enforced, but either side being able to ask the tribunal for an extension of time.

### *Costs: General Commissioners*

95. The informal nature of the General Commissioners naturally lends itself to representation by the taxpayer in person. In principle therefore we consider that, as a normal rule, a general tax tribunal should not have the power to order costs. It is important that it is cheap and readily accessible and the taxpayer knows that there is an avenue of appeal that does not put him at risk of having costs ordered against him, save in cases where a party has behaved wholly unreasonably either in bringing, or in the conduct of, the appeal.

### *Costs: Special Commissioners and VAT and Duties Tribunals*

96. As to the Special Commissioners and the VAT & Duties Tribunals, we can see no justification for dealing with costs on direct tax appeals differently from indirect tax in a unified tribunal system. Also, any removal of the current rights to costs in indirect tax appeals as part of any unification is likely to be widely perceived as unfair and would render the reforms very unpopular.
97. It is a significant disadvantage to the taxpayer's ability to bring an appeal, and consequently a significant and unfair advantage to the Revenue, that the Special Commissioners are currently unable to make an order for costs other than in very limited circumstances, namely wholly unreasonable conduct. Accordingly, we would recommend that the position that should be adopted regarding costs in the technical tribunal should be the same as that currently in place in the VAT & Duties Tribunals, namely that it should have the power to award costs in any case.
98. Where a taxpayer appears in person before the technical tribunal an award of costs against the Crown should include the taxpayer's loss of earnings.
99. However, a standard practice whereby costs were awarded against every taxpayer who was unsuccessful in his appeal would render it unlikely that most taxpayers would wish to raise appeals to the reconstituted Special Commissioners save in cases where huge amounts of tax were at stake. Accordingly the Revenue should adopt the same policy as that adopted by Customs and as set out in the Sheldon statement (Hansard 13 November, 1978 Cols 91-92), namely that the Crown will as a matter of practice, only seek an order for costs where a taxpayer

has behaved in a wholly unreasonable manner in bringing the appeal in question or in the conduct of the appeal.

## Question 16

***How could cases be allocated between the different parts of a unified tribunal? In particular, should a new equivalent of the General Commissioners hear some indirect taxation appeals?***

### *Panel composition*

100. Where the issues turn significantly on facts rather than on legal issues (Q16.1) the tribunal should have lay experts (in say insurance, banking, accountancy, land or share valuation) on the bench, as do the VAT Tribunals at present. These lay members should be as ‘qualified’ and ‘experienced’ (see end of Q16.1) as possible.
101. Where the legal or tax issues in a case are particularly complex (Q16.2), a second barrister or solicitor of equivalent standing and experience should sit alongside the Chairman
102. Parties to the proceedings should be entitled to make representations as to whether, for example, a lay member should sit on the tribunal.

### *Jurisdiction*

103. The aim should be that each case ends up before the most appropriate tribunal. At the moment the division between VAT and direct tax issues is sometimes artificial. The basic facts surrounding a Customs investigation may be the same as those applying to a taxpayer’s direct tax liabilities and in such circumstances there needs to be a unified departmental approach. The same applies to the work of the tribunals. Since on the question of investigations both Customs and the Revenue have commonality of interest, and the basic argument in such circumstances will be about facts and their interpretation, numbers and the tax consequences, the jurisdiction of the general tribunal should be extended to cover some indirect taxation appeals. The types of indirect tax appeals that would be appropriate would be ones where the establishment of the facts was critical, for example mark-up exercises or reasonable excuse cases. This should lead to further improvements in efficiency and flexibility, and probably improved convenience for taxpayers, as these could be dealt with at the local level. However, other types of indirect tax appeals will usually be questions of law rather than the establishment of the facts. Appeals that fall into this category should continue to be handled by a specialist tribunal.

### *Panel composition*

104. We think that an individual member of the unified tribunal who sits as Chairman should be discouraged from hearing both direct and indirect tax appeals. There are a few members of the Customs and VAT Tribunals who currently also sit as Special Commissioners. They have long experience and considerable expertise in both taxes. However, in the future it is too much to expect people to be able to keep on top of all the developments and complications of both taxes.

## ONWARD APPEALS

### SUMMARY

105. The following summarises our view.

- There should be a maximum of three levels of appeal (subject to the right of the courts to refer cases to the European Court of Justice).
- A specialist tax judiciary is required.
- As at present taxpayers should have the right of appeal to the Supreme Court.
- The jurisdiction of the tax tribunals should extend to matters currently requiring judicial review.

### GENERAL COMMENT

106 The comments in this section apply whether or not the tribunals are unified.

### DETAILED COMMENTS

#### Question 17

*If there is a unified tribunal, how should onward appeals be handled?*

- 107 Complex tax issues of major import should be heard in the first instance by a technical tribunal, presently the Special Commissioners and VAT & Duties Tribunals who are well qualified to discharge that duty. There are advantages in this, not least in terms of cost. A taxpayer may accept a Special Commissioner's decision and if he does not, the facts and issues will have been ascertained and aired before the matter goes to the next level of appeal, thus saving valuable and expensive judicial time.
- 108 The ideal procedure would be for there to be in each case a maximum of three hearings:
- the Tax Tribunal (Generals or Specials or VAT and Duties Tribunal);
  - the Court of Appeal or a new specialist Tax Appeal Court, on a point of law only; and
  - the House of Lords.
- 109 A specialist Tax Appeal Court (from which any appeal would be direct to the House of Lords) should be presided over by a High Court or Court of Appeal Judge (along the same lines as say the Employment Appeal Tribunal), probably with up to two other members, who might be a High Court judge and/or a Special Tax Tribunal Chairman (in the same way as the Court of Appeal, Criminal Division, is often comprised of a Court of Appeal judge, a High Court judge and a Circuit Judge). As to the attributes of the judges, see also Q21.

## Question 18

### *Should there be 'leap-frogging'? Generally, or only from specialist part of a unified tribunal?*

- 110 Following on from our recommendation in Q17 for a maximum of three hearings, leapfrogging becomes unnecessary.
- 111 In the absence of change, how often leapfrogging will be appropriate depends to some extent on the way in which the tribunal develops. If the Special Commissioners and VAT & Duties Tribunal/technical tribunal each sit as a panel of two or three lawyers, selected for their relevant expertise, leapfrogging should become the normal route for cases on points of law.
- 112 As to the existing position, the ability of a taxpayer in certain circumstances to leapfrog from the Special Commissioners and the VAT & Duties Tribunals to the Court of Appeal should be retained.
- 113 Although we can see superficial merit in the idea of requiring appeals from a factual tribunal to be reheard before a legally qualified tribunal before they go to the Supreme Court, we are not aware that in practice the number of unmeritorious appeals that come up from the General Commissioners by this route is great enough to justify the introduction of yet another tier of appeal. This indicates that the present system of having a legally-qualified clerk prepare a case stated is satisfactory.

## Question 19

### *Should tax appeals be exempt from the general requirement to obtain permission for an appeal to the Supreme Court?*

- 114 We consider that the first appeal from the tribunals to the Supreme Court should be of right. There may in any event be human rights requirements that render redundant the need to apply for permission.

## Question 20

### *If separate tribunals remain, what changes need to be made to improve appeals?*

#### *General*

- 115 The procedures for all technical tax appeals should be identical. Thus, we agree with the suggestion in paragraph 6.6 that stamp duty appeals should be aligned with those for stamp duty reserve tax, i.e. be heard by the tax tribunal. Similarly, we agree with paragraph 6.7 that tax appeals should be heard by tax tribunals even if they involve the value of land and the tax tribunal should bring in a lay expert on land valuation as appropriate.
- 116 Issues that affect both indirect and direct taxes in any particular case should be heard at one sitting. The need to reduce the burden of cost to the individual taxpayer as well as to the state is overwhelming.

### *Judicial review*

- 117 The Taxpayer's Charter recognised by Customs states that if a taxpayer considers that he has been unfairly treated, he can appeal to the VAT tribunal. However, in many circumstances this is prevented by section 83, VAT Act 1994, which lists the circumstances in which appeals may be made to the tribunal. Disagreements with Customs that are not included on the list have to be dealt with by way of judicial review. 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 Regulations.
- 118 Applications for judicial review are cumbersome and expensive. We consider that matters that are currently the subject of judicial review should be capable of being heard and resolved before the Special Commissioners or VAT & Duties Tribunals (or any reconstituted technical tax tribunal). This could be achieved by extending the jurisdiction of these tribunals to the hearing of appeals that currently have to be heard by way of judicial review in effect to allow the tribunal to adjudicate over any dispute between the taxpayers and the revenue authorities. In the examples cited in paragraph 116 above, specific powers should be introduced to allow appeals on these issues. We suggest replacing section 83 VAT Act 1994 with a general right of appeal giving the tribunal the same power the High Court currently has to deal with issues by way of judicial review. The tribunal would then have the power to adjudicate over any taxation dispute between taxpayers and Customs.

### **Question 21**

#### ***In either case, should there be tax specialist panels of judiciary in the High Court and Court of Appeal?***

- 119 As far as possible the entire tax system should form a coherent whole. The appeals procedure should encourage this. Even if the idea of a Tax Appeal Court referred to in our response to Q17 is not adopted, as some tax issues are so complex it is important that there are judges of the Chancery Division of the High Court and the Court of Appeal with experience either as tax practitioners or in hearing tax appeals. Appeals from the tax tribunals should be referred to such judges.
- 120 There has been concern in the past that judges with little or no experience of VAT have been hearing VAT appeals. The position has been improved by the recent transfer of VAT cases to the Chancery Division. This is particularly important in view of the application of EU law to VAT; judges need to be familiar and experienced with this body of the law. It may be easier to ensure that this does not happen with a Tax Appeal Court where a senior judge with relevant experience can be selected.

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