Tax Representation

TAX FACULTY

TAXREP 78/08

TRIBUNAL RULES IN THE TAX CHAMBERS

Comments submitted in November 2008 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales to the Tribunal Procedure Committee in response to the consultations on the First-tier Tax Chamber Rules and Upper Tribunal Rules published in August 2008.

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INTRODUCTION

1. In this document we present the comments of the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) on the consultations published in August 2008 on:

    - The draft First-tier Tribunal (Tax Chamber) rules
    - The Upper Tribunal Rules for tax.

2. The ICAEW is an active participant in the Tax Appeals Modernisation Stakeholder Group. We are pleased to have the opportunity to respond to this consultation. We would be happy to discuss any aspect of our comments and to take part in all further consultations on this area.

3. 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. Most of these tenets are equally relevant to legislation dealing with tax appeals in the tribunals.

THE FIRST-TIER TRIBUNAL (TAX CHAMBER) RULES

Rule 1 – Citation, commencement, application and interpretation

4. For tax, those starting proceedings could be appellants or applicants. In Rule 1(4) the definition of appellant is designed to include applicants. But this could cause confusion between tribunals and tax rules, as tax legislation generally uses either the term appellant or applicant, as appropriate. We would prefer the rules to use the two terms, appellant and applicant, in the same way as the tax legislation.

Rule 2 – Overriding objective and parties' obligation to cooperate

5. Rule 2(4)(a) states that parties to the Tribunal must 'help the Tribunal to further the overriding objective', which is to enable the Tribunal to deal with cases fairly and justly. While we support in principle the overriding objective, we consider that this rule should be deleted. It is not realistic to impose such an obligation on appellants, particularly those who may be unrepresented, who can have little influence on how the Tribunal does its work. It is of course entirely reasonable to require appellants to cooperate with the Tribunal, but Rule 2(4)(b) caters for that.

6. If Rule 2(4)(a) remains, the Tribunal should be required to take into account the parties' ability (which may be very limited) to further the overriding objective.

Rule 6 – Procedure for applying for and giving directions

7. Rule 6(4) states 'Unless the Tribunal considers that there is a good reason not to do so, the Tribunal must send written notice of any direction to every party to the proceedings…'. We would expect written notice of directions should be sent in all cases and would therefore prefer the first half of the above sentence to be deleted. If this is to be retained, we would welcome clarification of the sort of 'good reason'

for which the Tribunal would decide not to send written notice so that we can consider further whether they are sufficient reason not to do so.

Rule 7 – Failure to comply with rules etc

8. This Rule contains some potentially tough remedies which may not be appropriate in many cases. For the protection of appellants, particularly those who are unrepresented, we consider that the Tribunal should take into account why the appellant had not complied with the rules and should give due regard to all the circumstances. We should like this requirement to be made explicit in the rules.

Rule 8 – Striking out a party's case

9. We are concerned about the different and unequal treatment between appellants and respondents who do not comply or cooperate. If the appellant is at fault, the proceedings can be struck off; if the respondent is at fault, they may be barred from taking part but proceedings may go ahead. The respondent's case cannot be struck out.

10. If the hearing goes ahead but the respondent is barred, it is difficult to see how it would work in practice. In tax, the burden of proof lies with the appellant but he or she would not have the benefit of hearing HMRC's case or examining HMRC's witnesses.

11. In our view the Tribunal should have the option of striking out the respondent's case and deciding the appeal in favour of the appellant.

Rule 15 – Disclosure, evidence and submissions

12. In Rule 15(1)(c), we are concerned about the possible cost for appellants if they are required to provide expert evidence. What will happen where a party cannot afford to appoint an expert? We think that the tribunal should be obliged to consider a party's ability to comply before imposing such a requirement.

13. Rule 15(3)(b) deals with the Tribunal's power to exclude evidence in certain circumstances. Appellants who cannot afford expert advice may struggle to produce evidence in the required format or timetable, and in keeping with the overriding objective we think that Tribunals should use this power sparingly and not where appellants are clearly doing their best to comply. We would welcome clarification that the Tribunal will adopt such an approach.

Rule 19 et seq – Starting appeal proceedings

14. The draft Order prepared by HMRC on tax appeals provides that a person will either make an appeal to the Tribunal or (for direct taxes) appeal to HMRC and then notify the appeal to the Tribunal if he or she wishes it to go to hearing. The wording of Rule 19 is not consistent with this. If another enactment provides for a person to 'notify' an appeal to the Tribunal, rather than make an appeal, then how can the appellant 'deliver a notice of appeal' to the Tribunal? He or she can surely only notify the Tribunal of the pre-existing appeal. And if he does so, Rule 19(2) becomes meaningless as the format of the notice of appeal must surely have been delineated by the other enactment.

15. As a general point, we are strongly opposed to the concept of a person 'notifying an appeal to the Tribunal'. 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*. Requiring a person to make an appeal to HMRC and subsequently notify it to the Tribunal seriously undermines the perception of independence. We appreciate that in some cases HMRC may need to make various decisions prior to the appeal coming before the Tribunal and needs to know that the taxpayer disagrees with HMRC's view to be able to do this. However this could readily be dealt with by a two-stage process in which a taxpayer gives a notice of his disagreement (ie a disagreement but not an actual appeal) to HMRC at stage 1 and appeal to the Tribunal at stage 2 if the disagreement does not result in an agreement with HMRC. The current reform of the tribunals is an opportunity to firmly position the Tribunal as completely independent from HMRC. We think it wrong that this important principle, one of the main drivers for reform identified in the *Leggatt Report*, appears to have got lost because the rules are being tailored to HMRC's current administrative procedures that may well be obsolete in five to 10 years,

16. It also needs to be borne in mind that one of the benefits of a single Tax Chamber of the Tribunal is that where the same issue arises for say, income tax and VAT, a common occurrence where HMRC are 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.

17. The rules appear to require the appellant to provide a great deal of information with the initial notice of appeal (Rule 19 taken with Rules 26(2) and 27(2)).If the requirements are onerous they may act as a barrier to justice, by deterring potential appellants. The details listed in Rule 19(2) should be adequate to make a valid appeal or notification of an appeal. We would not want to see an appeal invalidated if the appellant does not provide (for example) full details of the grounds for appeal plus further information or documents. Such information can be supplied later, and unrepresented appellants may need help from the Tribunal in order to prepare it.

18. In fact the drafting is defective in that the appellant is required to send information required by practice directions with the notice of appeal – but unless he or she knows what track their case will be allocated to, they do not know what the requirements might be. As we understand it, the intention of the Tribunals Service is that there should be two stages – the appellant makes a simple appeal, their case is allocated and then they are told what else they need to supply. The two stages seem to have been combined in these rules and require redrafting.

19. The rules do not mention the possibility of applying to postpone payment of tax, which under current direct tax procedures can be done at the same time as making the appeal.

20. Rule 19(1) says that the appeal or notification must be made within the time limit 'proposed by such other enactment'. We are concerned that the appellant may not know what this time limit is or where to find it. It needs to be made clear to him or her what the time limit in their particular case – will this be done by HMRC? We

think this obligation should be placed on HMRC in legislation, either in the Tribunal Rules or in HMRC's own tax appeals order.

Rule 21 – Allocation of cases to tracks

21. In Rule 21(4) we are not convinced that involving an unusually large sum would necessarily make a case a complex one. We would also welcome clarification as to what is meant by 'unusually large' and 'an unusually complex issue'?

Rule 22 et seq – The Paper Track

22. Rule 24 says that a party can request a hearing rather than having a case dealt with on paper. The Tribunal must then hold a hearing to consider the disposal of the case. We are not clear as to whether the hearing referred to in Rule 25(1) is a hearing at which the actual arguments will be heard, or a hearing where the tribunal decides whether the appeal is to be dealt with subsequently on paper or by means of a hearing. We trust it will be the former interpretation, as this means that the appellant will have an absolute right to have this appeal heard by the Tribunal in person, which we consider essential. The wording of rule 25(1) needs to make the position clear.

Rule 28 – Transfer of cases to the Upper Tribunal

23. Rule 28(1) allows the President of the Tax Chamber to transfer a case to the Upper Tribunal. It seems this applies to any category of case and the parties consent is not required (or sought). By contrast, Rule 28(3) permits a case to be transferred with the consent of the parties, but only if it has been designated a complex case. These two rules appear inconsistent and this needs to be resolved.

Rule 31 – Time and place of hearings

24. The Tribunal should be obliged to consider the parties' circumstances when determining the time and place of hearings. Factors to consider would include the distance that the appellant might have to travel and any special needs he or she might have.

Rule 35 – Notice of decisions and reasons

25. Rule 35(2) requires the Tribunal to issue a final decision notice 'as soon as reasonably practicable'. We do not think this is adequate – there should be a specific time limit.

26. Rule 35(3) says that a decision must be put in writing 'unless each party agrees that it is not necessary'. Please clarify at what stage and in what way will the parties be asked for their views on this?

Publication of decisions

27. In the earlier (June 2008) draft of the rules, Rule 32 provided for publication of decisions. This is not included in the current draft. The rules should cover the publishing of decisions. We believe that there should be a presumption in favour of decisions being published although the tribunal should have power to agree to do

this in an anonymised form. Currently decisions in most Special Commissioners and VAT and Duties Tribunal cases are published and these reasoned decisions are of great help to practitioners.

Rule 39 – Application for permission to appeal

28. Rule 39(2) allows 28 days for a party to apply for permission to appeal. We do not consider the time allowed to be adequate. Before deciding whether to appeal, the party will need to consider the decision, most probably obtain legal advice, and then consider and draft the grounds for appeal. This is likely to take more than 28 days, particularly for an unrepresented appellant or one who did not seek specialist legal advice at the First-tier. There are likely to be a lot of applications for extensions, or a lot of cases where permission is applied for automatically in order the meet the time limit. We recommend that a longer, realistic time period is set – perhaps 60 days.

Rules 40 and 41 – Review of a decision

29. We are aware that this Rule is provided for by the Tribunals, Courts and Enforcement Act 2007. However, we are concerned that the Rule does not make clear on what grounds the Tribunal will decide to review its own decision, or how this will work in practice. In particular, it is only allowed to review a decision where it is satisfied there has been an error of law – but how will the Tribunal know this without doing a review in the first place?

30. We are concerned that the review might mean that the First-tier Tribunal will in effect be re-hearing and re-deciding cases, when they should be going on to the next tier for an appeal hearing. The circumstance and limits of the review procedure need to be much more clearly and tightly defined.

31. The review of a decision will affect the parties' rights. They should be notified that the Tribunal has decided to review its decision. The Tribunal should also have the option of involving the parties.

THE UPPER TRIBUNAL RULES FOR TAX

32. Upper Tribunal rules are so far only available for the Administrative Appeals Chamber. The issues which will need to be amended or addressed for the Finance and Tax Chamber are as follows:

Rule 8 – Striking out a party's case

33. The same comments apply as for the First-tier striking-out rules.

Rule 10 – Orders for costs

34. The rules for costs in tax appeals in the Upper Tier have not yet been decided. We are assuming there will be full costs regime with costs to follow the event. However, we should welcome clarification of when and by whom this costs regime will be decided. It has been raised in the Stakeholder Group but no firm conclusion reached, and indeed we do not believe the Group has been specifically asked to provide its views on this.

35. It is important to protect low income appellants who find that, due to the nature of their case, it starts in the Upper Tribunal. A discretion as in Rule 10(3) should be included for tax appeals.

Ex parte hearings

36. The Rules do not appear to cater for ex parte hearings. They will need amending along similar lines to the First-tier Tax Chamber.

OTHER ISSUES

Tax credits

37. We would like to raise the topic of tax credits appeal hearings. It has been accepted that if tax credits appeals are in due course transferred to the Tax Chamber, the rules will need to cater for them. Necessary rule changes will be made at that stage rather than from the outset. However, we would like the Tribunal Procedure Committee to keep in mind that:

    - The Social Entitlement Chamber Rules contain a number of features which are not in the Tax Chamber Rules but would need to be added, eg rules about medical examinations.
    - The Social Entitlement Chamber has a no-costs regime, without exceptions. If and when tax credit appeals are transferred to the Tax Chamber, it is essential that appellants should not be deterred by any perceived risk of costs.

38. Secondly, we strongly recommend that the question of transferring tax credits appeals should be properly considered. Things have moved on a great deal since the decision to transfer them to the tax tribunals at some stage was made (in 2002) and it would be unwise to follow that decision without reconsidering it or taking account of views from informed stakeholders. Tax credits have features of both tax and social security, and there are pros and cons of dealing with them in either chamber. There should be full consultation with stakeholder groups before any decision is made.

JMM
13 November 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 our 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 http://www.icaew.com/index.cfm?route=128518).