Tax Representation

TAX FACULTY

TAXREP 56/08

TAX APPEALS AGAINST DECISIONS MADE BY HMRC: TECHNICAL DOCUMENT AND DRAFT ORDER

Comments submitted in August 2008 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales to HM Revenue & Customs in response to the technical document 'Tax appeals against decisions made by HMRC' and the draft order published on 2 June 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 technical document *Tax appeals against decisions made by HMRC* (the technical document) and on the draft order entitled The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2008 (the draft order), both published on 2 June 2008.

2. 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.

GENERAL COMMENTS

4. There are two main areas which concern us in the drafting of the statutory instrument. One is terminology and the use of the word 'appeal'. The other is the lack of detail and safeguards regarding the internal review process.

Terminology and use of the word 'appeal'

5. There is a two-stage process in relation to appeals under the new tribunal system.

   - The taxpayer appeals to HMRC against the HMRC decision or assessment.
   - If that 'appeal' is not settled by agreement the taxpayer appeals to the First-tier tribunal.

6. A basic concept of the new tribunal system is that the tribunal is clearly seen by taxpayers to be wholly independent of HMRC. It is fundamental to this perception that the taxpayer appeals to the tribunal, not to HMRC. To emphasise this the draft tribunal rules require the taxpayer not only to appeal to the tribunal but to complete a tribunal, not an HMRC, appeal form and physically send it direct to the tribunal, not via HMRC as under the current system.

7. However the HMRC draft order contradicts this approach. It tells the taxpayer that he must appeal to HMRC and that, if he cannot resolve the issue with HMRC, he can 'notify the tribunal' of his existing appeal to HMRC (new s 43H, TMA 1970). This undermines the perception that the Government desires to achieve of the appeal being made to an independent body. Further, the intention of the Tribunal Service that the taxpayer should complete a tribunal appeal form is wholly inconsistent with the taxpayer not making an appeal but merely notifying the tribunal of the existence of an earlier appeal to HMRC.

5. We believe that these regulations need to be amended to reflect the concept of two appeals; one to HMRC to signify disagreement with the HMRC assessment or

decision and a separate appeal to the tribunal to ask the tribunal to adjudicate on the dispute.

6. We also think that the use of the word 'appeal' to describe both stages of this two-stage process is bound to lead to confusion in the minds of taxpayers. To avoid this confusion and to emphasise to taxpayers that their appeal right is a right to appeal to the tribunal, we think that the word 'appeal' should not be used in relation to the first stage, the notification to HMRC that the taxpayer wishes to challenge the assessment or decision. We suggest that the taxpayer should 'object to' (or whatever similar term is thought appropriate) the decision rather than 'appeal against' it.

Internal review

8. With regard to the internal review process, we broadly supported this proposal in our response to the earlier consultation (see TAXREP 3/08). We understand the need to manage the number of appeals which go the tribunals and thus to resolve issues beforehand where possible, and a robust, even-handed review could be helpful to taxpayers. However, our support was subject to the condition that the review would be at the taxpayers' option and to our comments on how it should be carried out (which are set out in paragraphs 6 to 14 of TAXREP 3/08).

9. We are pleased to note that the review will be at the taxpayer's option and not compulsory.

10. However, on the second point, we are disappointed that the draft legislation deals in very brief terms with the statutory requirements for the way in which HMRC carries out the review, and in fact does not define the purpose of the review at all. 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. We expand on our concerns below, in our comments on the relevant new sections.

11. Colleagues who deal with VAT matters have made the point that the new rules for the availability of costs in VAT cases will make optional reviews more important in VAT cases. Potential appellants will be more cost conscious and they will want a meaningful review, with a reasoned decision, to help them assess the risks of litigation.

DETAILED COMMENTS ON THE DRAFT ORDER

12. This section sets out our detailed comments on the draft statutory instrument, following the paragraph numbering in that document.

13. As a general point, we found the provisions in places very hard to follow, and more work is needed to ensure they are comprehensible. Also, as noted above, it is important that the difference between objecting to a decision and appealing to the tribunal is clear in the legislation and that the tax legislation and tribunal rules are consistent.

14. We accept that it is HMRC's intention to set out the details of how reviews will be done in guidance. However, non-statutory guidance is not a substitute for safeguards in the legislation itself.

Para 3(1)(e) There is a typing error. It is the TMA 1970.

Sch 1, para 1(19) – Reviews
(All section references are to TMA 1970.)

Note: we have made detailed comments on the internal review procedure as drafted in the amendments to TMA 1970. However, our comments are equally valid in respect of the similar new legislation on internal reviews which is being inserted into other parts of the taxes acts.

43D(1) It is open to the appellant to require HMRC to do a review – but also 'open to' HMRC to offer a review. This appears to leave the offer of a review to HMRC's discretion. HMRC should be required to offer a review.

43D(1) What is the policy reason for s 43D(1)(b)? This provides that a taxpayer cannot ask for a review if a determination of the tribunal on the appeal would not be capable of further appeal. We do not see why this procedure should be limited only to cases which can be appealed beyond the tribunal. The particular circumstances in which we think this restriction will apply are appeals against information notices under s 19A, TMA 1970 or para 27, Sch 18, FA 1998. Are there other circumstances in which para (b) can apply? It is unclear why it should not be thought appropriate to ask for a review of a s 19A notice and we think that s 43D(1)(b) should be deleted.

43D(2)

(i) Who is to determine whether a longer period than 30 days is reasonable? What factors can they take into account in making such a decision? We are concerned that what HMRC regards as reasonable may be regarded by the taxpayer or the tribunal as unreasonable. For example, could HMRC simply say that it cannot meet the 30-day deadline because it is understaffed? It has to be borne in mind that asking for a review suspends the taxpayer's right to go to the tribunal. A period of 30 days under s 43D(2) plus 45 days for the actual review is a total of 2½ months. We think it is unreasonable for HMRC to be able to lengthen that period without the taxpayer having any right of objection to anyone. Further any potential extension of the period is open-ended.

(ii) We have another concern about the 30 days. It only starts from the time that the taxpayer requests a review. Why does HMRC need 30 days to acknowledge the taxpayer's letter – which is all that s 43D(2) seems to envisage? We think a seven or 14-day period ought to be sufficient.

43D We suggest adding a new sub-section (5), 'In either case HMRC shall draw the terms of s 43E(3) to the attention of A at the time that it notifies A'.

43E(1) We think that the reference here should be to s 43D(3) rather than 43D(1).

43E(2) There ought to be symmetry of treatment between taxpayers and HMRC. The 30 days under s 43D(2) runs from the receipt of the notice by HMRC whereas the 30

days under s 43E(2) runs from the date of the notice to the taxpayer, not his receipt of the notice. This creates a perception of unfairness to taxpayers.

43E(3) We are concerned that failure to appeal or to ask for a review should be treated as if a s 54, TMA 1970 agreement had been entered into. This does not fit easily with the power under s 49, TMA 1970 for both HMRC and the tribunal to accept a late appeal. It is inconsistent for an appeal to be treated as finally determined (which is what s 54 does) and at the same time capable of being heard by the tribunal (which is what new s 49 does).

43F(1) HMRC should be required to give notice in writing. It should also be required to set out in the notice the reasons for its conclusion.

43F(2) We are concerned that this appears to be saying that a review is whatever HMRC wants it to be in any particular case. It is difficult to see why a taxpayer should ask for a review in circumstances where, at the sole option of HMRC, this could be a cursory rubber-stamping of a note prepared by the officer setting out the reasons for his decision or could be a thorough review of the issues and an attempt to convince one side of the strength of the other's arguments.

While we appreciate that HMRC may want some flexibility in devising the procedures for conducting these reviews, this lack of clarity about the approach to a review potentially undermines the usefulness of the process, which we think should be a 'fresh pair of eyes' looking at the case objectively and without pre-conceived ideas about the merits of the views of either taxpayer or HMRC.

First of all, we think that the legislation should make clear what a review is, and what its purpose is.

Secondly, there should be a statutory requirement on HMRC:

1. that the review will be undertaken by someone unconnected with the case
2. to notify the taxpayer that the review has started,
3. to give the taxpayer contact details for the reviewer, and
4. 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.

Please see our TAXREP 3/08 (referred to above) for a more detailed discussion and recommendations on how reviews should be carried out.

43F(3) We think it is unreasonable that, under this provision, if HMRC fails to state its conclusions, the taxpayer is required to appeal to the tribunal within 30 days of the expiration of the 45-day period. Under this provision, HMRC could merely delay stating its conclusions, hope the taxpayer does not notice and wait for the taxpayer to be out of time to appeal to the tribunal. Alternatively HMRC simply have failed to do the review because the papers have been lost or some other internal systems failure. The taxpayer ought not to be expected to track the timing of the review.

We think that the provisions should be amended so that where HMRC has failed to state its conclusions within 45 days, the 45-day period should be treated as having been extended, with a right to the taxpayer to give notice to HMRC requiring it to state its conclusions within, say, seven days. That would enable the taxpayer to phone the

reviewer after the expiry of the 45-day period, point out that the period has expired and ask if the reviewer needs to agree an extension of the 45-day period.

43G(2) Our comments on s 43E(3) also apply here.

43G(3) We are unclear what this is trying to do. The sub-paragraph appears to have been added subsequent to the explanatory notes. It seems to deny any right of appeal against a review, although clearly that is not the intention. The provision as it stands is unclear and needs to be redrafted.

43H(1) As stated in our General Comments above, we think that the taxpayer should appeal to the tribunal, not notify the tribunal of an earlier appeal to HMRC. That defeats the intention that appeals should be seen to be independent from HMRC.

43H(2) We are not wholly clear what this covers. Is it simply appeals under s 19A, TMA 10970 and para 27, Sch 18, FA 1998?

43H(5) How does this sub-section fit in with new s 49(5)? Both seem to entitle the taxpayer to ask the tribunal to accept a late appeal. The only difference appears to be that s 43H(5) allows the taxpayer to go direct to the tribunal whereas s 49 requires him to have first asked HMRC to accept the late appeal. As this seems the more sensible procedure, what is the purpose of s 43H(5)?

43I This ought not to apply to the notice under s 43F. Such a notice triggers appeal rights and, in the same way as with an assessment, this notice ought to go to the taxpayer personally (of course with a copy to the agent). It ought not to go to an agent instead of to the taxpayer.

Sch 1, para 1(22) – s 48(1), TMA 1970
As stated in our General Comments, it is confusing to use the word 'appeal' to mean one thing in part of para V of TMA 1970 and a different thing in the remainder. 'An appeal to the tribunal' also seems to contradict s 43H, which does not provide for an appeal to the tribunal but the notification to the tribunal of the appeal to HMRC.

Sch 1, para 1(30) – s 57, TMA 1970
We do think it appropriate that HMRC should be able to make regulations in relation to appeals (which means to the tribunal) to supplement or override those promulgated, after statutory consultation, by the Rules Committee set up under the TCEA 2007? Please clarify in what circumstances this provision is expected to be necessary and how it will interact with the tribunal procedure rules.

Sch 1, para 1(44) – s 118, TMA 1970
We think that the opportunity should also be taken to substitute 'HMRC' for 'the Board' in s 118(2), TMA 1970, as this is not nowadays a matter considered by the Board.

Sch 1, para 1(45) – Sch 1A, TMA 1970
This is an example of the confusion caused by using the word 'appeal' to mean two different things, as the word has one meaning in para 6A(2) and a completely different meaning in para 6A(3).

Sch 1, para 9 – Finance (No 2) Act 1992

Para 9(2) contains a reference to modifying s 35(9), Finance (No2) Act 1992. We think this should actually be a reference to Finance (No2) Act 1997.

Sch 1, para 18 – ITEPA 2003

Para (18)(9)(c) The instruction is to make an insert 'tax year'. In fact the reference should be to 'tax' only.

Para 18(11)(e) The inserts for Schedule 5, ITEPA 2003 contain no reference to defining 'tribunal' though the inserts for Schedules 1, 2 3 and 4, do include such a definition in their respective defined expressions. Schedule 5 should have the same.

Sch 1, para 11 – VATA 1994

(All section references are to VATA 1994.)

82A(b) Please clarify what this is intended to cover? We are not aware of situations in which an appeal to the VAT & Duties Tribunal cannot be further appealed to the High Court.

82C It is unclear why for VAT purposes HMRC can agree to carry out a review out of time but there is no similar provision for direct tax.

82D Our comments on the direct tax provisions again apply.

82F The notification under s 82D(1) should have to be given to the trader not to an agent.

85A(4) The draft order takes away the tribunal's current power to award a discretionary rate of interest, repealing s 84(8), VATA 1994. It inserts new s 85A, under which interest will be paid on amounts overpaid or underpaid (as determined by the tribunal) at the rate applicable under s 197, FA 1996.

We are concerned firstly that under these current proposals, successful VAT appellants will suffer financially by making an appeal because interest will be awarded at a lower rate than that at which most businesses borrow. It should be open to the tribunal in VAT cases to award interest at such a rate as it may determine.

We assume that there will need to be amendments to s 197, FA 1996 to determine what the rates will be. However, when directly effective Community law rights are relevant to an appeal, it is arguable that payment of interest at a level inferior to that available in restitution cases would be a breach of Community law.

Secondly, currently both interest and supplement are payable to successful appellants in VAT cases. This is because interest compensates the recipient for the loss of use of the money and the supplement is designed to disincentivise administrative failures. Since they serve different ends, there is no anomaly in paying both in appropriate cases.

Taking into account the fact that interest awarded in VAT appeals may be inferior to that available at present, the removal of the entitlement to supplement is a dilution of taxpayers' rights. This proposal seeks to reverse *Olympia Technology Ltd* (VDT 19145) and it is not a necessary part of the harmonisation of tribunal procedures.

Sch 2 – Transitional provisions

Para 5 It is not clear what is meant by 'proceedings were pending'. If a case had been listed before the General Commissioners but had been adjourned and had not started to be heard, or if the only hearing had been in relation to an order for directions, is that 'proceedings were pending'? Indeed, if an appeal had been lodged with HMRC but not listed at all before the Commissioners, is that 'proceedings were pending'? We would have thought that only part heard substantive appeals should use the old procedure.

Para 6 What is meant by 'subject to paragraph 7'? This merely seems to extend the length of a review. We cannot see why this should affect which procedures are followed on the appeal to the tribunal against the result of the review.

Para 7(2) While we can understand the reason for this, it needs to be appreciated that a period of 120 days (30 for HMRC to start the review and 90 to carry it out) is likely to deter some taxpayers from seeking a review.

Para 8 Again we think it would be more sensible for VAT appeals that have not been made by 1 April 2009, and even those which have been made but not yet heard, to be dealt with under the new procedures. Otherwise we may be in a position for several years where the First-tier tribunal has to ascertain which set of rules apply before it can start to hear a case.

JMM
August 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).