

Tribunals reform: General and Special Commissioners – RIP

AS A RESULT OF SIR ANDREW LEGGATT'S Review of Tribunals in 2001 and the Tribunals, Courts and Enforcement Act 2007, a new two-tier tribunal structure is, over time, replacing all the old tribunals.

CHANGES

The new tribunal structure first became operational on 3 November 2008 with social security appeals being the trail blazers. On 1 April 2009 it was the turn of the tax tribunal. All the existing tax tribunals were replaced by a new two-tier structured tribunal. From now on the lower-tier tribunal, known as the Tax Chamber of the First-tier Tribunal, will hear most tax appeals. The second-tier tribunal, known as the Finance and Tax Chamber of the Upper Tribunal, will hear appeals against First-tier Tribunal decisions and some judicial review work. In addition, some cases (expected to be a very small number) in which complex legal points are raised and which are fact light, may be transferred to the Upper Tribunal at first instance.

TIERS

The Tax Chamber of the First-tier Tribunal will be the primary tribunal for fact finding. Even highly complex cases, if they require a significant amount of fact finding, will be heard in this tribunal. The Tax Chamber of the First-tier Tribunal will hear all appeals formerly dealt with by the General Commissioners of Income Tax, the Special Commissioners of Income Tax, the VAT and Duties Tribunal and the Section 706 (now section 704) Tribunal. All of these tribunals had their own procedural rules but they have all now been abolished and there is one set of consolidated rules that covers all the areas previously handled by the four tribunals. It is hoped that this will result in a more consistent approach to tax appeals, regardless of which tax is being disputed.

JURISDICTION OF THE FIRST-TIER TRIBUNAL

This tribunal will hear all cases except those that go direct to the Upper Tribunal. A case

that is fact light but tax-issue heavy can be transferred for hearing before the Finance and Tax Chamber of the Upper Tribunal, but only if both parties agree. The president of the Tax Chamber of the First-tier Tribunal (currently, Sir Stephen Oliver) makes a direction and the president of the Finance and Tax Chamber of the Upper Chamber (currently, Warren J) must agree with the First-tier Tribunal president's direction before the case is transferred.

JURISDICTION OF THE UPPER TRIBUNAL

The Finance and Tax Chamber of the Upper Tribunal will hear substantial and complex cases that are fact light at first instance, appeals from the First-tier Tribunal Tax Chamber decisions (with permission) and some judicial review cases. The Finance and Tax Chamber is intended to be, essentially, an appeal tribunal and is effectively taking the place of the Chancery Division of the High Court's role in the old tax appeal system. Appeals from the Finance and Tax Chamber lie to the Court of Appeal (or Court of Session in Scotland).

COMPOSITION OF THE TRIBUNALS

Members of the First-tier Tribunal are judges and deputy judges drawn from the former Special Commissioners, the former VAT and Duties Tribunal chairmen, assignees from other tribunals and non-legal recruits selected by open competition, possibly including ex-General Commissioners.

Members of the Upper Tribunal are drawn from High Court judges (*ex-officio*), the former president of the VAT and Duties Tribunal, the former Special Commissioners, other VAT and Duties Tribunal chairmen, president and vice-presidents or senior immigration judges of the Asylum and Immigration Tribunal, Social Security Commissioners and Deputy Commissioners and any other Chamber presidents and vice-presidents of other Chambers.



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The president of the tribunal decides the number of members of the First-tier Tribunal (one to three members). In the Upper Tribunal there will only be one member unless the senior president (Carnwath LJ) determines otherwise. The single member must be a tribunal judge unless the senior president otherwise determines. It is a majority decision if there is more than one member and the presiding member has a casting vote.

PROCESS

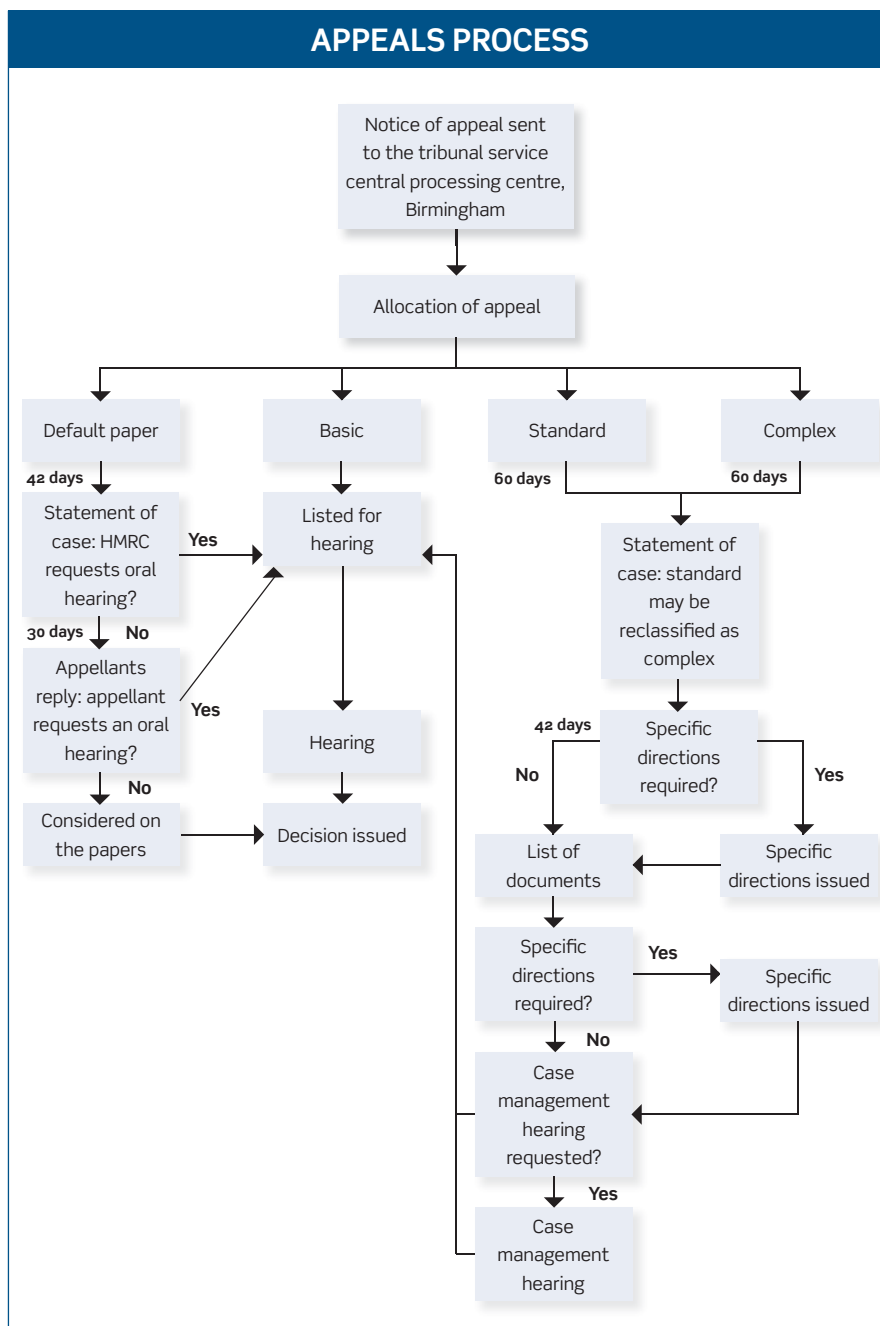
Under the old system, in the case of direct taxes, the taxpayer first appealed to HM Revenue & Customs (HMRC). More than 90% of cases were settled without the appeal going to a tribunal. VAT and Duties appeals, on the other hand, went straight to the VAT and Duties Tribunal, although the taxpayer could, at the same time as appealing, request an internal review. Under the new system, direct tax appeals are still made to HMRC in the first instance and it is expected that many appeals will be settled as before. However, if a taxpayer does not wish to settle they can send their appeal direct to the tribunal. Under the old system only HMRC could list a case on direct taxes for a tribunal hearing. In addition, a taxpayer can now, instead of appealing, request an internal review from HMRC. For indirect taxes the appeal is direct to the tribunal as before, but a taxpayer can invoke the new internal review process first. The review process is discussed later.

APPEALS PROCESS

The tribunal service central processing centre (TSCP) in Birmingham will receive all tax tribunal appeals and originating applications, and will make arrangements for the appeal to be heard. Either party can apply for the hearing and the TSCP will allocate appeals applications and other references to one of four categories:

- 1) default paper;
- 2) basic;
- 3) standard; or
- 4) complex.

The HMRC Clearing House (based in York) must then be informed of the case and category. TSCP will send the Clearing House copies of documentation and notify it of relevant deadlines. The Clearing House then forwards direct tax appeals to the relevant



HMRC appeals unit and indirect taxes will be sent to HMRC Solicitor's Office. The appeals unit or Solicitor's Office will then notify the tribunal service of the contact details of the person preparing the case and any future correspondence will then be between them and the Tribunal Service without reference to the Clearing House.

CATEGORIES OF CASE

Default paper

These appeals are the simplest cases that can be dealt with on paper, unless either party chooses to have an oral hearing.

Default paper category cases will normally be appeals against self-assessment late return fixed penalties; employer end-of-year return penalties; construction industry late return penalties; corporation tax return fixed penalties; Class 2 national insurance contribution notification penalties; and income tax fixed-percentage surcharges.

Cases in this category will be decided on the basis of the written documentation. HMRC will make a statement of case that has to be provided within 42 days of the date the tribunal sends notice of the appeal

and its categorisation to the taxpayer. The appellant then has 30 days from the date that the statement of case is sent to him in which to respond. Unless the tribunal directs otherwise there will be no further exchanges and the case will be decided on the papers provided.

The decision will be sent to all parties after the appeal has been considered by the tribunal.

Basic category

These appeals are those where there is no requirement for HMRC to serve a statement of case. These will normally be:

- 1) Appeals against:
 - a) late filing and late payment penalties (except those in the default paper category);
 - b) penalties for incorrect tax returns, except appeals against penalties for deliberate or concealed action, cases where an appeal is also brought against the assessment to tax to which the penalty relates and indirect taxes;
 - c) indirect tax penalties on the basis of reasonable excuse;
 - d) HMRC Construction Industry Scheme (CIS) gross payment status decisions; and
 - e) information notices.
- 2) Applications for:
 - a) permission to make a late appeal;
 - b) postponement of tax where HMRC does not agree the amount; and
 - c) a direction that HMRC close an enquiry.

The basic category case hearings will be similar to hearings before the General Commissioners, with a limited exchange of papers prior to the tribunal hearing. HMRC is not required to provide a statement of case but if HMRC plans to rely on any information or argument that the appellant does not already know of, HMRC has an obligation

to inform the taxpayer as soon as they are aware that this is the case. HMRC must give sufficient detail to enable the appellant to respond to the points at the hearing.

Cases will be listed for hearing at different venues across the UK, local to the taxpayer. The decisions will usually be announced on the day of the hearing. The tribunal will always send down a written decision notice outlining the decision and setting out any rights of appeal against the decision.

Standard category

These appeals are ones that require a longer hearing because they have facts to consider and complicated arguments. HMRC will be asked to provide a statement of case within 60 days and the parties then have 42 days in which to file a list of documents that they have in their possession and on which they intend to rely or produce at the hearing. Standard category decisions will usually be reserved and given in writing later.

Complex category

These appeals are cases that the tribunal considers will:

- 1) require lengthy or complex evidence in a lengthy hearing;
- 2) involve a complex or important principle issue; or
- 3) a large financial sum.

As for standard cases, HMRC will have to provide a statement of case within 60 days, after which the parties have 42 days in which to file a list of documents that they have in their possession and on which they intend to rely or produce at the hearing.

Standard and complex cases will normally be heard in London, Manchester, Birmingham, Belfast or Edinburgh. As with standard cases, the decision in a complex case is likely to be reserved and given later in writing.

APPEALS AGAINST FIRST-TIER DECISIONS

There is a right of appeal (with permission) on a point of law to the Upper Tribunal against First-tier Tribunal decisions.

Applications for permission to appeal must be made in writing to the First-tier Tribunal. If permission is refused, the taxpayer can

then apply in writing to the Upper Tribunal for permission to appeal. This is a change from the old system under which an appeal lay from the Special Commissioners to the High Court as of right. Appeals against decisions of the Upper Tribunal are heard by the Court of Appeal (or Court of Session in Scotland). Appeals from these courts will be to the House of Lords. At any stage, including at the First-tier Tribunal, the case may be referred to the European Court of Justice.

COSTS

Costs can be awarded in the First-tier Tribunal in cases other than complex cases only if the tribunal considers that either of the parties has acted unreasonably in bringing, defending or conducting the proceedings. This is a more restrictive cost regime than in the old VAT and Duties Tribunal but less restrictive than was the case in the Special Commissioners hearings where a party had to have acted 'wholly unreasonably' for costs to be awarded against that party. In a complex case, unless the taxpayer has asked for the case to be excluded from the costs regime within 28 days of being notified that the case has been classified as complex, the normal High Court costs regime will apply, so that costs will usually follow the event.

The First-tier Tribunal cannot award costs without considering the parties' representations and, if the taxpayer is an individual, without taking their means into account.

The Upper Tribunal can award costs (again, the normal High Court costs regime) but the same considerations apply as for awarding costs in complex cases in the First-tier Tribunal.

HMRC REVIEW

In addition to the new tribunal procedures, a new HMRC review concept has been introduced for direct taxes. (A review process was previously available for indirect taxes only.) An HMRC review officer will internally review a decision, assessment, or other matter that could be appealed, with which the taxpayer disagrees. Since 1 April 2009, when HMRC sends a decision letter to a taxpayer, the letter must reflect the new appeals and the new internal review process. The letter will explain to the taxpayer what HMRC believes the facts to be, what the

decision is, the reasons for the decision, the legislation and relevant case law supporting the decision, the tax that HMRC believes to be due, a note stating that the taxpayer should contact HMRC if they do not agree with the assessment or other decision, the taxpayer's rights or any time limits, and what will happen if HMRC does not hear from the taxpayer within the time limit.

After this, the procedure differs depending on whether the disputed tax is a direct or indirect tax.

REVIEW: DIRECT TAXES

After a taxpayer appeals to HMRC, a taxpayer may:

- 1) discuss the matter in an effort to settle the appeal;
- 2) ask for a review; or
- 3) notify their appeal to the tribunal.

If HMRC and the appellant agree, the appeal can still be settled by agreement under s54 Taxes Management Act (TMA) 1970 or other relevant provisions. HMRC may offer a review in the course of discussions or the taxpayer may ask for a review. If a review is undertaken an appeal cannot be notified to the tribunal during the review period.

The procedure differs depending on whether HMRC offers the review or if the taxpayer asks for a review. If HMRC offers a review, the taxpayer then has 30 days from the date of the review offer either to accept the offer or to notify the appeal to the tribunal. If the taxpayer does not reply or appeal then the matter is treated as settled on the basis set out in the HMRC letter that offered the review, as though agreed under s54 TMA 1970 (or relevant equivalent legislation). If the offer of review is accepted by the taxpayer, the review team then has 45 days from the date the acceptance is received by HMRC (the review period) to conduct the review and notify the taxpayer of the review conclusions. (A longer review period can be agreed by both parties.) However, HMRC's review team has 90 days to carry out

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reviews of appeals that were made to HMRC before 1 April 2009, provided the review offer is made before 31 March 2010. When the review is completed the review officer will issue a letter setting out and explaining the conclusions of the review and pointing out the taxpayer's options from then on. If the review is not concluded within the review period (and no extension is agreed) then the matter is treated as upheld and HMRC must write to the taxpayer and notify them of this. The taxpayer then has 30 days in which to appeal, otherwise HMRC's view of the matter stands.

If the taxpayer asks for a review, the request is considered by the HMRC decision-maker who has 30 days to state HMRC's current view of the matter, setting out any changes in view since the initial appeal. The procedure is then the same as when HMRC has itself offered a review which the taxpayer has accepted.

REVIEW: INDIRECT TAXES

Since 1 April 2009, when an HMRC officer makes an indirect tax decision that is appealable they must include an offer of review in the decision letter. The taxpayer must in turn either:

- accept the decision;
- send new information or arguments to the decision-maker;
- accept HMRC's offer of a review; or
- appeal to the tribunal.

If the taxpayer accepts the decision or takes no action within 30 days of the

decision letter, then the decision stands and the disputed indirect tax is payable, subject to normal rules.

If the taxpayer sends in new information or arguments in time, an appeal or review can be extended but only if HMRC agrees and within 30 days of the decision letter (not within 30 days of the taxpayer sending in new information or arguments).

If the taxpayer accepts HMRC's review offer, the review team has 45 days to conduct the review (or a longer period if agreed). If the review officer does not send the taxpayer the review team's conclusion within the review period (and no extension is agreed), the decision under review is treated as upheld and HMRC must write to the taxpayer to notify them of this. The taxpayer then has 30 days in which to appeal to the tribunal.

CONCLUSION

A reform of the tax appeal procedures has been sought by tax professionals for many years. Taxpayers are now, in direct tax cases, able to apply for an appeal to be heard by the tribunal, which is a big improvement on the old system. The requirement for HMRC to provide a statement of case and the aligning of procedures with High Court practice is also welcome. However, there are undoubtedly pitfalls for taxpayers in the new procedure if they do not respond appropriately at the end of the review period. Time will tell how well it all works.

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