



SCOTTISH EXECUTIVE

**GUIDANCE NOTES FOR
GENERAL COMMISSIONERS
OF INCOME TAX
(SCOTTISH VERSION)**

JUNE 2003

INTERPRETATION

In these Guidance Notes, the following expressions have the following meanings.

the Board	the Commissioners of Inland Revenue
business	includes a trade, profession or vocation
Chairman	The Presiding General Commissioner, of either sex
the Clerk	the Clerk to the General Commissioners
Commissioner(s)	Commissioner(s) for the general purposes of the income tax
division	the separate area to which General Commissioners are appointed
ECHR	European Convention on Human Rights
FA	Finance Act
filing date	for filing a return under self-assessment is 31 January following the tax year to which it refers or, if the return is issued after 31 October following the tax year to which it relates, three months from that issue;
final determination	the decision finally determining any proceedings before a Tribunal
he / his / him	Includes she / her
Inspector	an inspector of taxes
Officer of the Board	is used in the self-assessment legislation in place of the more traditional terms 'Inspector' and 'Collector'
party	a party to any proceedings
proceedings	(a) any appeal to the General Commissioners under the Taxes Acts; (b) any proceedings before the General Commissioners which under the Taxes Acts are to be heard and determined in the same way as such an appeal; (c) any proceedings before the General Commissioners which relate to a penalty and are not within paragraph (a) or paragraph (b) above;
Regulations	The General Commissioners (Jurisdiction and Procedure) Regulations 1994
The Revenue	The Inland Revenue, or an officer of the Inland Revenue, as the context requires.

Taxes Acts	The Taxes Management Act 1970, the Income and Corporation Taxes Act 1988, the Taxation of Chargeable Gains Act 1992 and all other enactments relating to income tax, corporation tax and capital gains tax.
TMA	Taxes Management Act 1970
Tribunal	Means two or more, but not more than five, General Commissioners for a division before whom the proceedings are brought

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Education (Student Loans) (Repayment) Regulations 2000

Regulation 4	7.15
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European Convention on Human Rights

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Finance Act 2000

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General Commissioners (Jurisdiction and Procedure) Regulations 1994

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Income and Corporation Taxes Act 1988

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Social Security Contributions (Transfer of Functions) Act 1999

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Social Security (Categorisation of Earners) Regulations 1978

	7.13.4
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Social Security (Contributions) Regulations 2001

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Social Security Contributions (Decisions and Appeals) Regulations 1999

Regulation 10	7.13
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Taxes Management Act 1970

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SCOTTISH EXECUTIVE

Secretary of Commissions for Scotland

These Guidance Notes aim to provide a source of information, specific to Scotland, for newly appointed General Commissioners together with advice and guidance on practice, procedure and taxation for existing General Commissioners.

The Scottish Executive has based this guidance on that currently used in England and Wales. That guidance was originally prepared by the Association of General Commissioners of Income Tax for the Greater London area with the Lord Chancellor's Department and I am extremely grateful to them for allowing us to adapt it to our systems in Scotland. My thanks also go to John Barton, Clerk of the Edinburgh North Division for his invaluable help with this edition.

Your copy of the guidance is enclosed and it will also be available on the password protected General Commissioners' and Clerks' website at <http://www.courtservice.gov.uk/tribunals/gcit/index.htm>. Once again, I would like to thank everyone who has contributed to the preparation of these Guidance notes and I commend them to you.

Alan Oliver
Secretary of Commissions for Scotland

Chapter 1

INTRODUCTION

- 1.1 General Commissioners of Income Tax in the United Kingdom are the first point of appeal by a taxpayer who is in dispute with the Inland Revenue. They are not paid for their time and expertise in tax matters is not a requirement for appointment. They are completely independent of the Inland Revenue and have wide discretion on procedures to follow when hearing appeals.
- 1.2 These Notes seek to provide guidance to Commissioners on the law relevant to their duties and suggests how the many aspects of their duties may be carried out in practice.
- 1.3 The General Commissioners (Jurisdiction and Procedure) Regulations 1994, (the Regulations) cover the jurisdiction and procedures of Commissioners. The Regulations came into force on 1 September 1994 and are covered in the following chapters.
- 1.4 Self-assessment commenced generally, except for companies and some partnerships, on 6th April 1996. Company self-assessment began on 1st July 1999. The main legislation for self-assessment is in the Finance Act 1994 which considerably amended the Taxes Management Act 1970. Further legislation is in later Finance Acts. The following chapters contain the relevant provisions of these Acts as they affect Commissioners. The Notes based on legislation are for general guidance only and Commissioners should always refer to the actual legislation and to their Clerks in cases where definitive interpretation of the law is necessary

Chapter 2

GENERAL COMMISSIONERS

Appointment

2.1 General Commissioners in Scotland are appointed by Scottish Ministers. They are appointed to local areas, known as divisions. A Commissioner may be appointed to more than one division but may only sit for the division, or divisions, to which he or she is appointed. Commissioners retire at 70, except those appointed before 1 January 1996 who may serve till their 75th birthday.

Personal Qualities

2.2 The personal qualities expected of a Commissioner include:

- 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 other's 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 but not prematurely (ie not before having weighed all the relevant evidence and arguments)
- some experience, understanding or knowledge of, and sympathy for, life outside his or her own immediate circle of family and work.
- Commissioners should also have the qualities to determine properly and fairly issues between the appellants (the taxpayers) and the Inland Revenue.

Conduct

2.3 Commissioners are expected:

- (a) to perform a fair share of the Commissioners' duties and to resign if unable to perform those duties;
- (b) to maintain the dignity, standing and good reputation of the Commissioners at all times and to refrain from conduct or activities inconsistent with those standards;
- (c) to inform the Chairman and the Clerk of their Division of any impending proceedings, whether criminal or civil, against them or in which they are involved in any capacity (unless they are to be a witness in a non-contentious matter), and to disclose to those persons the results of any such proceedings;

(d) to comply with any direction, including suspension or refraining from sitting as a Commissioner, made by Scottish Ministers or on their behalf by the Advisory Committee;

(e) to declare whether or not they have been convicted of any offence or formally cautioned and that no order of court, either civil or criminal, has been made against them and that they are not involved in any matter pending before the courts;

(f) to set out on the undertaking or on a separate sheet attached to the form the particulars of every conviction, formal caution or order and particulars of all matters pending before the court.

Commissioners should inform the Secretary of Commissions for Scotland

- if they become unfit to discharge their duties because of ill health or for any other reason, or
- if they are charged with a serious offence, or
- if they become bankrupt or sign a trust deed for creditors or have a judicial factor appointed to their estates.

Remuneration

2.4 Commissioners receive no payment for their services, but the Lord Chancellor's Department on behalf of the Scottish Executive reimburses their expenses. Travel and subsistence claims from Commissioners should be submitted to the Lord Chancellor's Department's expense claims section in London with supporting receipts. Circulars issued by the Lord Chancellor's Department set out the rates in respect of travel and subsistence that may be claimed and motor mileage allowances. Commissioners are required to complete an insurance undertaking for car journeys for which a mileage allowance is claimed.

Duties

2.5 There are two main statutory duties specified for Commissioners namely:

- (a) to exercise the powers relating to appeals and other matters conferred on them by the Taxes Acts (these are wide-ranging and spread throughout the Taxes Acts) – TMA s2; and
- (b) to appoint a clerk – TMA s3.

Secrecy

2.6 The names of Commissioners are not confidential. However, matters dealt with by Commissioners are highly confidential and a declaration of secrecy must be made before any Commissioner can adjudicate. The maximum penalty for a breach is imprisonment for up to two years.

Quorum

2.7 When hearing appeals, the Commissioners constitute a Tribunal. The term was introduced by the Regulations. Under Regulation 11, a Tribunal comprises at least three Commissioners where possible, but the validity of any proceedings cannot be challenged where a Tribunal comprises only two Commissioners. If proceedings are adjourned after evidence has been heard, only those Commissioners who were present at the original hearing may attend the

adjourned hearing. The proceedings may continue with fewer Commissioners only if all parties give their consent.

Although the legal quorum is two Commissioners it is always safer and fairer to have a Tribunal of three Commissioners. The Regulations state that no more than five Commissioners may sit on a Tribunal. This maximum should not be exceeded in any circumstances, even though some divisions have, in the past, had a tradition of all the Commissioners for the division sitting together.

- 2.8 There are a few matters which only one Commissioner is required to hear, such as applications for leave to issue a notice under TMA s20(3).

Chapter 3

THE CLERK

Appointment

- 3.1 The Clerk to the General Commissioners is appointed by the Commissioners and acts under their direction. The Clerk is often the Clerk for more than one division. The Clerk is paid by the Government. He or she may be dismissed by the Commissioners or by the Scottish Ministers (after consultation with the Commissioners). The Commissioners may appoint an Assistant Clerk if they think it necessary – TMA s3. The Commissioners should notify the Secretary of Commissions as quickly as possible of the retirement or resignation of a Clerk, and of the appointment of a new Clerk, so that the appropriate remuneration action can be taken.

The Lord Chancellor's Department and the National Association of General Commissioners have published guidelines for the appointment of a Clerk; these are reproduced in Appendix A.

Eligibility

- 3.2 There is no legal requirement for a Clerk to have any formal qualification. A Clerk is usually a solicitor. He or she should not be a former employee of the Inland Revenue. He or she must have the resources necessary to provide the administration required by the Commissioners and, of course, the personal qualities which will enable him or her to carry out the duties with efficiency, knowledge and tact. A Clerk may not normally continue in office after the age of 70, although in exceptional circumstances he or she may continue to the age of 75.

Statutory Duties

- 3.3 The main statutory duties of the Clerk are:
- (a) To receive notice from any party to proceedings to be heard by the Commissioners that he wishes a date for the hearing to be fixed and to send notice to each party of the place, date, and time of the hearing. The hearing must be at least twenty-eight days after the notice is sent, unless the parties otherwise agree or a Tribunal otherwise directs – Regulation 3.
 - (b) To send notice to each party of the place, date and time of a postponed hearing and similarly for an adjourned hearing unless the place, date and time of the adjourned meeting were announced before the adjournment in the presence of the parties. Regulation 8(1)-(3)
 - (c) To receive service of notices on behalf of the Commissioners. Regulation 26(3)(c)
 - (d) To send a notice of the final determination of the Tribunal to each party;
 - (e) To notify parties of any direction made by the Tribunal ;
 - (f) To sign a certificate of value or apportionment of value in connection with chargeable gains; and
 - (g) To prepare a case to be stated for the Court of Sessions when required to do so by any party.

Other Duties

- 3.4 In practice the Clerk has many more duties.
- 3.5 The Clerk's practical duties include:
- (a) Arranging the date, time and venue for appeal meetings and the rota of Commissioners' attendances.
 - (b) Liaison between the Commissioners and the Inland Revenue in agreeing dates and possible length of meetings.
 - (c) Sending out the notices to attend meetings and dealing with telephone calls and enquiries from appellants.
 - (d) Dealing with queries, both legal and procedural, from taxpayers and the Revenue.
 - (e) Dealing with correspondence from appellants who feel aggrieved about a previous decision.
 - (f) Arranging for the Commissioners to hear a case at the taxpayer's request (as distinct from the usual route of listing by the Inspector of Taxes).
- 3.6 The attendance of the Clerk or Deputy Clerk at hearings is of the utmost importance. Initially the appellants should be received outside the meeting room in such a way that they perceive the Commissioners as an impartial and independent tribunal. During the meeting the Clerk will advise on law and general procedural matters and take notes and may well find that he or she has to draw the Commissioners' attention to points of law when they have not requested such information. The Clerk's knowledge and experience, as a result of attending many more Commissioners' meetings than any one Commissioner, will help to ensure that the meetings are conducted in an equitable and proper way and in a consistent manner throughout the division.
- The Clerk must not offer an opinion on the merits of a case. It is the duty of the Commissioners to arrive at a decision and it would be unlawful for the Clerk to try to influence them.
- 3.7 In most divisions there will be cases which come up at meeting after meeting. The Commissioners may allow extra time for the production of information or records with the warning that, for example, at the next meeting a precept may be issued or confirmation of the assessment may be made. The Clerk should be able to draw this to the attention of the Commissioners sitting at the next meeting. The Clerk may also maintain a record of outstanding precepts.
- 3.8 The Clerk will draft a Case Stated for the approval of the Commissioners if a Case is required by one of the parties.
- 3.9 The Clerk must keep records of Commissioners' sittings.
- 3.10 Where, due to the unavoidable absence of the Clerk, it is necessary to have a substitute, he or she should be formally appointed Clerk for the proceedings to be heard. A Minute should record the appointment.
- 3.11 Should correspondence arise about the handling of an appeal, the Clerk should initially consider the matter, consulting as necessary the Commissioners who heard the appeal in question. If the

matter cannot be resolved and the writer wishes to pursue the matter further, then it should be referred to the Secretary of Commissions for Scotland, for the attention of Scottish Ministers, who will consider the matter further.

Chapter 4

THE MEETING PLACE

- 4.1 It is the responsibility of the Clerk to arrange for suitable premises at which hearings may be held. Such premises are usually in public buildings or offices conveniently situated, but not at the offices of the Inland Revenue.
- 4.2 The meeting room must be large enough to accommodate:
 - (a) the Tribunal of General Commissioners;
 - (b) the Inland Revenue representatives;
 - (c) the appellant(s) with their representative(s) and any witnesses;
 - (d) the Clerk;
 - (e) any person with statutory entitlement to attend; and
 - (f) any members of the public who wish to attend.
- 4.3 The requirement for a hearing in public does not require the Tribunal to make special arrangements for accommodating members of the public.
- 4.4 There must also be a separate area apart from the meeting room where appellants and representatives can be seated until it is their turn to be heard. Attention must also be given to the requirements of the Disability Discrimination Act 1995 which stipulates that as a provider of services there should be reasonable access to, and provision within, the premises for disabled people and that the necessary steps should be taken to make this possible. Reference should also be made to the best practice as set out in the Council on Tribunals' Checklist and Code of Practice on 'Access for Disabled People Using Tribunals'. For example, there should be access for wheelchair users.
- 4.5 The Council on Tribunals emphasises the importance of ensuring that appellants should not be intimidated by their surroundings and that the room should therefore not appear too formal. For example, a court room atmosphere should be avoided. It is also important that it is clear to the appellants from the layout of the room used for the purpose of a hearing that the General Commissioners are independent. The Inland Revenue representatives and the appellants should be seated at a similar distance from the General Commissioners. Attention should also be given to smaller points ie if the Inland Revenue representatives have glasses of water then so should the appellants and neither party should be facing direct sunlight when addressing the General Commissioners.

Chapter 5

JURISDICTION

- 5.1 General Commissioners are concerned with income tax, corporation tax, capital gains tax, national insurance contributions and student loan repayments. Their considerable powers are outlined in later chapters. They have jurisdiction in exercising their powers within the area covered by their division, but this is subject to the exclusive rights of other bodies to hear certain types of proceedings and to the right of taxpayers to elect for proceedings to be heard by the Special Commissioners instead of the General Commissioners, although the General Commissioners may decide to disregard such an election in certain circumstances. TMA ss 31(4), (5A)-(5E), 46(1).
- 5.2 General Commissioners may decide that an appeal should be transferred to the Special Commissioners if they consider it is complex or will require too lengthy a time for hearing it. The General Commissioners must consider any representations from the parties and receive agreement from the Special Commissioners before any transfer. Similarly, proceedings may be transferred on a joint application of the parties. TMA 44(3), (3A)
- 5.3 Special Commissioners are barristers or advocates of at least ten years' standing appointed by the Lord Chancellor as full-time or part-time Commissioners. Their hearings are more formal than those of General Commissioners and they are better suited to deal with complex points of law and complicated lengthy cases. They have power to award costs, to publish their decisions and their hearings may be in public. Some matters are dealt with exclusively by the Special Commissioners and these are listed in Appendix B.

The Relevant Place for 1996/97 onwards

- 5.4 Appeal proceedings must be brought before the General Commissioners for the division which contains a **Relevant Place** as specified in Schedule 3 TMA.

Relevant Places are:

- (a) the taxpayer's usual place of residence in the UK; or if this is unknown by the officer of the Board, the taxpayer's last known place of residence:
- (b) the taxpayer's place of business in the UK; (where the business with which the proceedings are concerned is carried on or, if it is carried on in more than one place, the head office or place where it is mainly carried on):
- (c) the taxpayer's place of employment in the UK; (whether or not the proceedings relate to the taxpayer's employment): If the taxpayer makes no election in a PAYE appeal, the place is where specified by the PAYE regulations.

For income tax and capital gains tax, the taxpayer may elect which place is the Relevant Place with the notice of appeal or, if the proceedings are not an appeal, when he commences the proceedings. The Revenue may allow the taxpayer to make the election at a later date. The election is irrevocable. If the proceedings are commenced by an Officer of the Board, or if the taxpayer fails to make an election within the time limit, the election is made by the Officer.

For corporation tax, the relevant place for a corporate taxpayer is similar to (a) and (b) above but these provisions come into effect only for accounting periods ending on or after 1st July 1999.

For partnerships, the Relevant Place is the place, or principal place, where the business is carried on.

Occasionally special rules are set out in the Taxes Acts for a particular tax or allowance but in most cases the parties can agree which Commissioners' division should hear an appeal. In practice it is rare for Commissioners to be asked to determine whether or not they have jurisdiction.

Where a Commissioner is asked to give consent to the issue of a notice under s20(3) TMA, the Commissioner need not be a Commissioner for the Division which would have jurisdiction over the taxpayer's appeal. A Commissioner may therefore consent to the issue of a s20(3) notice in respect of any taxpayer in UK.

5.5 The above rules may be altered:

(a) where the Board directs that any particular proceedings are to be heard by the General Commissioners for a specified division, but the direction will not apply if the taxpayer serves notice of objection within 30 days. Schedule 3 paragraphs 8 and 9 TMA;

(b) where the parties agree the proceedings should be heard by the General Commissioners for a specified division TMA s44(2);

(c) where the General and the Special Commissioners agree to transfer proceedings (see paragraph 5.2 above); and

(d) where proceedings are heard together (see 6.8 below) and where parties are joined (eg for capital gains tax purposes), see paragraph 6.7 et seq.

5.6 The jurisdiction of General Commissioners under the above rules cannot be questioned except by an objection made to them before or during the hearing by a party to the proceedings. (TMA s44(4)) The General Commissioners will then decide if they have jurisdiction.

5.7 Under no circumstances should the venue be chosen to suit the convenience of the taxpayer's accountant or agent.

Capital Gains Tax

5.8 Where the market value of an asset on a particular date or the apportionment of an amount or value is a material question in any proceedings relating to tax on chargeable gains, any party may require the Tribunal to record in its final determination that value or apportionment and a certificate of the material particulars may be evidence in any proceedings relating to capital gains tax without further proof. The certificate will be signed by the Clerk where the General Commissioners determined the appeal or an inspector where the appeal was settled by agreement or the clerk or registrar of another tribunal which determined the question – Regulation 18.

Jurisdiction of other bodies

5.9 Other bodies which have jurisdiction in certain matters are as follows:

(a) The Lands Tribunal in Scotland has jurisdiction where the dispute concerns the value of land or lease of land for capital gains tax or the value of an interest in land for the Business Expansion Scheme.

(b) The Special Commissioners (see paragraph 5.3 above) have exclusive jurisdiction in certain matters which are mainly specialist areas (see list at Appendix B). They also hear cases transferred to them by the General Commissioners or by election of the taxpayer (see paragraphs 5.1 and 5.2 above).

5.10 Scottish Taxpayers

The Law

Scotland Act 1998, s75

75(1) For the purposes of this Part a person is a Scottish taxpayer in relation to any year of assessment if–

- (a) he is an individual who, for income tax purposes, is treated as resident in the United Kingdom in that year, and
- (b) Scotland is the part of the United Kingdom with which he has the closest connection during that year.

75(2) For the purposes of this section an individual who is treated for income tax purposes as resident in the United Kingdom in any year of assessment has his closest connection with Scotland during that year if, but only if, one or more of the following paragraphs applies in his case–

- (a) he is an individual to whom subsection (3) applies for that year,
- (b) the number of days which he spends in Scotland in that year is equal to or exceeds the number of days in that year which he spends elsewhere in the United Kingdom,
- (c) he is an individual who, for the whole or any part of that year, is a member of Parliament for a constituency in Scotland, a member of the European Parliament for Scotland or a member of the Scottish Parliament.

75(3) This subsection applies to an individual for a year of assessment if–

- (a) he spends at least a part of that year in Scotland,
- (b) for at least a part of the time that he spends in Scotland in that year, his principal UK home is located in Scotland and he makes use of it as a place of residence, and
- (c) the times in that year when Scotland is where his principal UK home is located comprise (in aggregate) at least as much of that year as the times (if any) in that year when the location of his principal UK home is not in Scotland.

75(4) For the purposes of this section–

- (a) an individual spends a day in Scotland if, but only if, he is in Scotland at the end of that day, and
- (b) an individual spends a day elsewhere in the United Kingdom if, but only if, he is in the United Kingdom at the end of that day and it is not a day that he spends in Scotland.

75(5) For the purposes of this section an individual's principal UK home at any time is located in Scotland if at that time–

- (a) he is an individual with a place of residence in Scotland, and
- (b) in the case of an individual with two or more places of residence in the United Kingdom, Scotland is the location of such one of those places as at that time is his main place of residence in the United Kingdom.

75(6) In this section "place" includes a place on board a vessel or other means of transport.

Commentary

- 5.10.1 Under the Scotland Act 1998 the Scottish Parliament has power to increase or reduce the percentage determined to be the basic rate of income tax for Scottish taxpayers by up to 3% in either direction. Thus if the UK basic rate tax is 22%, the Scottish Parliament can charge as much as 25% or as little as 19%.
- 5.10.2 It therefore becomes important to know who is a Scottish taxpayer. The rules are set out in s75 of the Scotland Act. Only an individual who is resident in the United Kingdom for income tax purposes in a year of assessment can be a Scottish taxpayer for that year. There are three further tests. If a taxpayer satisfies any one of them he or she is a Scottish taxpayer.
- 5.10.3 A taxpayer who is an MP for a Scottish constituency, or a member of the Scottish Parliament or a member of the European Parliament for Scotland is a Scottish taxpayer
- 5.10.4 If the number of days in the year of assessment on which the taxpayer is physically present in Scotland at midnight exceeds the number of days on which he is physically present elsewhere in the United Kingdom at midnight then he is a Scottish taxpayer.
- 5.10.5 If a taxpayer spends part of a year in Scotland, has a home there and nowhere else in the United Kingdom and uses that home as a place of residence in the course of the year then he is a Scottish taxpayer. Even if he has a home elsewhere in the United Kingdom he is still a Scottish taxpayer provided his Scottish home is his main place of residence for a larger part of the year than his other UK home.
- 5.10.6 Working for a Scottish employer does not determine the status of a taxpayer. Under the test in s75(2)(b), a taxpayer who lives in England and travels to work daily in Scotland will not be a Scottish taxpayer if he returns home to England before the end of each day. Conversely, a taxpayer who lives in Scotland and travels to work daily in England will probably be a Scottish taxpayer on the one of the residence tests.
- 5.10.7 The location of the tax office dealing with a taxpayer's affairs has no relevance to the taxpayer's status as a Scottish or non-Scottish taxpayer. Nor is Scottish ancestry relevant.
- 5.10.8 When Commissioners are asked to determine where a person's principal residence is, it is likely that both parties will cite case law on UK residency and on private residence relief for capital gains tax purposes. Commissioners may find the principles laid down in those cases helpful but, as always, must determine appeals on the facts as they find them.
- 5.10.9 The arguments are likely to vary depending on whether Scottish income tax is at a higher or lower rate than in the rest of the UK. If Scottish tax is higher, then some taxpayers will seek to argue that they should not be classed as Scottish taxpayers. If Scottish tax is lower, then many English taxpayers may seek to establish a connection with Scotland. The law does not allow a taxpayer to choose whether or not to be a Scottish taxpayer – the case must be decided strictly according to the rules set out above.

Chapter 6

PROCEDURE

6.1 Hearings in public

The Law

Regulation 13

(1) Subject to the following paragraphs of this regulation, hearings before a Tribunal shall be in public.

- (2) A Tribunal may direct that all or part of a hearing shall be in private –
- (a) upon the application of all the parties by notice to the Clerk;
 - (b) upon the application of any party by notice to the Clerk;
 - (c) of its own motion,

if in each case, a Tribunal is satisfied that a hearing in private is necessary -

- (i) in the interests of morals, public order, national security, juveniles or for the protection of the private life of the party; or
- (ii) if it considers that publicity would prejudice the interests of justice.

(3) Before determining an application under paragraph (2)(b) or giving a direction under (2)(c) a Tribunal shall give all other parties an opportunity to make representations.

(4) Before giving a direction under paragraph (2) that the entire hearing be in private, a Tribunal shall consider whether only part of the hearing should be heard in private.

(5) The following persons shall be entitled to be present at the hearing of any proceedings before a Tribunal notwithstanding that the hearing or part of the hearing takes place in private, and those referred to in sub-paragraphs (b) to (e) only may remain present during the deliberations of the Tribunal but shall take no part in those deliberations -

- (a) the parties and their representatives;
- (b) the Clerk and any of the staff of the General Commissioners;
- (c) a member of the Council on Tribunals or of the Scottish Committee of that Council in the capacity of member;
- (d) any of the Special Commissioners;
- (e) a member of the Judicial Studies Board or of one of its Committees in the capacity of member.

(6) A Tribunal may exclude from the whole or part of a hearing any person whose conduct, in the opinion of a Tribunal, has disrupted or is likely to disrupt the hearing.

(7) A Tribunal, with the consent of the parties, may permit any other person to be present at the hearing of proceedings before it which is to take place, or part of which is to take place, in private.

(8) Where all or part of a hearing is held or is to be held in private, a Tribunal may direct that information about the whole or part of the proceedings (including information that might help to identify any person) before a Tribunal shall not be made public.

(9) For the purposes of paragraph (2)(i) “party” shall not include the Revenue.
Human Rights Act 1998

3(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

Article 6, ECHR – Right to a fair trial

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Commentary

- 6.1.1 As is pointed out at paragraph 6.5.1, there is some doubt whether Article 6 of the ECHR applies to all proceedings before General Commissioners. Nevertheless it is desirable that Commissioners should at all times have regard to the provisions of Article 6.
- 6.1.2 Regulation 13(1) might appear incompatible with Article 6. However it is the taxpayer whose interests are to be protected under Article 6 and the Tribunal can exercise its powers under Regulation 13(3) to permit other persons to attend. A “public hearing” does not necessarily imply that everyone has a right to attend, and the Tribunal might still exercise its discretion if the taxpayer were to seek the attendance of an excessive number of observers or if such persons were attempting to disrupt the proceedings.

6.2 Parties

The Law

Regulation 12

At the hearing of any proceedings before a Tribunal—

- (a) a party other than the Revenue may be represented by any person whether or not legally qualified, except that if in a particular case the Tribunal is satisfied that there are good and sufficient reasons for doing so, it may refuse to permit a particular person, other than one who is legally qualified or who has been admitted a member of an incorporated society of accountants, to represent a party at the hearing;
- (b) the Revenue may be represented by a barrister, advocate, solicitor or any officer of the Board.

Commentary

- 6.2.1 The Revenue is always a party to proceedings at a hearing. Usually the Revenue will be represented by one or two inspectors from the local tax office. Sometimes a case will be taken by an officer from another division or branch of the Inland Revenue (for example, in special investigation cases). The Revenue may be represented by an advocate, barrister, advocate, solicitor or any officer of the Board.
- 6.2.2 No more than two representatives of the Revenue should normally be present in the meeting room while taxpayers are in attendance. If more than two representatives of the Revenue have come to the meeting to deal with different cases, those representatives who are not involved in the case which is being heard should be asked to wait outside. This is so that the taxpayer does not feel intimidated by a large number of people on the Revenue's side of the room. In rare cases it may be necessary for more than two representatives of the Revenue to be present, but they will discuss this with the Clerk before the meeting.
- 6.2.3 The taxpayer may appear in person or may be represented by any person whether or not legally qualified. Note Regulation 12(b): the Tribunal may exclude certain representatives, except lawyers and accountants, if it is satisfied that there are good and sufficient reasons for doing so.
- 6.2.4 The tax inspectors who represent the Revenue at the hearings are expected to be knowledgeable in taxation matters and are, usually, accustomed to appearing before the Commissioners. Most taxpayers, and quite a few accountants and other agents, are not used to such appearances. Many taxpayers are unable to afford the cost of being represented by an agent. Remember that unrepresented taxpayers are in an unfamiliar situation and have no real knowledge of procedure or what is required of them.
- 6.2.5 The Commissioners must be impartial and be seen to be impartial. Accordingly, the Commissioners have a responsibility to ensure that the appellant taxpayer has a fair hearing and the Chairman should always be ready to vary the usual procedure if he considers it would put the taxpayer, and indeed his agent where necessary, at ease and to assist in the presentation of his case, without the Commissioners losing their impartiality. Where appropriate, the agreement of the Revenue should be sought.

6.3 Non-appearance of a party – Postponements and Adjournments

The Law

Regulation 8

8(1) A Tribunal may postpone the hearing of any proceedings, and the Clerk shall send notice to the parties of the place, date and time of the postponed hearing.

8(2) A Tribunal may from time to time adjourn the hearing of any proceedings and, subject to paragraph (3) below, the Clerk shall send notice to the parties of the place, date and time of the adjourned hearing.

8(3) If the place, date and time of the adjourned hearing are announced before the adjournment in the presence of the parties, no notice need be sent by the Clerk under paragraph (2) above.

8(4) When any hearing is adjourned in order that further information or evidence may be obtained, the Tribunal hearing the proceedings may give directions regarding the disclosure of such information or evidence to the parties prior to the resumption of the hearing.

Regulation 14

14(1) If a party fails to attend or to be represented at a hearing of which he has been duly notified, the Tribunal may—

- (a) unless it is satisfied that there is good and sufficient reason for such absence, hear and determine the proceedings in the absence of the party or his representative, or
- (b) postpone or adjourn the hearing.

14(2) Before deciding to hear and determine any proceedings in the absence of a party or his representative, the Tribunal shall consider any representations in writing or otherwise submitted by or on behalf of that party in response to the notice of hearing and shall give any party present at the hearing an opportunity to be heard in regard to those representations.

Commentary

6.3.1 Note the distinction between postponement and adjournment

Postponement. A hearing is postponed where there has been no consideration of the substantive issues of the appeal and the appeal is not to be heard and determined until a later date, eg to allow more time for either party to obtain or submit information or where a person is unable to attend a hearing owing to absence, sickness or some other reasonable cause.

Adjournment. A hearing is adjourned where the appeal has been part heard and has to be discontinued for some reason and reconvened at a later time or date. At the resumed hearing the Tribunal should consist of the same Commissioners but proceedings may be continued by a smaller number of those Commissioners if all parties give their consent - Regulation 11(3).

In practice, postponements are commonly referred to as adjournments, but the distinction is important for procedural reasons.

- 6.3.2 Regulation 14 deals with the non-appearance of one of the Parties; in practice it will usually be the non-appearance of the taxpayer.
- 6.3.3 In many cases the Revenue will have no objection to a case being postponed, and it is quite common for the Inspector to give the Clerk a list of those cases where the Revenue has agreed a postponement to the next meeting with the taxpayer or his agent. Where the Tribunal is given a list of agreed postponements the Commissioners are entitled to ask the Inspector for more information before agreeing to a postponement.
- 6.3.4 In other cases where the taxpayer or his accountant has requested a postponement the Revenue may either oppose a postponement or wish to make the Tribunal aware of relevant facts before it makes a decision. Commissioners must consider carefully why the taxpayer has requested a postponement.
- 6.3.5 If the taxpayer is said to be ill, and some details of the illness are given, Commissioners should always postpone the case at least once and possibly again if the taxpayer's illness continues. On a subsequent request for a postponement on the grounds of illness consider asking for a medical certificate – the Clerk will write to the taxpayer to request this. In a number of cases in England the High Court has overturned the decision of Commissioners who proceeded to hear an appeal in the absence of the taxpayer after the taxpayer had produced medical evidence in support of his request for a postponement.
- 6.3.6 If the taxpayer's accountants say they need more time to find the information, always consider an adjournment, especially if the accountants have only recently been instructed. The High Court in England has held that Commissioners acted unreasonably in refusing to grant a postponement when the taxpayer's accountants had written to say that they had supplied all the information requested to the Revenue, would deal with any further enquiries the Revenue had by correspondence, and would try to settle the appeal by agreement.
- 6.3.7 Bearing in mind that the taxpayer normally receives only four weeks notice of the date and time of the hearing of the appeal, the hearing should be postponed on the first occasion it is listed if he or she writes back to say that they will be on holiday on the date of the hearing or has a business appointment they cannot rearrange.
- 6.3.8 The Revenue often makes a distinction between ordinary postponements and final postponements. In the Revenue's view, an ordinary postponement leaves open the possibility that a further postponements may be granted while a final postponement means that the case will be determined at the next hearing, come what may. But there is only one type of postponement – the Tribunal either postpones the case or it does not. The Tribunal is required to consider the case on its merits each time it is listed for hearing and is not bound by what the General Commissioners who considered the case on a previous occasion said. If a case is listed on a "final adjournment", the Commissioners must consider any further representations by the taxpayer, and decide whether or not to postpone the hearing on the basis of those representations.
- 6.3.9 A case may be postponed to a fixed date (usually the next meeting, but occasionally to a date to be fixed if the appeal is likely to be contentious and require a special hearing) or for a specified period, or indefinitely. An indefinite postponement is commonly referred to by the Latin tag *sine die*, which most taxpayers do not understand. The preferred term is an open postponement.

6.3.10 An open postponement must always be granted if the notice has not been served on the taxpayer – the letter will have been returned to the Clerk by the Post Office. However Commissioners may proceed to determine on assessment if notice has been given to an agent, and there is a reasonable belief that the agent has continuing instructions from the taxpayer.

6.4 The Chairman

The Law

Regulation 11

11(2) The General Commissioners comprising a Tribunal shall decide which one of them shall preside at the hearing of proceedings before them.

Regulation 16

16(1) Any decision of a Tribunal shall be made by the votes of the majority of the General Commissioners comprising that Tribunal and, in the event of an equality of votes, the General Commissioner presiding at the hearing shall be entitled to a second or casting vote.

Commentary

- 6.4.1 The Chairman ('the Presiding General Commissioner') of a Tribunal is decided by the General Commissioners comprising that Tribunal. The Chairman should control the proceedings and should ensure that all parties have sufficient and equal opportunity to present their cases and that the proceedings are justly handled. He or she should not allow the parties to address each other (apart from cross-examination) or to interrupt each other, except in the most unusual circumstances and where it will obviously help the matter in hand. Otherwise all matters should be addressed to the Commissioners as it is important that the parties recognise that the Tribunal does not consist only of the Chairman. If any individual appears upset or appears to be losing control the Chairman should adjourn the hearing for a short while.
- 6.4.2 The Chairman has a casting vote in the event of an equality of votes on a decision by the General Commissioners comprising a Tribunal. This is why it is preferable for there to be three Commissioners on a Tribunal, so that the need for the Chairman to exercise his or her casting vote does not arise.
- 6.4.3 The Chairman should ask any questions he or she considers necessary to clarify any points made by either party. Other members of the Tribunal should not ask questions or intervene in any way without having first obtained the consent of the Chairman to do so. This helps to keep good order and reinforces the authority of the Chairman. However, the Chairman should ensure that fellow Commissioners have an opportunity to ask questions of each party and their respective witnesses, but questions should not generally be asked during examination in chief or cross-examination. It is unlikely that there will be any objections if they ask questions about relevant matters even if they have not been raised by either party.
- 6.4.4 The Chairman should always refer to the Clerk if there is any doubt on a point of law or procedure, and indeed the Clerk ought to intervene if he has any reason to believe that there is any misunderstanding. The Commissioners should not ask the Revenue for legal advice, since to do so would give an impression of bias. The Revenue may, of course, make legal submissions in support of their case while making their presentation.

6.5 Impartiality

The Law

Article 6, ECHR – Right to a fair trial

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Taxes Management Act 1970

5(1) No General Commissioner or Special Commissioner shall act as such in relation to any matter in which he has a personal interest, or is interested on behalf of another person, except with the express consent of the parties to the proceedings.

Commentary

- 6.5.1 Some commentators have suggested that Article 6 ECHR does not apply to all proceedings before General Commissioners, because Article 6 is expressly limited to civil and criminal proceedings and in many European jurisdictions tax appeals are regarded as public or administrative law proceedings, not civil law proceedings. But the safer course is to assume that Article 6 does apply to all proceedings before General Commissioners.
- 6.5.2 It is of vital importance that Commissioners and their Clerks are seen to be independent of the Inland Revenue and completely impartial in the conduct of their duties. Some suggestions follow:
- (a) **Layout of the room.** The parties (the Revenue and the taxpayer) should be seated at an equal distance from the Commissioners.
 - (b) **Entrance of parties.** Both parties should enter and leave the room together. This is particularly recommended in contentious cases and, where there are several such appeals on the same day, the tax inspectors should leave with the taxpayer at the end of one appeal and be re-admitted with the taxpayer of the next appeal. This may not be practical with delay appeals when there are other appellants waiting and it would save time for the tax inspectors to remain seated in the room, but the balance of practicality and advantage must be considered. If the tax inspectors remain in the room then whatever the business there should be no conversation or other action which might suggest to the next appellant that the Commissioners and the Inland Revenue are on familiar terms. The impartiality of the Commissioners must be seen to be beyond question.
 - (c) **Identification.** It is good practice to have a title plate or notice showing the function of each person, ie Chairman, Commissioners, Clerk, Inspector, Appellant. These identify each person to the appellant who may otherwise be confused as to who is which. There is

no confidentiality of the names of the Commissioners hearing an appeal and any party may ask for their names.

- (d) **Size of parties.** Only the parties and their representatives are entitled to be present at a hearing (plus certain persons who have a statutory right to be present, see Regulation 13(2) above). The parties will usually consist of the taxpayer and, for the Revenue, the officers concerned with the proceedings.
- (e) **Statement by Chairman or Clerk.** A statement of the independence of the Commissioners should be made by the Chairman or the Clerk to each appellant (see below) unless the appellant or his agent are obviously experienced in attending appeal hearings and some other statement is more appropriate.
- (f) **Formality of address.** To avoid giving the impression that any General Commissioner is well acquainted with the tax inspectors, it is recommended that Commissioners should avoid addressing an inspector by name but refer to him as 'Mr Inspector' or 'Tax Inspector'. General Commissioners should never use forenames, even when addressing each other. The Clerk should address the Commissioners and likewise the Commissioners should address the Clerk as 'Mr X' or 'Ms Y', even if they are on first name terms privately.
- (g) **Badges etc.** General Commissioners should avoid wearing badges, ties or other emblems identifying them with any group or organisation.
- (h) **Conflict of interest.** Note Section 5 of the Taxes Management Act set out above. 'Interest' here includes personal knowledge, pecuniary involvement, family relationship or other connection which could be construed as bringing a Commissioner's impartiality into doubt (this, of course, includes gifts from either party). Where there is any doubt the Commissioner should consider withdrawing from those proceedings or declaring his 'interest' to the parties if the connection is extremely remote.

6.5.3 Statement at commencement of an appeal hearing

It is recommended that where a taxpayer attends an appeal hearing not accompanied by an agent the Chairman (or the Clerk with appropriate adjustments) should:

- (a) Invite the taxpayer to take a seat;
- (b) Ascertain the identity of the taxpayer, and if representing a company or other body his position in that company and similarly that of any person accompanying the taxpayer;
- (c) Indicate the Commissioners and that he or she is the Chairman;
- (d) State that the Commissioners are not part of the Inland Revenue, but are an independent and impartial tribunal appointed by the Secretary of State;
- (e) Indicate the Clerk;
- (f) Indicate the Inland Revenue representatives;
- (g) Explain that the Commissioners have no prior knowledge of the case; and
- (h) Explain the order of proceedings.

If the taxpayer is represented by an agent (g) and (h) above should be adapted. It would be prudent to ascertain the extent of the agent's experience beforehand.

6.6 Witness Summons

The Law

Regulation 4

4(1) Where a party to any proceedings requires the attendance of a person at the hearing of those proceedings to give evidence or to produce any document in his possession, custody or power relevant to the subject matter of the proceedings, a General Commissioner may, on the application of that party, issue a summons (in this regulation referred to as a “witness summons”) requiring the attendance of that person at the hearing, or the production of the document, wherever that person may be in the United Kingdom.

4(2) A witness summons issued under paragraph (1) above shall state the name and address of, or otherwise describe, the person to be served and shall be signed by the General Commissioner issuing it, and it shall be the responsibility of the party on whose application the summons was issued to serve it on that person.

4(11) On the application, by notice served on the Clerk, of a person on whom a witness summons has been served, a General Commissioner may set aside the summons in whole or in part; and the party on whose application the summons was issued shall be entitled to be heard on such an application.

4(12) Subject to [the above], if a person on whom a witness summons is served—

- (a) fails to attend in obedience to the summons, or
- (b) attends, but refuses to be sworn or to affirm, or
- (c) refuses to answer any lawful question, or
- (d) refuses to produce any document which he has been required by the summons to produce,

the Tribunal hearing the proceedings may summarily determine a penalty against him not exceeding £1,000.

4(13) Any penalty determined by a Tribunal under paragraph (12) above shall for all purposes be treated as if it were tax charged in an assessment and due and payable.

Commentary

- 6.6.1 The Tribunal has extensive powers to summon witnesses to appear before it. A Witness Summons can be issued by a single General Commissioner and would normally be requested by one of the parties before the meeting which the witness is required to attend.

6.7 Joining additional parties

The Law

Regulation 7

7(1) If it appears to a Tribunal, whether on the application of a party or otherwise, that it is desirable that any person other than the Revenue be made a party to any proceedings, the Tribunal may order such person to be joined as a party in the proceedings and may give such directions for giving effect to, or in connection with, the order as it thinks fit.

7(2) Where pursuant to an order under paragraph (1) above a person is joined as a party in any proceedings by reason of a question arising in those proceedings which may affect his liability to tax or in which he otherwise has an interest, he shall not be entitled, unless all the other parties consent, to be present at the hearing of the proceedings except during such part of the hearing as relates to that question, and a Tribunal shall, if necessary, hear any such question separately from the rest of the proceedings.

7(3) On the application of a person who has been joined as a party in the circumstances specified in paragraph (2) above, a Tribunal may, if it is satisfied that it would be to the convenience of the parties to do so, transfer the proceedings to the General Commissioners for the division in which the applicant ordinarily resided at the date of the application, or to the Special Commissioners.

Commentary

- 6.7.1 It may be desirable to join another party into the proceedings. For example, suppose that two out of three partners in a partnership have appealed against an assessment. Because the Tribunal's decision is likely to affect the tax liability of the third partner, the Commissioners have power under Regulation 7 to make that person a party to the proceedings, and to give any further directions which are necessary.
- 6.7.2 The third party is only entitled to be present at the parts of the hearing which affect his or her own tax liability, unless the other parties consent to his or her presence throughout. It may be necessary to hear the issues which affect the third party separately from the issues which do not.
- 6.7.3 The party who has been joined may apply for the proceedings to be transferred to the General Commissioners for the division in which he ordinarily resided at the date of his application or to the Special Commissioners, and the Tribunal may transfer the Proceedings if the Commissioners are satisfied that it would be to the convenience of the parties.

6.8 Hearing proceedings together

The Law

Regulation 6

6(1) Where two or more proceedings have been brought before, but have not yet been heard by, the General Commissioners for one or more divisions and it appears to two or more of the General Commissioners for one of those divisions—

(a) that some common issue arises in both or all of them, or

(b) that both or all of them are relevant to some common issue,

those Commissioners may, of their own motion or on an application by a party to any of those proceedings, direct that those proceedings be heard at the same time or consecutively and by the same Tribunal within their division.

6(2) A direction shall not be given under paragraph (1) above except on notice sent to all the parties to the proceedings in question who shall be entitled to be heard before any direction is given.

6(3) On the giving of a direction under paragraph (1) above, the Clerk to the General Commissioners by whom the direction is given shall send notice of the date and terms of the direction to all the parties to the proceedings and, except where all the proceedings have been brought before the General Commissioners for the same division, to the Clerk to the other division or, if more than one, each other division of General Commissioners concerned.

Commentary

- 6.8.1 Sometimes there are two or more sets of proceedings before the Tribunal which give rise to common issues. For example, two joint owners of a property which has been sold might each have appealed against a capital gains tax assessment. The two appeals have been made by two different taxpayers, and strictly each appeal should be heard separately. However, both appeals are likely to involve the same facts.
- 6.8.2 Regulation 6 allows the Commissioners to direct that the two appeals be heard together, even if one appeal is due to be heard by another division. They can only make such a direction before any of the proceedings have been heard and they must notify all parties and allow them to make representations. If another Division is involved, the Commissioners must notify the Clerk to the other Division that they have made a direction under this Regulation.

6.9 Order of Proceedings

The Law

Regulation 15

15(1) At the beginning of the hearing of any proceedings the Tribunal shall, except where it considers it unnecessary to do so, explain the order of proceeding which it proposes to adopt.

15(2) The Tribunal shall conduct the hearing in such manner as it considers most suitable to the clarification and determination of the issues before it and generally to the just handling of the proceedings and, so far as appears to it appropriate, shall seek to avoid formality in its procedure.

15(3) The parties shall be heard in such order as the Tribunal shall determine and shall be entitled—

- (a) to give evidence,
- (b) to call witnesses,
- (c) to question any witnesses including other parties who give evidence, and
- (d) to address the Tribunal both on the evidence and generally on the subject matter of the proceedings.

Commentary

6.9.1 At the commencement of the hearing, the Chairman should ask parties to produce the documents which are to be referred to and ask whether there is any agreed statement of facts. The Chairman should also enquire whether any witnesses are to give evidence, whether either party wishes that evidence to be on oath and suggest (particularly if there are matters of credibility) that such witnesses should withdraw until their evidence is to be heard. The formal order of proceedings, which is similar to the order of proceedings in a civil court case, is as follows:

- (a) The Chairman asks the appellant to present his case.
- (b) The appellant, or his representative, explains the point at issue and examines any witnesses. The appellant will often be the main witness giving evidence. The Chairman will ask the Inspector of Taxes if he wishes to cross-examine the witness, after which the appellant, or his representative, may re-examine the witness.
- (c) The Revenue will present its case and the procedure is the same as for the appellant.
- (d) The appellant, or his representative, and then the Inspector of Taxes will present their respective arguments. The appellant, or his representative, may reply to the Revenue. No totally new points should be raised but if they are, the Revenue may reply on those new points.
- (e) The Commissioners confer, usually after both parties have been asked to leave the room or by retirement, if that is possible.
- (f) The Commissioners give their decision.

- 6.9.2 In practice the full formal order of proceedings is rarely adopted except in contentious cases where the taxpayer is professionally represented. A less formal order is more commonly used.
- 6.9.3 The taxpayer is asked to present his case first since he is normally the appellant. Sometimes the taxpayer may find it easier for the Revenue to introduce the appeal by describing the point at issue with any relevant legislation or case law. But it is always the taxpayer's choice whether to present his case first or allow the Revenue to outline the case first.

After the taxpayer has presented his case, the Revenue may respond. When both parties appear to have said all they wish to say, the Chairman should ask if they wish to make any final statements or representations before the Commissioners retire to consider their decision.

- 6.9.4 Whatever the procedure, care must be taken to ensure that both parties have had sufficient opportunity to present their cases. Unrepresented taxpayers may repeat points they have already made several times. Some patience is necessary, but if the taxpayer (or, occasionally, the Revenue) is not advancing his case, the Chairman may need to ask tactfully for him to move on or conclude his presentation.
- 6.9.5 The Clerk may ask the taxpayer or other witnesses questions to draw out points which may be relevant to the taxpayer's case. This is not done to present the taxpayer's case but to draw out information relevant to the case which may help the Tribunal in reaching a decision.
- 6.9.6 Although the Revenue usually send at least two officers to attend Commissioners' meetings, it is important to establish at the start of the hearing which officer is presenting the case for the Revenue. Any other Revenue officers who are present should take no part in the case unless invited to do so by the Commissioners.

6.10 Evidence

The Law

Regulation 15

15(4) In assessing the truth and weight of any evidence, the Tribunal may take account of its nature and source, and the manner in which it is given.

15(5) Evidence before the Tribunal may be given orally or, if the Tribunal so directs, by affidavit or a statement made or recorded in a document, but at any stage of the hearing the Tribunal may, on the application of any party or of its own motion, require the personal attendance as a witness of–

- (a) the maker of an affidavit, or
- (b) the maker of such a statement, or
- (c) in the case of an oral statement recorded in a document, the person by whom the statement was so recorded.

15(6) The Tribunal may receive evidence of any fact which appears to the Tribunal to be relevant to the subject matter of the proceedings notwithstanding that such evidence would be inadmissible in proceedings before a court of law in that part of the United Kingdom by reference to the law of which the proceedings before the Tribunal are to be determined, but, save in cases where claims for privilege are allowed (including, in proceedings in Scotland, claims for protection from disclosure by virtue of any rule of law relating to the confidentiality of communications), it shall not refuse to admit any evidence which would be admissible in such proceedings.

15(7) The Tribunal may require any witness to give evidence on oath or affirmation and for that purpose there may be administered an oath or affirmation in due form.

Regulation 5

5 If a party agrees a document for the purposes of any proceedings he shall be deemed, subject to the terms of the agreement, to admit for the purposes of those proceedings–

- (a) that the document was written and signed or executed by the person by whom, and on the date on which, it purports to have been, and
- (b) if it purports to be a copy of another document, that it is a true copy of that document,

but, subject to any enactment or rule of law, in the absence of an express admission or agreement, he shall not be deemed to admit the truth of the contents of that document.

Commentary

- 6.10.1 The Tribunal is given considerable discretion over the types of evidence it can hear and is not bound by the formal rules of evidence which apply in the courts.
- 6.10.2 Expert evidence should normally be agreed in advance with the other party. An expert witness is there to give independent and impartial advice to assist the Commissioners to understand the

background which is relevant to the case. For example, if the taxpayer's case is that it is customary for her trade to prepare accounts in a particular way which differs from most business accounts, she may call an expert witness with knowledge of her trade (but not necessarily the taxpayer's business) to explain how and why the trade prepares its accounts. In some cases the Revenue may call an "in-house" expert witness, such as a Revenue accountant or a member of the District Valuer's staff. The Commissioners should ascertain that such witnesses understand their duty to give impartial evidence. It is in order for an expert witness to hear the preceding evidence.

- 6.10.3 It is not usual for witnesses to be sworn, but the Commissioners may require a witness to give evidence under oath.
- 6.10.4 Oral evidence is given by a witness answering questions put to him, first on behalf of the party who has called him, and then in cross-examination on behalf of the other party, with the first party having a right of re-examination. Generally, a party may not cross-examine a witness he has called, unless the Tribunal gives him leave to treat the witness as a hostile witness.
- 6.10.5 Questions put to a witness on behalf of the party who has called him should not be leading questions; that is, they should not be questions which indicate what answer is looked for. A simple rule of thumb is that if a question can be answered 'yes' or 'no' it is a leading question. The answers should be the witness's own answers, based on his own unprompted recollection. It is, however, permissible to lead a witness with the other side's consent, or when he is merely dealing with matters not in dispute, or which have already been agreed.
- 6.10.6 Cross-examination is, in general, to test the validity of the evidence given by the witness, or to elicit further facts within the knowledge of the witness which the party cross-examining wishes to establish. Questions need not be confined to such evidence as the witness may already have given, but should be relevant to the issues in the appeal, for example, credibility. If the evidence of a witness called by one side is challenged by the other side, that challenge should be made clear in the questions put by the other side in cross-examination.
- 6.10.7 Re-examination after cross-examination on behalf of the other party. A witness may be re-examined on behalf of the party by whom he was called. Such re-examination must be confined to elucidating matters which have emerged in cross-examination.
- 6.10.8 Documentary evidence usually takes the form of a bundle of agreed documents or copies of documents. Note the provisions of Regulation 5 relating to documentary evidence. A party wishing to introduce a document which is not agreed by the other side must provide evidence to verify it.
- 6.10.9 Sometimes the Revenue and the taxpayer will produce an agreed written statement of facts to the Tribunal. Usually the parties will ask the Commissioners to read the statement first – this can be helpful in establishing exactly which issues are in dispute between the parties. In contentious cases, where a Tribunal has been convened to hear one case or group of related cases, the Clerk will usually have asked the parties if an agreed statement of facts can be produced. But the Commissioners must not draw any adverse conclusions from the failure of parties to produce an agreed statement.
- 6.10.10 In all cases, the Revenue must be asked to produce the taxpayer's original appeal notice or letter, with copies so that each Commissioner and the Clerk have a copy. It is not acceptable for the Revenue to read out the appeal or, even worse, attempt to summarise it.
- 6.10.11 In appeals against penalties and surcharges, where dates are important, it is helpful if the Revenue produce a chronology of key dates and events. A specimen chronology is included at

Appendix D. The summary should not contain any other evidence or opinions as to the reasonableness of the taxpayer's excuse. Five copies are required: one for each Commissioner, one for the Clerk and one for the taxpayer in case he or she appears in person.

Where the taxpayer appears in person, the Revenue should give her a copy of any summary before the meeting so that they can consider it. At the hearing the Chairman will ask the taxpayer if she has been given a summary and whether she has any objection to it being produced to the Tribunal. If there is no objection the Revenue will give the summary to the Commissioners and the Clerk, which will demonstrate that the Commissioners have no prior knowledge of the case.

The Inspector can then introduce the case very briefly and ask the Commissioners to read the appeal notice and chronology. He can then say why the Revenue does not think that the taxpayer has a reasonable excuse and the taxpayer can respond. This may shorten the time taken on each case, but more importantly because the Commissioners will have the information before them they can concentrate on the issues rather than trying to take down dates in the right order.

6.10.12 In all cases, a party only has to prove his case on the balance of probabilities (the civil standard of proof), not beyond all reasonable doubt (the criminal standard of proof). Note that penalty cases heard by Commissioners are not criminal cases and therefore facts only need to be proved on the balance of probabilities.

6.11 The Decision

The Law

Regulation 16

16(1) Any decision of a Tribunal shall be made by the votes of the majority of the General Commissioners comprising that Tribunal and, in the event of an equality of votes, the General Commissioner presiding at the hearing shall be entitled to a second or casting vote.

16(2) The final determination may be given orally by a Tribunal at the end of the hearing or may be reserved and in either event shall be recorded in a document which shall be signed and dated by the Tribunal.

16(3) The Clerk shall send to each party a notice setting out determination recorded under paragraph (2) above.

16(4) Except where the final determination is given at the end of the hearing, it shall be treated as having been made on the date on which the notice is sent to the parties under paragraph (3) above.

16(5) Every notice sent to the parties under paragraph (3) above shall be accompanied by a notification of the provisions of—

- (a) the Management Act,
- (b) these Regulations, and
- (c) rules of court,

relating to appeals from the General Commissioners and of the time within which, and the manner in which, such appeals shall be made.

Regulation 24

24(1) Any irregularity resulting from any failure to comply with any provision of these Regulations or with any direction given by a Tribunal before the Tribunal has reached its final determination shall not of itself render the proceedings void.

24(2) Where any such irregularity comes to the attention of a Tribunal, the Tribunal before reaching its final determination may, and if it considers that any person may have been prejudiced by that irregularity shall, give such directions as it thinks just to cure or waive the irregularity.

24(3) Clerical mistakes in any document recording a direction or a decision of a Tribunal, or errors arising in such a document from an accidental slip or omission, may be corrected by the General Commissioner presiding at the hearing or any other of the General Commissioners comprising the Tribunal, or by the Clerk if all the General Commissioners comprising the Tribunal have died or ceased to be General Commissioners, by certificate under his hand.

Commentary

- 6.11.1 Regulation 16(2) requires the decision to be recorded in a document signed and dated by the Tribunal. Normally this will be the Clerk's list of cases to be heard on which he or she will have noted the Tribunal's decision. The Clerk will ask the Chairman to sign the list at the end of the meeting. This is in addition to the Meeting Record Form which is required by the Lord Chancellor's Department for statistical and pay purposes.
- 6.11.2 In some cases the Commissioners determine the appeal in principle; that is, they decide everything except the actual figures. They may then adjourn the hearing so that the parties can agree the figures and then come back for a 'final determination'. If the parties cannot agree the figures then there may have to be a further hearing. The Tribunal at an adjourned hearing must be made up of some or all of Commissioners who were at the original hearing (Regulation 11(3)).
- 6.11.3 In a case where the figures cannot be agreed without much delay or inconvenience, the Tribunal may be asked to state a case on the point of principle, leaving the figures to be worked out after the appeal has finally been decided. General Commissioners have no power to do this, and in a case in Northern Ireland the Court refused to hear a case stated where the Commissioners had not made a final determination of the figures.

6.12 Review of the Tribunal's Determination

The Law

Regulation 17

17(1) If, on the application of a party or of its own motion, a Tribunal is satisfied that—

- (a) the final determination was wrongly made as a result of an administrative error on the part of the Clerk or any of the staff of the General Commissioners or a party, or
- (b) a party, who was entitled to be heard at a hearing but failed to appear or to be represented, had good and sufficient reason for failing to appear or to be represented, or
- (c) accounts or other information relevant to a party's case had been sent to the Clerk or to the appropriate inspector or other officer of the Board prior to the hearing of the proceedings but had not been received by the Tribunal until after the hearing,

the Tribunal may review and set aside or vary the final determination.

17(2) An application for the purposes of paragraph (1) above shall be made to the Tribunal not later than fourteen days after the date on which notice setting out the final determination was sent to the parties under regulation 16(3), or by such later time as the Tribunal may allow, and shall be in writing stating the grounds in full.

17(3) Where the Tribunal proposes to review of its own motion the final determination, it shall serve notice of that proposal on the parties not later than fourteen days after the date on which notice setting out the final determination was sent to the parties under regulation 16(3).

17(4) The parties shall have an opportunity to be heard on a review, or in relation to any application or proposal for review, under this regulation and the review shall be determined by the Tribunal which decided the case or, where it is not practicable for it to be heard by that Tribunal, by another Tribunal; and if, having reviewed the final determination, the Tribunal sets aside that determination, it shall substitute such determination as it thinks fit or order a rehearing before either the same or a differently constituted Tribunal.

17(5) Regulation 16 shall apply to a decision by a Tribunal varying a final determination or substituting a new final determination, as it applies to a final determination.

Commentary

6.12.1 This useful provision allows the Commissioners to re-open cases where there would be an injustice if the original decision were allowed to stand. It quite often happens that the taxpayer did not receive notice of the original hearing, especially if he is divorced and letters sent to him at the former matrimonial home are not sent on to him by his ex-wife. The regulation is occasionally used by the Revenue where they find that they have omitted to put relevant information before the Tribunal.

6.12.2 Although Regulation 17(2) requires the application to be made within 14 days of the original decision, it is rare for applications are made within the time limit. If the taxpayer's mail is not

being forwarded to him it may be some weeks or months before he discovers that a determination has been made. Commissioners should lean in favour of exercising their discretion to accept late applications, but always consider the time which has elapsed between the taxpayer discovering the original determination and making his application to set it aside.

- 6.12.3 If the taxpayer has asked the Commissioners to exercise their discretion under Regulation 17, it is reasonable to expect that the taxpayer or his representative to attend the meeting at which his application is to be considered. At the very least, the taxpayer should write to the Clerk in support of his application. It is for the applicant to persuade the Commissioners to review their decision and Commissioners are entitled to draw whatever conclusions they wish from the applicant's failure to put forward evidence in support of his case for a review of the previous decision.
- 6.12.4 If the application is made by the taxpayer, the Revenue will usually say if they support the application, oppose it or are taking a neutral position. Commissioners are not bound by the Revenue's position and may well decide to allow the earlier decision to be set aside even if the Revenue oppose the application, if the justice of the case so requires.
- 6.12.5 In some cases, the taxpayer and the Revenue will have agreed what determination they would like the Commissioners to make, if they agree to set aside their earlier decision. Commissioners may take that into account in deciding whether of not to set aside the earlier decision. The setting aside of the earlier decision would then be followed by a fresh determination of the appeal on the basis agreed between the parties. In other cases, after setting aside the earlier decision the Tribunal may adjourn the case to allow the parties an opportunity to settle the appeal by agreement.

6.13 Appeal by way of Case Stated

The Law

Regulation 20

20(1) Within thirty days after the final determination of any proceedings falling within paragraph (a) or (b) of the definition of "proceedings" in regulation 2 is made by a Tribunal other than a final determination to which regulation 19(2)(b) refers, or, as the case may be, within thirty days after a decision varying such a final determination or substituting for it a new final determination is made by a Tribunal under regulation 17, any party to the proceedings, if dissatisfied with the determination or decision as being erroneous in point of law, may by notice served on the Clerk require the Tribunal to state and sign a case for the opinion of the Court of Session as the Court of Exchequer.

20(2) A case stated pursuant to a requirement under paragraph (1) above shall set forth the facts and the final determination of the Tribunal.

20(3) After a party has required a case to be stated under paragraph (1) above, the Tribunal may by notice served on him require him within a period of time stated in the notice not being less than twenty eight days, to identify the question of law on which he requires the case to be stated.

20(4) If a party fails to comply with a notice served under paragraph (3) above, or if the Tribunal is not satisfied that the question identified is a question of law, or until the fee specified in section 56(3) of the Management Act has been paid, the Tribunal may refuse to state a case.

20(5) Where a final determination of a Tribunal is set aside or varied under regulation 17, a requirement for a case to be stated in respect of that determination shall cease to be valid.

Regulation 21

21(1) Within fifty six days after the receipt of a notice served under regulation 20(1) requiring a case to be stated or, if a notice is served under regulation 20(3), within fifty six days after the day on which a question of law is identified to the satisfaction of the Tribunal, the Clerk shall send a draft of the case to the party who required the case to be stated and to the other party or parties.

21(2) Within fifty six days after the draft case is sent to the parties under paragraph (1) above, any party may make representations on the draft to the Clerk in writing and shall at the same time send a copy of any representations so made to the other party or parties.

21(3) Within twenty eight days after the latest date on which representations may be made under paragraph (2) above, any party may make further representations on the draft to the Clerk in writing in response to any representations made under paragraph (2) above, and shall at the same time send a copy of such further representations to the other party or parties.

21(4) A failure by the Clerk to send a draft case within the time specified in paragraph (1) above, or a failure by a party to make representations within the

time specified in paragraph (2) or (3) above, or to send a copy of representations under either of those paragraphs to the other party or parties, shall not affect the validity of the case after it has been stated and signed pursuant to regulation 22, or of any subsequent proceedings in relation to the case.

21(5) Where a party fails to send a copy of any representations to another party in accordance with paragraph (2) or (3) above, that other party may apply to the Clerk for a copy of the representations.

Regulation 22

22(1) Subject to paragraph (2) below, as soon as may be after the latest date on which representations may be made under regulation 21, the Tribunal whose decision is questioned, after taking into account any representations made under that regulation, shall state and sign the case.

22(2) If a member of the Tribunal has died or ceased to be a General Commissioner, then the case shall be stated and signed by the continuing Commissioner or Commissioners or, if there is no continuing Commissioner, by the Clerk.

22(3) After the case has been stated and signed the Clerk shall send it to the party who required it to be stated, and shall notify the other party or parties that the case has been sent to that party.

22(4) The party requiring the case shall—
(a) transmit the case to the Court of Session within thirty days of receiving it, and
(b) at or before the time when he transmits the case to the Court of Session, send notice of the fact that the case has been stated on his application, together with a copy of the case, to the other party or parties.

Commentary

- 6.13.1 A party can only appeal from the Commissioners to the Court of Session on a point of law. The Commissioners are the sole judges of fact. Regulation 20(3) allows the Tribunal to require the party who has requested the Case to identify the point of law involved. If there is no point of law, then the Tribunal can refuse to state a Case. Many appeals before the General Commissioners rarely, if ever, involve a point of law – reasonable excuse appeals against automatic penalties are the most common example.
- 6.13.2 It is the responsibility of the Clerk to draft the Case. If the Clerk thinks that the losing party is likely to request a Case Stated, he or she will retain all the notes of evidence made by the Commissioners until the time limit for requesting a Case has expired. The Clerk will send the first draft of the Case to the Commissioners who heard the appeal and invite comments.
- 6.13.3 The draft Case is then reviewed by the Revenue and the taxpayer or his representative, both of whom will make suggestions. A party is often tempted to include arguments in the Case Stated which it did not put at the hearing but wishes it had. This should be resisted. The Clerk will usually strike out any such amendments, but when the final draft is circulated to the Commissioners they should not be afraid to question any statements or arguments that they do not recall being made at the hearing.

6.13.4 When the Case has been agreed by all parties, the Commissioners who heard the appeal will sign the Case and the Clerk will forward it to the party who requested it. The Commissioners have no further involvement in the appeal after that.

6.14 Judicial Review

Commentary

- 6.14.1 Judicial review is an application to the Court of Session on the grounds that there were procedural irregularities in the proceedings before the General Commissioners. The aggrieved party will apply to the Court of Session to ask the Court to set aside the Commissioners' determination of the proceedings. If the Court of Session agrees, the case is usually sent back to the Commissioners to be heard again, sometimes with a direction that a different panel of Commissioners should hear the appeal.
- 6.14.2 Although the Commissioners who heard the appeal may be asked through the Clerk to provide a statement, they normally take no part in the proceedings. Commissioners do not normally need to be represented personally in the Court of Session. On no account should Commissioners instruct Counsel.
- 6.14.3 As from 1st April 2001, General Commissioners have immunity from action and immunity from expenses orders in respect of any act or omission arising from the execution of their duties, provided they have acted in good faith. General Commissioners and their Clerks also have an indemnity in specified circumstances.

6.15 Special Procedures

The Law

Proceedings relating to tax on Chargeable Gains

Regulation 18

18(1) Where the market value of an asset on a particular date or the apportionment of an amount or value is a material question in any proceedings relating to tax on chargeable gains, the Tribunal hearing the proceedings shall, if so required by any party, record in its final determination that market value or apportionment.

18(2) The final determination on an appeal of the market value of an asset on a particular date or of the apportionment of any amount or value may be proved in any proceedings relating to tax on chargeable gains by a certificate stating the material particulars signed by—

- (a) an inspector where the appeal was settled by agreement, or
- (b) the Clerk where the General Commissioners determined the appeal, or
- (c) the clerk or registrar of another tribunal where the material question was determined by that other tribunal in accordance with section 46D or 47B of the Management Act,

and a document purporting to be such a certificate may be received in evidence in any such proceedings without further proof.

18(3) In this regulation the expression "final determination on an appeal" shall be construed in accordance with regulation 11(2) of the Capital Gains Tax Regulations 1967, and the expression "material question in any proceedings" shall be construed in accordance with regulation 15(a) of those Regulations.

References to other Tribunals

Regulation 19

19(1) A question in an appeal which is required to be determined in accordance with section 46B, 46C, 46D or 47B of the Management Act shall be referred to the appropriate tribunal by the Tribunal before whom the appeal is brought or, if the hearing of the appeal has not begun, by an inspector or other officer of the Board.

19(2) Where any question in an appeal has been referred to another tribunal in accordance with paragraph (1) above, the Tribunal before whom the appeal is brought -

- (a) shall make a final determination of the remaining question or questions in the appeal, and shall at the request of any party state a case therein under regulation 22, without awaiting the determination of the question referred to the other tribunal, and
- (b) shall make a final determination of the appeal (in accordance with regulation 16) once all the questions in the appeal have been finally determined.

19(3) Where –

- (a) a question in an appeal has been referred to the Special Commissioners in accordance with paragraph (1) above, and
- (b) that question is the sole question in dispute in the appeal, the proceedings shall be transferred to the Special Commissioners by the Tribunal before whom the appeal is brought or, if the hearing of the appeal has not yet begun, shall be brought before the Special Commissioners by an inspector or other officer of the Board.

Commentary

6.15.1 These provisions relate to matters in which the Special Commissioners have exclusive jurisdiction and to questions arising on appeals involving chargeable gains and do not arise very often. The Clerk will advise as necessary.

Chapter 7

TYPES OF APPEAL

7.1 Penalty appeals

The Law

Taxes Management Act 1970, s100

Determination of penalties by officer of Board

100 (1) Subject to subsection (2) below and except where proceedings for a penalty have been instituted under section 100D below, an officer of the Board authorised by the Board for the purposes of this section may make a determination imposing a penalty under any provision of the Taxes Acts and setting it at such amount as, in his opinion, is correct or appropriate.

100 (3) Notice of a determination of a penalty under this section shall be served on the person liable to the penalty and shall state the date on which it is issued and the time within which an appeal against the determination may be made.

100 (4) After the notice of a determination under this section has been served the determination shall not be altered except in accordance with this section or on appeal.

Taxes Management Act 1970, s100B

Appeals against penalty determinations

100B (1) An appeal may be brought against the determination of a penalty under section 100 above and . . . the provisions of this Act relating to appeals shall have effect in relation to an appeal against such a determination as they have effect in relation to an appeal against an assessment to tax.

100B (2) Subject to sections 93(8) and 93A(7) of this Act on an appeal against the determination of a penalty under section 100 above section 50(6) to (8) of this Act shall not apply but—

(a) in the case of a penalty which is required to be of a particular amount, the Commissioners may—

(i) if it appears to them that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to them to be correct, confirm the determination, or

(iii) if the amount determined appears to them to be incorrect, increase or reduce it to the correct amount,

(b) in the case of any other penalty, the Commissioners may—

(i) if it appears to them that no penalty has been incurred, set the determination aside,

(ii) if the amount determined appears to them to be appropriate, confirm the determination,

(iii) if the amount determined appears to them to be excessive, reduce it to such other amount (including nil) as they consider appropriate, or

(iv) if the amount determined appears to them to be insufficient, increase it to such amount not exceeding the permitted maximum as they consider appropriate.

Commentary

- 7.1.1 The Taxes Acts provide for penalties for all kinds of failure by the taxpayer to comply with his or her obligations. Penalties are charged under TMA s100 and the rules in TMA s100B apply to appeals against them. Some penalties, especially under self-assessment, are subject to specific rules which apply in addition to the basic rules. All penalties charged under TMA s100 are civil penalties and do not carry the stigma of a criminal conviction.
- 7.1.2 It is important to distinguish between those cases where the law imposes a penalty of a fixed amount and those where the level of the penalty is discretionary. The Revenue will refer the Tribunal to the statutory provision under which the penalty arises, which will state the category the penalty falls into.
- 7.1.3 Where the penalty is of a fixed amount, the Commissioners may only confirm it or set it aside. It is not possible to reduce the penalty to reflect a lesser degree of culpability by the taxpayer. Only in the very rare case where the Revenue has made a mistake and imposed a penalty of the wrong amount may the Tribunal substitute a different amount. The Commissioners may consider whether or not the taxpayer has a reasonable excuse for the act or omission which gave rise to the penalty.
- 7.1.4 Where the penalty is of a variable amount, the Commissioners may confirm the penalty, set it aside, reduce it to a lower amount or increase it, as appropriate.
- 7.1.5 A table of penalties is given in Appendix E.
- 7.1.6 Advice on specific penalty provisions is given in the following sections.
- 7.1.7 Where the General Commissioners are dealing with penalties, it will be open to the taxpayer to apply to the Scottish Legal Aid Board through a solicitor for legal advice and assistance and legal representation. The General Commissioners will have no involvement in any such application, except to the extent that where the General Commissioners have been informed that an application has been made, it will be reasonable for the General Commissioners to postpone any hearing to a date by which time it will be known whether the application has been successful.

7.2 Reasonable Excuse Appeals – Self-Assessment

The Law

Penalties - Taxes Management Act 1970, s93

- 93 (1) This section applies where–
- (a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act (or either of those sections as extended by section 12 of this Act) to deliver any return, and
 - (b) he fails to comply with the notice.
- 93 (2) The taxpayer shall be liable to a penalty which shall be £100.
- 93 (3) If, on an application made to them by an officer of the Board, the General or Special Commissioners so direct, the taxpayer shall be liable to a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which he is notified of the direction (but excluding any day for which a penalty under this subsection has already been imposed).
- 93 (4) If–
- (a) the failure by the taxpayer to comply with the notice continues after the end of the period of six months beginning with the filing date, and
 - (b) no application is made under subsection (3) above before the end of that period,
- the taxpayer shall be liable to a further penalty which shall be £100.
- 93 (5) Without prejudice to any penalties under subsections (2) to (4) above, if–
- (a) the failure by the taxpayer to comply with the notice continues after the anniversary of the filing date, and
 - (b) there would have been a liability to tax shown in the return,
- the taxpayer shall be liable to a penalty of an amount not exceeding the liability to tax which would have been so shown.
- 93 (6) No penalty shall be imposed under subsection (3) above in respect of a failure at any time after the failure has been remedied.
- 93 (7) If the taxpayer proves that the liability to tax shown in the return would not have exceeded a particular amount, the penalty under subsection (2) above, together with any penalty under subsection (4) above, shall not exceed that amount.
- 93 (8) On an appeal against the determination under section 100 of this Act of a penalty under subsection (2) or (4) above, . . . the Commissioners may–
- (a) if it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not delivering the return, set the determination aside; or
 - (b) if it does not so appear to them, confirm the determination.

Surcharges – Taxes Management Act 1970, s59C

- 59C (1) This section applies in relation to any income tax or capital gains tax which has become payable by a person (the taxpayer) in accordance with section 55 or 59B of this Act.

59C (2) Where any of the tax remains unpaid on the day following the expiry of 28 days from the due date, the taxpayer shall be liable to a surcharge equal to 5 per cent of the unpaid tax.

59C (3) Where any of the tax remains unpaid on the day following the expiry of 6 months from the due date, the taxpayer shall be liable to a further surcharge equal to 5 per cent of the unpaid tax.

59C (7) An appeal may be brought against the imposition of a surcharge under subsection (2) or (3) above within the period of 30 days beginning with the date on which the surcharge is imposed.

59C (8) Subject to subsection (9) below, the provisions of this Act relating to appeals shall have effect in relation to an appeal under subsection (7) above as they have effect in relation to an appeal against an assessment to tax.

59C (9) On an appeal under subsection (7) above . . . the Commissioners may—
(a) if it appears to them that, throughout the period of default, the taxpayer had a reasonable excuse for not paying the tax, set aside the imposition of the surcharge; or
(b) if it does not so appear to them, confirm the imposition of the surcharge.

59C (10) Inability to pay the tax shall not be regarded as a reasonable excuse for the purposes of subsection (9) above.

59C (12) In this section—
“the due date”, in relation to any tax, means the date on which the tax becomes due and payable;
“the period of default”, in relation to any tax which remained unpaid after the due date, means the period beginning with that date and ending with the day before that on which the tax was paid.

Commentary

7.2.1 Most appeals by taxpayers under self-assessment are appeals against automatic penalties and surcharges. There is a table showing the key dates in the self-assessment timetable in Appendix C.

7.2.2 The Revenue has published its own guidelines of what it will accept as a reasonable excuse and what it does not consider to be a reasonable excuse. At the time of writing, the Revenue has suggested that the following may amount to reasonable excuses:

- a serious illness which prevented the taxpayer from making the payment, for example a major heart attack, stroke or coma;
- bereavement of a close relative or companion, although payment would have to be made within a reasonable time;
- misleading advice from the Revenue;
- a cheque lost in the post, provided the taxpayer sends a replacement cheque promptly;

- a cheque dishonoured solely because of bank error or unexpected action by the bank (ie not because there are insufficient funds in the account), provided payment is made within a reasonable time;
- the death of the taxpayer.

Appeals based on these grounds will normally be allowed by the Revenue and are unlikely to come before the Commissioners.

7.2.3 The Revenue has published a list of matters which, in the Revenue's view, do not amount to a reasonable excuse:

- Tax return too difficult
- Pressure of work
- Failure by tax agent
- Lack of information needed to complete the tax return
- Not knowing exactly what to pay

It cannot be emphasised too strongly that the Revenue's views on what is not a reasonable excuse are not law and it is exclusively for the Commissioners to determine whether or not a taxpayer's excuse is reasonable or not.

7.2.4 The only excuse which the law says is not reasonable is inability to pay the tax due. This arises only in respect of appeals against surcharges.

7.2.5 The excuse must apply throughout the period that the taxpayer is alleged to be in default of his obligations. For instance, if the taxpayer is ill he must pay the tax or file his return as soon as he has recovered sufficiently to deal with it. An illness during August is unlikely to be a reasonable excuse for not filing a tax return by 31st January if the taxpayer was well on the way to recovery by November.

7.2.6 If the taxpayer has still not filed his return at the date of the appeal hearing, the Commissioners cannot set the penalty aside because the taxpayer is still in default and it is not known at that point whether or not the excuse will continue up until the return is filed. If the Commissioners are satisfied that the taxpayer's excuse is not reasonable it may confirm the penalty. If the Commissioners accept that the taxpayer's excuse is reasonable up to the date of the hearing, they may adjourn the case and encourage the taxpayer to file his return as soon as possible. The merits of the excuse can be considered at the adjourned hearing in the light of circumstances at that time.

7.2.7 Always consider whether a penalty is actually due. The penalty cannot exceed the amount of tax outstanding on 31st January. Thus if the taxpayer has paid all the tax due on 25th January but does not file her return until 3rd March, there can be no penalty even though the return has been filed late. In such cases it may be unnecessary to consider the reasonableness of the excuse for late filing. This exception applies only to personal tax returns and not to partnership returns.

7.2.8 The period of default ends at midnight the day before the return is actually delivered to the Revenue. Thus a tax return delivered to a tax office by hand at any time on 1st February has been filed in time and the taxpayer is not liable to a penalty.

7.2.9 The decision on whether to confirm or set aside a penalty or surcharge is all or nothing. The penalty or surcharge must be confirmed in full or cancelled altogether. It is not open to the Commissioners to reduce a penalty or surcharge to a smaller amount because the Commissioners think the taxpayer is partly culpable.

7.3 Penalty Appeals – PAYE and Sub-contractors

The Law

Taxes Management Act 1970, s98A

Special penalties in the case of certain returns

98A (1) Regulations under section 203(2) (PAYE) or 566(1) (sub-contractors) of the principal Act may provide that this section shall apply in relation to any specified provision of the regulations.

98A (2) Where this section applies in relation to a provision of regulations, any person who fails to make a return in accordance with the provision shall be liable–

- (a) to a penalty or penalties of the relevant monthly amount for each month (or part of a month) during which the failure continues, but excluding any month after the twelfth or for which a penalty under this paragraph has already been imposed, and
- (b) if the failure continues beyond twelve months, without prejudice to any penalty under paragraph (a) above, to a penalty not exceeding so much of the amount payable by him in accordance with the regulations for the year of assessment to which the return relates as remained unpaid at the end of 19th April after the end of that year.

98A (3) For the purposes of subsection (2)(a) above, the relevant monthly amount in the case of a failure to make a return–

- (a) where the number of persons in respect of whom particulars should be included in the return is fifty or less, is £100, and
- (b) where that number is greater than fifty, is £100 for each fifty such persons and an additional £100 where that number is not a multiple of fifty.

98A (4) Where this section applies in relation to a provision of regulations, any person who fraudulently or negligently makes an incorrect return of a kind mentioned in the provision shall be liable to a penalty not exceeding the difference between–

- (a) the amount payable by him in accordance with the regulations for the year of assessment to which the return relates, and
- (b) the amount which would have been so payable if the return had been correct

Commentary

7.3.1 Employers and contractors in the construction industry are required to deduct tax from payments to their employees or sub-contractors under PAYE or the Construction Industry Scheme as appropriate. Some employers in the construction industry with a mix of employees and sub-contractors have obligations under both schemes.

To ensure the smooth operation of the schemes and to make sure that tax deducted is credited to the relevant employee or sub-contractor, the Revenue requires employers to make end of year returns. These are made on forms P35 for PAYE returns and CIS36 (formerly SC35) for sub-contractors' returns. The forms must be returned by 19th May following the end of the tax year which they relate to. If the forms have not been returned by that date penalties are applied under s98A.

- 7.3.2 The amount of the penalty depends on the number of employees or sub-contractors and the number of months for which the return has been outstanding. The current rate is £100 per 50 (or fewer) employees or subcontractors per month the return is overdue. Thus an employer with 25 employees who files his return three months late faces a penalty of £300. An employer with 125 employees who files his return six months late faces a penalty of £1,800.
- 7.3.3 Inevitably a number of employers each year are late filing their returns, and appeal to the General Commissioners against the penalty. On the face of it, s98A gives no discretion: the return is filed either in time or late and if late the penalty applies. However, the imposition of the penalty is at the discretion of the Revenue under s100(1), and the Revenue's discretion can be reviewed by the Commissioners. The Revenue accept that the Tribunal may set aside the penalty in PAYE and Sub-Contractor cases where the employer satisfies the Tribunal that he has a reasonable excuse for filing the return late.
- 7.3.4 The penalty is imposed for filing the return late, not for late payment of tax. In many cases the employer has paid all the tax that he has deducted from his employees or sub-contractors, and the Revenue will usually confirm if that is the case. While the Commissioners may take note of the fact that all tax has been paid, if that is the only ground of the appeal the penalty should be confirmed.
- 7.3.5 As with self-assessment appeals, it is entirely a matter for the Commissioners to decide whether or not the employer has a reasonable excuse.
- 7.3.6 The penalty is of a fixed amount and therefore the Commissioners may only confirm it or set it aside. It is not possible to reduce it to reflect a degree of culpability.

7.4 Corporation Tax Self-Assessment

Commentary

7.4.1 Corporation Tax Self-Assessment (CTSA) applies to all company accounting periods ending on or after 1st July 1999. The law is in Schedule 18, Finance Act 1998.

7.4.2 The principal matters which a company can appeal against under CTSA are:

- penalty for late filing of a Company tax return
- penalty for delivering an incorrect return or accounts
- penalty for not keeping records
- as assessment which is not a self-assessment
- a discovery determination
- an amendment to a self-assessment during an enquiry
- a notice asking for documents or information
- a Revenue amendment to a company return following an enquiry
- any penalty for failing to comply with a notice.

7.4.3 CTSA penalties are charged under s100 TMA 1970 and the taxpayer can therefore appeal against them under s100B TMA 1970 in the usual way.

7.4.4 Appeals under CTSA are generally made on the same grounds as appeals under income tax self-assessment, and Commissioners should approach such appeals in the same way. Where there are special considerations for CTSA appeals, they are noted in the relevant section of these Guidance Notes.

7.5 Consent to Penalties and Penalty Awards

Commentary

- 7.5.1 While most penalties under the Taxes Acts are imposed by the Revenue, with the taxpayer having a right of appeal to the General Commissioners, there are a few cases where the penalties are imposed by the General Commissioners or the General Commissioners have to give the Revenue permission to issue penalties.
- 7.5.2 In cases where the General Commissioners impose the penalty, the relevant section of the statute will set out whether the amount of the penalty is fixed or discretionary (up to a maximum). The taxpayer will have been summonsed to appear before the Tribunal and the normal procedural rules should be followed.
- 7.5.3 In cases where the Revenue have to seek leave to impose a penalty, the application is usually made to the Tribunal *ex parte*, that is, without the taxpayer being notified of the application or being entitled to attend the hearing. An example is TMA s 93(3), relating to failure to send in returns on time:

93 (3) If, on an application made to them by an officer of the Board, the General or Special Commissioners so direct, the taxpayer shall be liable to a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which he is notified of the direction (but excluding any day for which a penalty under this subsection has already been imposed).

On an application under this sub-section, the Commissioners only have to decide whether or not the Revenue may impose daily penalties on the taxpayer, on the basis of the evidence put before them by the Revenue. The Commissioners are not concerned with the amount of the penalty – it is for the Revenue to determine the level of penalty (up to the maximum) after the Commissioners have given permission for a daily penalty to be charged. In the past the Revenue has declined to tell the Commissioners the level of penalty it proposes to charge, on the grounds that the law does not entitle the Commissioners to that information. However, the Revenue has changed its procedure and will now inform the Commissioners of the level of daily penalties it has in mind.

The penalty is charged by the Revenue under TMA s100 and the taxpayer has a right of appeal against the amount of the penalty under s100B. Because the amount of the penalty is discretionary, the Commissioners hearing an appeal may reduce or increase the penalty, according to the justice of the case. In an appropriate case, the Tribunal could reduce the penalty to nil. Thus the taxpayer retains the right to a full hearing on the question of daily penalties, even though he had no right to be heard on the application for leave to charge a daily penalty.

7.6 Enquiries – Introduction

The Law

Taxes Management Act 1970 s9A

Power to enquire into returns

9A (1) An officer of the Board may enquire into a return under section 8 or 8A of this Act if he gives notice of his intention to do so (“notice of enquiry”)-

- (a) to the person whose return it is (“the taxpayer”),
- (b) within the time allowed.

9A (2) The time allowed is-

- (a) if the return was delivered on or before the filing date, up to the end of the period of twelve months after the filing date;
- (b) if the return was delivered after the filing date, up to and including the quarter day next following the first anniversary of the day on which the return was delivered;
- (c) if the return is amended under section 9ZA of this Act, up to and including the quarter day next following the first anniversary of the day on which the amendment was made.

For this purpose the quarter days are 31st January, 30th April, 31st July and 31st October.

9A (3) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) of the return under section 9ZA of this Act.

9A (4) An enquiry extends to anything contained in the return, or required to be contained in the return, including any claim or election included in the return, subject to the following limitation.

9A (5) If the notice of enquiry is given as a result of an amendment of the return under section 9ZA of this Act-

- (a) at a time when it is no longer possible to give notice of enquiry under subsection (2)(a) or (b) above, or
- (b) after an enquiry into the return has been completed,

the enquiry into the return is limited to matters to which the amendment relates or which are affected by the amendment.

9A (6) In this section “the filing date” means the day mentioned in section 8(1A) or, as the case may be, section 8A(1A) of this Act.

Taxes Management Act 1970 s12AC

Power to enquire into partnership return

12AC. - (1) An officer of the Board may enquire into a partnership return if he gives notice of his intention to do so (“notice of enquiry”)-

- (a) to the partner who made and delivered the return, or his successor,

(b) within the time allowed.

Sections 12AC(2) to 12AC(5) are in the same terms as s9A(2) – s9A(5) above

12AC (6) The giving of notice of enquiry under subsection (1) above at any time shall be deemed to include the giving of notice of enquiry-

(a) under section 9A(1) of this Act to each partner who at that time has made a return under section 8 or 8A of this Act or at any subsequent time makes such a return, or

(b) under paragraph 24 of Schedule 18 to the Finance Act 1998 to each partner who at that time has made a company tax return or at any subsequent time makes such a return.

Finance Act 1998, Schedule 18, Paragraph 24 Notice of enquiry into Company Tax Return

24 (1) The Inland Revenue may enquire into a company tax return if they give notice to the company of their intention to do so ("notice of enquiry") within the time allowed.

24 (2) If the return was delivered on or before the filing date, notice of enquiry may be given at any time up to twelve months from the filing date.

24 (3) If the return was delivered after the filing date, notice of enquiry may be given at any time up to and including the 31st January, 30th April, 31st July or 31st October next following the first anniversary of the day on which the return was delivered.

24 (4) If the company amends its return, notice of enquiry may be given at any time up to and including the 31st January, 30th April, 31st July or 31st October next following the first anniversary of the day on which the amendment was made.

24 (5) A return which has been the subject of one notice of enquiry may not be the subject of another, except one given in consequence of an amendment (or another amendment) by the company of its return.

Commentary

- 7.6.1 A fundamental feature of self-assessment, both for income tax and corporation tax, is the right of the Revenue to enquire into the returns of any taxpayer. In the majority of enquiry cases the Revenue will have good reason to enquire into a return, but a number of returns are randomly selected for enquiry each year so that the Revenue can monitor taxpayers' compliance with their obligations.
- 7.6.2 For internal purposes, the Revenue divides enquiries in **aspect enquiries** and **full enquiries**.
- 7.6.3 An **aspect enquiry** is opened where there is a question about one or two items on a tax return – perhaps the Inspector needs clarification about a particular source of income – but once the taxpayer has given a satisfactory answer to the questions raised the enquiry is closed. Nevertheless the full enquiry provisions in the Taxes Management Act apply to an aspect enquiry, including the power to call for information or documents under TMA s19A.

- 7.6.4 A **full enquiry** is opened when the Revenue wishes to make a detailed examination of a taxpayer's affairs and includes a random enquiry.
- 7.6.5 The Inspector opens a full enquiry by serving a notice on the taxpayer under the appropriate provision set out above. The notice is usually accompanied by a letter asking the taxpayer to make specified information and documents available to the Revenue.
- 7.6.6 An enquiry notice must be issued within 12 months after the filing date (normally 31st January for income tax) for the tax year which it relates to. The latest date is therefore 31st January the following year, and that is the date by which the taxpayer must have received the notice, not the date by which the Revenue must have sent it out. Because a notice is deemed to be received by the addressee 'in the normal course of post', where the Revenue have issued an enquiry notice close to the end of January it is vital to check the dates and the calendar carefully. 'Normal course of post' is (a) in the case of first class mail, on the second working day after posting, (b) in the case of second class mail, on the fourth working day after posting. "Working days" are Monday to Friday, excluding any bank holiday. (Interpretation Act 1978 s7 and Practice Direction 8th March 1985).

The enquiry timetable is set out in Appendix C. For years before 2001/02, the enquiry deadline was 30th January in the year following the filing date.

- 7.6.7 If the enquiry notice is invalid, any actions by the Revenue which depend on that notice are invalid. This includes notices under s19A TMA.
- 7.6.8 Following a number of decisions by the Special Commissioners in 2000, establishing that the time limits for the issue of a notice of enquiry must be construed strictly against the Revenue, the Revenue is now careful to ensure that enquiry notices are issued well within the time limit.

7.7 Powers to call for documents and information (Precepts)

The Law

Taxes Management Act 1970 s19A

Power to call for documents for purposes of certain enquiries

19A (1) This section applies where an officer of the Board gives notice under section 9A(1) or 12AC(1) of this Act to any person (the taxpayer) of his intention to enquire into—

- (a) the return on the basis of which the taxpayer's self-assessment or partnership statement was made, or
- (b) any amendment of that return on the basis of which that assessment or statement has been amended by the taxpayer, or
- (c) any claim or election included in the return (by amendment or otherwise), or
- (d) the period for which a return should have been made.

19A (2) For the purpose of enquiring into the return or amendment, the officer may at the same or any subsequent time by notice in writing require the taxpayer, within such time (which shall not be less than 30 days) as may be specified in the notice—

- (a) to produce to the officer such documents as are in the taxpayer's possession or power and as the officer may reasonably require for the purpose of determining whether and, if so, the extent to which the return is incorrect or incomplete or the amendment is incorrect, and
- (b) to furnish the officer with such accounts or particulars as he may reasonably require for that purpose.

19A (2A) The officer of the Board may also (whether or not he imposes a requirement under subsection (2) above), by a notice in writing, require the taxpayer, within such time (which shall not be less than 30 days) as may be specified in the notice—

- (a) to produce to the officer such documents as are in the taxpayer's possession or power and as the officer may reasonably require for the purpose of making a determination for the purposes of section 28A(7A)(d) or 28B(6A)(d) of this Act, and
- (b) to furnish the officer with such accounts or particulars as he may reasonably require for that purpose.

19A (3) To comply with a notice under subsection (2) or (2A) above, copies of documents may be produced instead of originals; but—

- (a) the copies must be photographic or otherwise by way of facsimile; and
- (b) if so required by a notice in writing given by the officer, in the case of any document specified in the notice, the original must be produced for inspection by him within such time (which shall not be less than 30 days) as may be specified in the notice.

19A (5) A notice under subsection (2) or (2A) above does not oblige the taxpayer to produce documents or furnish accounts or particulars relating to the conduct of any pending appeal by him.

19A (6) An appeal may be brought against any requirement imposed by a notice under subsection (2) above to produce any document or to furnish any accounts or particulars.

19A (7) An appeal under subsection (6) above must be brought within the period of 30 days beginning with the date on which the notice under subsection (2) or (2A) above is given.

19A (9) On an appeal under subsection (6) above section 50(6) to (8) of this Act shall not apply but the Commissioners may—

- (a) if it appears to them that the production of the document or the furnishing of the accounts or particulars was reasonably required by the officer of the Board for the purpose mentioned in subsection (2) or (2A) above, confirm the notice under that subsection so far as relating to the requirement; or
- (b) if it does not so appear to them, set aside that notice so far as so relating.

19A (10) Where, on an appeal under subsection (6) above, the Commissioners confirm the notice under subsection (2) or (2A) above so far as relating to any requirement, the notice shall have effect in relation to that requirement as if it had specified 30 days beginning with the determination of the appeal.

Taxes Management Act 1970, s97AA **Failure to produce documents under section 19A**

97AA (1) Where a person fails to comply with a notice or requirement under section 19A(2), (2A) or (3) of this Act or paragraph 6(2) or (3A)(b) of Schedule 1A to this Act, he shall be liable, subject to subsection (4) below—

- (a) to a penalty which shall be £50, and
- (b) if the failure continues after a penalty is imposed under paragraph (a) above, to a further penalty or penalties not exceeding the relevant amount for each day on which the failure continues after the day on which the penalty under that paragraph was imposed (but excluding any day for which a penalty under this paragraph has already been imposed).

97AA (2) In subsection (1)(b) above "the relevant amount" means—

- (a) in the case of a determination of a penalty by an officer of the Board under section 100 of this Act, £30;
- (b) in the case of a determination of a penalty by the Commissioners under section 100C of this Act, £150.

97AA (4) No penalty shall be imposed under subsection (1) above in respect of a failure within that subsection at any time after the failure has been remedied.

Finance Act 1998 Schedule 18 **Notice to produce documents, etc. for purposes of enquiry**

27(1) If the Inland Revenue give a notice of enquiry to a company, they may by notice require the company—

- (a) to produce to them such documents in the company's possession or power, and
- (b) to provide them with such information, in such form,

as they may reasonably require for the purposes of the enquiry.

27(2) A notice under this paragraph (which may be given at the same time as the notice of enquiry) must specify the time (which must not be less than 30 days) within which the company is to comply with it.

27(3) In complying with a notice under this paragraph copies of documents may be produced instead of originals, but—

- (a) the copies must be photographic or other facsimiles, and
- (b) the Inland Revenue may by notice require the original to be produced for inspection.

A notice under paragraph (b) must specify the time (which must not be less than 30 days) within which the company is to comply with it.

27(4) The Inland Revenue may take copies of, or make extracts from, any document produced to them under this paragraph.

27(5) A notice under this paragraph does not oblige the company to produce documents or provide information relating to the conduct of any pending appeal by the company.

Finance Act 1998 Schedule 18
Appeal against notice to produce documents, etc.

28(1) An appeal may be brought against a requirement imposed by a notice under paragraph 27 to produce documents or provide information.

28(2) Notice of appeal must be given—

- (a) in writing,
- (b) within 30 days after the notice was given to the company,
- (c) to the officer of the Board by whom that notice was given.

28(3) An appeal under this paragraph shall be heard and determined in the same way as an appeal against an assessment.

28(4) On an appeal under this paragraph the Commissioners—

- (a) shall set aside the notice so far as it requires the production of documents, or the provision of information, which appears to them not reasonably required for the purposes of the enquiry, and
- (b) shall confirm the notice so far as it requires the production of documents, or the provision of information, which appears to them reasonably required for the purposes of the enquiry.

28(5) A notice which is confirmed by the Commissioners (or so far as it is confirmed) has effect as if the period specified in it for complying was 30 days from the determination of the appeal.

28(6) The decision of the Commissioners on an appeal under this paragraph is final and conclusive.

Finance Act 1998 Schedule 18
Penalty for failure to produce documents, etc.

29(1) A company which fails to comply with a notice under paragraph 27 (notice to produce documents, etc. for purposes of enquiry) is liable—

(a) to a penalty of £50, and

(b) if the failure continues after a penalty is imposed under paragraph (a) above, to a further penalty or penalties not exceeding the amount specified in sub-paragraph (2) below for each day on which the failure continues.

29(2) The amount referred to in sub-paragraph (1)(b) is—

(a) £30 if the penalty is determined by an officer of the Board under section 100 of the Taxes Management Act 1970, and

(b) £150 if the penalty is determined by the Commissioners under section 100C of that Act.

29(3) An officer of the Board authorised by the Board for the purposes of section 100C of the Taxes Management Act 1970 may commence proceedings under that section for any penalty under sub-paragraph (1)(b) above.

29(4) No penalty shall be imposed under this paragraph in respect of a failure at any time after the failure has been remedied.

Regulation 10

Power of Tribunal to obtain information

10 (1) A Tribunal hearing any proceedings may at any time before the final determination of those proceedings serve notice on any party, other than the Revenue, directing him within the time specified in the notice—

(a) to deliver to it such particulars as it may require for the purpose of determining any of the issues in the proceedings, and

(b) to make available for inspection by it, or by an officer of the Board, all such books, accounts or other documents in his possession or power as may be specified or described in the notice, being books, accounts or other documents which, in the opinion of the Tribunal, contain or may contain information relevant to the subject matter of the proceedings.

10 (2) Any officer of the Board may at all reasonable times inspect and take copies of, or extracts from, any particulars delivered under paragraph (1)(a) above, and the Tribunal or any officer of the Board may take copies of, or extracts from, any books, accounts or other documents made available for inspection under paragraph (1)(b) above.

10 (3) If any person fails to comply with a notice served under this regulation, the Tribunal may summarily determine a penalty against him not exceeding £300 and, if the failure continues after the determination of such penalty, a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which the penalty was determined (but excluding any day for which a further penalty has already been determined).

10 (4) Any penalty determined by the Tribunal under paragraph (3) above shall for all purposes be treated as if it were tax charged in an assessment and due and payable.

Commentary

- 7.7.1 Notices requiring the taxpayer to produce documents are commonly known as precepts, even though that term disappeared from the legislation many years ago. It remains a convenient shorthand expression for such notices.
- 7.7.2 Notices may be issued by the Revenue under TMA s19A in respect of income tax or capital gains tax, under paragraph 27 of Schedule 18, Finance Act 1998 in respect of Corporation Tax, or by the Tribunal itself under Regulation 10. In the case of a notice under s19A or paragraph 27, the taxpayer may appeal to the Commissioners against any of the requirements of the notice, but not against the Revenue's decision to issue the notice.
- 7.7.3 However, a s19A notice can only be issued after the Revenue has given notice to the taxpayer starting an enquiry under s9A(1) (enquiry into an individual's return) or s12AC(1) (enquiry into a partnership return). Appeals are sometimes made against s19A notices on the grounds that the notice of enquiry is invalid. The usual argument is that the notice was served out of time – see paragraph 7.6.7
- .
- 7.7.4 The Tribunal has power under Regulation 10 to issue a notice in any proceedings before it. Note that the power cannot be exercised against the Revenue. In practice it is almost never used in appeals against penalties, where the taxpayer is usually more than willing to produce documents and information in support of his case. In self-assessment enquiries the Revenue will have used their powers under s19A to require the production of documents and information. The power is mainly used in the few remaining appeals against estimated assessments issued in the years before self-assessment.
- 7.7.5 Note that a fixed penalty for failure to comply with a Regulation 10 notice must be determined (even if it is only £1) before daily penalties can be imposed. The daily penalties cannot be imposed on the same occasion as the penalty for failure to comply with the notice and they can only be determined retrospectively.

7.8 Application to close an Enquiry

The Law

Taxes Management Act 1970, s28A Income Tax Enquiries

28A (1) This section applies where an officer of the Board gives notice under section 9A(1) of this Act to any person (the taxpayer) of his intention to enquire into—

- (a) the return on the basis of which the taxpayer's self-assessment was made, or
- (b) any amendment of that return on the basis of which an amendment (the taxpayer's amendment) of that assessment has been made by the taxpayer, or
- (c) any claim or election included in the return (by amendment or otherwise).

28A (5) Subject to subsection (6) below, the officer's enquiries shall be treated as completed at such time as he by notice—

- (a) informs the taxpayer that he has completed his enquiries, and
- (b) states his conclusions as to the amount of tax which should be contained in the taxpayer's self-assessment and as to any claims or elections into which he has enquired.

28A (6) At any time before a notice is given under subsection (5) above, the taxpayer may apply for a direction that the officer shall give such a notice within such period as may be specified in the direction.

28A (6A) Subject to subsection (7) below, an application under subsection (6) above shall be heard and determined in the same way as an appeal against an amendment of a self-assessment under subsection (2) or (4) above.

28A (7) The Commissioners hearing the application shall give the direction applied for unless they are satisfied that the officer has reasonable grounds for not giving the notice.

Finance Act 1998 Schedule 18, Paragraph 33 Corporation Tax Enquiries

33 (1) The company may apply to the Commissioners for a direction that the Inland Revenue give a closure notice within a specified period.

33 (2) Any such application shall be heard and determined in the same way as an appeal.

33 (3) The Commissioners hearing the application shall give a direction unless they are satisfied that the Inland Revenue have reasonable grounds for not giving a closure notice within a specified period.

Commentary

7.8.1 We have seen that enquiries by the Revenue are fundamental to monitoring the self-assessment. The taxpayer cannot prevent the Revenue from enquiring into his affairs, but he is given a right to apply to the Commissioners for a direction that the Revenue issue a closure notice to bring the enquiry to an end.

- 7.8.2 The law requires the Commissioners to direct the Revenue to issue a closure notice unless the Revenue can persuade them that it is reasonable for the enquiry to continue. Once the taxpayer has applied for a direction to issue a closure notice, the burden of proof shifts to the Revenue.
- 7.8.3 The Commissioners do not have to direct the Revenue to issue a closure notice immediately; they may specify some future date, thus allowing the Revenue a little more time to complete the enquiry.
- 7.8.4 Some taxpayers may apply for a closure direction immediately they receive a notice of enquiry, in the hope of finding out whether it is a random enquiry or whether the Revenue have reasons to enquire into the taxpayer's affairs. The Revenue have stated on a number of occasions that they will not state whether an enquiry is random or for a reason, even if the taxpayer applies for a closure notice. It is a matter for the Revenue to decide how best to persuade the Tribunal that the enquiry is reasonable and the Commissioners have no power to compel them to disclose the reason the enquiry was started.
- 7.8.5 Should the Commissioners issue a closure direction when the enquiry has only just begun? Every case must be decided on the facts before the Tribunal, but the enquiry system exists to monitor the working of self-assessment as well as to catch fraudsters. Therefore many enquiries will result in the Revenue agreeing that the return is in order and that no adjustments to the return are needed. The monitoring function of enquiries will not work effectively if taxpayers can avoid giving even the minimum of information to support their return. In most cases it will therefore be appropriate to expect the taxpayer to supply the information requested by the Revenue in the letter which accompanies the enquiry notice.
- 7.8.6 If the taxpayer is very elderly, or seriously ill, it may be appropriate to issue a closure direction even if the enquiry has only just started, but Commissioners should consider whether a compromise is possible, for example, that the taxpayer will send in copies of those bank statements he still has and the Revenue will close the enquiry after the statements have been checked.
- 7.8.7 There is no limit on how many times a taxpayer can apply for a closure direction. It is possible to adjourn the hearing of an application on the basis that the Tribunal will consider the merits of the application if the taxpayer supplies some information to the Revenue. As always, such cases must be considered on their merits.

7.9 Retirement Benefit Schemes – Late Returns

The Law

The Retirement Benefits Schemes (Information Powers) Regulations 1995

Investment and borrowing transactions of small self-administered schemes

Regulation 5

5 (1) The prescribed person in relation to a small self-administered scheme shall furnish to the Board, at the time prescribed by paragraph (2) below, such information (including copies of any relevant books, documents or other records) as–

- (a) is specified on the relevant form supplied by the Board, and
- (b) relates to any transaction that is–
 - (i) of a kind specified in paragraph (3) below, and
 - (ii) entered into by or on behalf of the trustees or the administrator of the scheme on or after the date of coming into force of these Regulations.

5 (2) The time prescribed is any time not later than 90 days after the date of the transaction in question.

5 (3) The transactions specified in this paragraph are–

- (a) the acquisition or disposal of land;
- (b) the lending of money to an employer in relation to the scheme or any company associated with him;
- (c) the acquisition or disposal of shares in an employer in relation to the scheme or any company associated with him;
- (d) the acquisition or disposal of shares in an unlisted company;
- (e) the borrowing of money;
- (f) the purchase, sale or lease from or to an employer in relation to the scheme, or any company associated with him, of any asset other than one specified in sub-paragraph (a), (c) or (d).

Taxes Management Act 1970, s98

98 (1) Subject to the provisions of this section and section 98A below, where any person–

- (a) has been required, by a notice served under or for the purposes of [The Retirement Benefits Schemes (Information Powers) Regulations 1995], to deliver any return or other document, to furnish any particulars, to produce any document, or to make anything available for inspection, and he fails to comply with the notice, or
- (b) fails to furnish any information, give any certificate or produce any document or record in accordance with any of the provisions specified in the second column of the Table below,

he shall be liable, subject to subsections (3) and (4) below–

- (i) to a penalty not exceeding £300, and

(ii) if the failure continues after a penalty is imposed under paragraph (i) above, to a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which the penalty under paragraph (i) above was imposed (but excluding any day for which a penalty under this paragraph has already been imposed).

98 (3) No penalty shall be imposed under subsection (1) above in respect of a failure within paragraph (a) of that subsection at any time after the failure has been remedied.

98 (4) No penalty shall be imposed under paragraph (ii) of subsection (1) above in respect of a failure within paragraph (b) of that subsection at any time after the failure has been remedied.

Taxes Management Act 1970, s100C **Penalty proceedings before Commissioners**

100C (1) An officer of the Board authorised by the Board for the purposes of this section may commence proceedings before the General or Special Commissioners for any penalty to which subsection (1) of section 100 above does not apply by virtue of subsection (2) of that section.

100C (2) Proceedings under this section shall be by way of information in writing, made to the Commissioners, and upon summons issued by them to the defendant (or defender) to appear before them at a time and place stated in the summons; and they shall hear and decide each case in summary way.

Commentary

7.9.1 The administrators of retirement benefit schemes are required to make returns to the Revenue of certain transactions, listed in regulation 5(3) above. Failure to make the return incurs a penalty under s98 TMA; in this case the Revenue cannot impose a penalty itself under s100 TMA but must bring penalty proceedings before the Commissioners under s100C TMA. The procedure is that the Revenue will lay an information before the Commissioners and ask the Commissioners to issue a summons to the administrators of the retirement benefit scheme to appear before them at the next available meeting. The Clerk will serve the summons by recorded delivery post.

At the next hearing the Tribunal must hear both sides and then determine the penalty to be imposed. The maximum penalty is £300, but the Tribunal can award a penalty of any amount from nil to the maximum. Daily penalties are not usually relevant in these cases, as explained below.

7.9.2 Most cases arise in respect of the pension schemes of small owner managed companies. In a typical case, the pension fund owns the factory from which the company trades. There are tax benefits in doing so, but in return the Revenue expects to be kept informed of transactions affecting property in the pension fund, to ensure that it is dealt with in accordance with the tax rules applicable to pension schemes.

7.9.3 The unusual feature of penalty proceedings in relation to retirement benefit schemes is that the Revenue does not know that a return should have been submitted until the administrators of the scheme send it in. Thus in all cases, by the time the appeal reaches the Commissioners, the Revenue has received the return and thus the only penalty to be considered is the fixed penalty of not more than £300.

- 7.9.4 Note that the administrators of a scheme are often required to make a return under more than one head of Regulation 5(3). For instance, if the owner of the company sells the factory to the trustees of the scheme, who borrow money from a bank to fund the purchase, and then lease the factory back to the company, they must make a return under paragraphs (a), (e) and (f) of the Regulation. An offence is committed for each return not sent in, so that the administrators face a possible penalty of £900 because three returns are late.
- 7.9.5 The reasons why a return was filed late will be specific to the case before the Commissioners. In many cases, the administrators will blame one or more of their professional advisers for the delay. That may well be the case, but the obligation to make the return falls on the administrators of the scheme, not their professional advisers.

7.10 Refusal of sub-contractors' certificates

The Law

Income and Corporation Taxes Act 1988, s562 **Conditions to be satisfied by individuals**

562 (2) The applicant must be carrying on a business in the United Kingdom which satisfies the following conditions, that is to say—

- (a) the business consists of or includes the carrying out of construction operations or the furnishing or arranging for the furnishing of labour in carrying out construction operations;
- (b) the business is, to a substantial extent, carried on by means of an account with a bank;
- (c) the business is carried on with proper records and in particular with records which are proper having regard to the obligations referred to in subsections (8) to (12) below; and
- (d) the business is carried on from proper premises and with proper equipment, stock and other facilities.

562 (2A) The applicant must satisfy the Board . . . that the carrying on of the business mentioned in subsection (2) above is likely to involve the receipt, annually in the period to which the certificate would relate, of an aggregate amount by way of relevant payments which is not less than the amount specified in regulations . . . as the minimum turnover for the purposes of this subsection.

[For 2000/01 the minimum turnover is £30,000 per annum]

562 (8) The applicant must, subject to subsection (10) below, have complied with all obligations imposed on him by or under the Tax Acts or the Management Act in respect of periods ending within the qualifying period and with all requests to supply to an inspector accounts of, or other information about, any business of his in respect of periods so ending.

562 (9) An applicant who at any time in the qualifying period had control of a company shall be taken not to satisfy the condition in subsection (8) above unless the company has satisfied that condition in relation to periods ending at a time within that period when he had control of it; . . .

562 (10) An applicant or company that has failed to comply with such an obligation or request as is referred to in subsection (8) above shall nevertheless be treated as satisfying that condition as regards that obligation or request if the Board are of the opinion that the failure is minor and technical and does not give reason to doubt that the conditions mentioned in subsection (13) below will be satisfied

562 (12) The applicant must, if any contribution has at any time during the qualifying period become due from him under Part I of the Social Security Act 1975 or Part I of the Social Security (Northern Ireland) Act 1975 have paid the contribution when it became due.

562 (13) There must be reason to expect that the applicant will, in respect of periods ending after the end of the qualifying period, comply with such

obligations as are referred to in subsections (8) to (12) above and with such requests as are referred to in subsection (8) above.

562 (13A) Subject to subsection (10) above, a person shall not be taken for the purposes of this section to have complied with any such obligation or request as is referred to in subsections (8) to (11) above if there has been a contravention of a requirement as to the time at which, or the period within which, the obligation or request was to be complied with.

562 (14) In this section "the qualifying period", in relation to an application for the issue of a certificate under section 561, means the period of three years ending with the date of the application.

Income and Corporation Taxes Act 1988, s. 564 **Conditions to be satisfied by firms**

564 (2) The firm's business must be carried on in the United Kingdom and must satisfy the conditions mentioned in section 562(2)(a) to (d).

564 (2A) The partners must satisfy the Board . . . that the carrying on of the firm's business is likely to involve the receipt, annually in the period to which the certificate would relate, of an aggregate amount by way of relevant payments which is not less than whichever is the smaller of—

- (a) the sum specified in subsection (2B) below; and
- (b) the amount specified for the purposes of this paragraph in regulations made by the Board; . . .

564 (2B) The sum referred to in subsection (2A)(a) above is the sum of the following amounts, that is to say—

- (a) the amount obtained by multiplying the number of partners in the firm who are individuals by the amount specified in regulations as the minimum turnover for the purposes of section 562(2A); and

(b) in respect of each partner in the firm who is a company (other than one to which section 565(2A)(b) would apply), the amount equal to what would have been the minimum turnover for the purposes of section 562(2A) if the application had been for the issue of a certificate to that company.

The rest of the section sets out the compliance tests which are the same as those for individuals.

Income and Corporation Taxes Act 1988, s. 565 **Conditions to be satisfied by companies**

565 (2) The company must be carrying on (whether or not in partnership) a business in the United Kingdom and that business must satisfy the conditions mentioned in section 562(2)(a) to (d).

565 (2B) The minimum turnover . . . is whichever is the smaller of—

- (a) the amount obtained by multiplying the amount specified in regulations as the minimum turnover for the purposes of section 562(2A) by the number of persons who are relevant persons in relation to the company; and

(b) the amount specified for the purposes of this paragraph in regulations made by the Board.

The rest of the section sets out the compliance tests which are broadly the same as those for individuals, but a company must also have complied with its obligations under the Companies Acts.

Commentary

7.10.1 The Construction Industry Tax Scheme was completely revised with effect from 1st August 1999. The purpose of the scheme is to prevent tax evasion in the building trade. The basic principle is that tax must be deducted from payments to self-employed workers (sub-contractors) for construction work. The contractor gives the sub-contractor a Taxed Payment Voucher, showing the amount of tax deducted. These were previously known as SC60s.

7.10.2 The Revenue will issue a Gross Payment Certificate (previously known as a 714 certificate) to a sub-contractor if he meets the requirements of the legislation set out above. A Gross Payment Certificate entitles the sub-contractor to be paid without tax being deducted. He must pass three tests:

(a) **The Business Test**

He must be carrying on a construction business, with proper records, premises and equipment, and have a bank account.

(b) **The Turnover Test**

A *sole trader's* turnover must be at least £30,000 per annum. Turnover includes all construction income, less the cost of materials.

A *partnership's* turnover must be at least the sole trader's threshold multiplied by the number of partners. Thus a four partner firm must show an annual turnover of at least £120,000. There is an alternative turnover test for partnerships of £200,000 regardless of the number of partners.

A *company's* turnover must be at least the sole trader's threshold multiplied by the number of directors, or beneficial shareholders in the case of a close company. The alternative turnover test of £200,000 is also available.

An established business must show that its average turnover exceeds the relevant threshold over the three most recent tax years.

New businesses may show that they have achieved 70% of the relevant threshold within a six month period in the twelve months before the application. If successful, the certificate will be valid for one year only, and the sub-contractor will then have to reapply.

(c) **The Compliance Test**

The sub-contractor must have complied with all his tax obligations during the three years before the application for a Gross Payment Certificate. This includes filing all returns on time and paying all tax (including PAYE and deductions from sub-contractors) on time. Under the old scheme it was possible for a sub-contractor to meet the compliance test if he brought his tax affairs up to date immediately before applying for a certificate; that is not possible under the new scheme. The sub-contractor must show that he has complied with his tax obligations on time as they fall due throughout the three year period and there must be reason to expect that the sub-contractor will comply with his obligations in future.

Minor and technical breaches of the rules can be disregarded.

In the case of a new company, the directors must meet the compliance test.

In addition, companies must also comply with their obligations under the Companies Acts.

- 7.10.3 A person working in the construction industry can be both a contractor and a sub-contractor in respect of the same job. For example, if a developer engages the services of a builder, the builder is a sub-contractor to the developer. The builder in turn may engage the services of an electrician to install the wiring in the building. The electrician is a sub-contractor to the builder. Cash flow difficulties can arise if the builder does not have a Gross Payments Certificate, because the contractor has to deduct tax from all payments to the builder. But the builder still has to pay the electrician in full – either the electrician has a Gross Payments Certificate and is entitled to full payment, or he does not and the builder pays a net sum to the electrician and the tax to the Revenue.
- 7.10.4 It is common for big construction companies to employ only those sub-contractors who hold a Gross Payments Certificate. The result is that small tradesmen who have been refused a Gross Payments Certificate can find it difficult to obtain work.
- 7.10.5 For these reasons, the refusal of a Gross Payments Certificate often causes a sub-contractor severe difficulties. The dissatisfied sub-contractor may appeal to the Commissioners against the refusal of a certificate. It must be emphasised that any commercial difficulty which results from the sub-contractor not having a certificate is not a ground for appeal against the refusal of the Revenue to grant a certificate.
- 7.10.6 In most cases the sub-contractor will have no difficulty meeting the business test, but in borderline cases the Commissioners must look carefully at the nature and extent of the appellant's business.
- 7.10.7 The turnover test is mandatory and in most cases there will be no dispute about whether or not the appellant meets the test. Where appeals are made on this ground it is often because the appellant wishes to air his views about the system. If his appeal is refused because he does not meet the turnover test the Commissioners should say that they have no discretion on the point.
- 7.10.8 Most appeals against the refusal of Gross Payment Certificates relate to the compliance test. There is a statutory discretion to ignore minor and technical breaches of tax obligations and this is a fruitful source of grounds for appeal.

7.10.9 In the 2002 case of *Shaw (HMIT) v Vicky Construction Ltd* the High Court in England held that repeated late payments of PAYE tax, sometimes seriously late, of significant sums for an unbroken period of sixteen months did not fall within the natural and ordinary meaning of the words ‘minor and technical’. The late payments had continued even after a warning letter from the Revenue that failure to comply might result in the company’s next application for a gross payment certificate being refused. The High Court also held that the Commissioners’ conclusion ‘that there are no grounds to question the general tax reliability’ of the sub-contractor did not address the question of whether there are reasons to expect that the sub-contractor will comply with its obligations in the future.

7.10.10 Nevertheless each case must be judged on its own facts and, as in reasonable excuse cases, it is for the Commissioners to decide what minor and technical breaches may properly be overlooked, even if their view differs from the Revenue’s. The commercial consequences for the sub-contractor of being refused a gross payment certificate is not relevant to question whether the sub-contractor’s breach of tax obligations are minor and technical.

7.11 Appeals against estimated assessments and Revenue determinations

The Law

Taxes Management Act 1970 s31

Right of appeal

- 31 (1) Subject to subsection (1A) below, an appeal may be brought against—
- (a) an amendment under section 28A(2) or (4) of this Act of a self-assessment, or
 - (aa) a decision contained in a notice under section 28A(4A) of this Act disallowing a claim or election in whole or in part, or
 - (b) an amendment under section 28B(3) or 30B(1) of this Act of a partnership statement, or
 - (c) an assessment to tax which is not a self-assessment,
- by a notice of appeal in writing given within 30 days after the date on which the notice of amendment, the notice under section 28A(4A) of this Act or, as the case may be, the notice of assessment was issued.
- 31 (1A) An appeal against an amendment under subsection (2) of section 28A of this Act of a self-assessment shall not be heard and determined before the officer who made the amendment gives notice under subsection (5) of that section that he has completed his enquiries.
- 31 (2) The notice of appeal shall be given to the officer of the Board by whom the notice of amendment or assessment was given.
- 31 (4) . . . the appeal shall be to the General Commissioners, except that the appellant may elect (in accordance with section 46(1) of this Act) to bring the appeal before the Special Commissioners instead of the General Commissioners.
- 31 (5) The notice of appeal shall specify the grounds of appeal, but on the hearing of the appeal the Commissioners may allow the appellant to put forward any ground not specified in the notice, and take it into consideration if satisfied that the omission was not wilful or unreasonable.

Taxes Management Act 1970 s50

Procedure

- 50 (6) If, on an appeal, it appears to the majority of the Commissioners present at the hearing, by examination of the appellant on oath or affirmation, or by other evidence—
- (a) that, by reason of an amendment under section 28A(2) or (4) of this Act or paragraph 30 or 34(2) of Schedule 18 to the Finance Act 1998, the appellant is overcharged by a self-assessment;
 - (b) that, by reason of an amendment under section 28B(3) or 30B(1) of this Act, any amounts contained in a partnership statement are excessive; or
 - (c) that the appellant is overcharged by an assessment other than a self-assessment,
- the assessment or amounts shall be reduced accordingly, but otherwise the assessment or statement shall stand good.
- 50 (7) If, on an appeal, it appears to the Commissioners—
- (a) that the appellant is undercharged to tax by a self-assessment which has been amended under section 28A(2) or (4) of this Act or paragraph 30 or 34(2) of Schedule 18 to the Finance Act 1998;
 - (b) that any amounts contained in a partnership statement which has been amended under section 28B(3) or 30B(1) of this Act are insufficient; or

(c) that the appellant is undercharged by an assessment other than a self-assessment,

the assessment or amounts shall be increased accordingly.

50 (7A) If, on appeal, it appears to the Commissioners that a claim or election specified in a notice under section 28A(4A) of this Act should have been allowed or disallowed to an extent different from that specified in the notice, the claim or election shall be allowed or disallowed accordingly to the extent that appears to them appropriate, but otherwise the decision in the notice shall stand good.

50 (8) Where, on an appeal against an assessment (other than a self-assessment) which—

(a) assesses an amount which is chargeable to tax, and

(b) charges tax on the amount assessed,

it appears to the Commissioners as mentioned in subsection (6) or (7) above, they may, unless the circumstances of the case otherwise require, reduce or, as the case may be, increase only the amount assessed; and where any appeal is so determined the tax charged by the assessment shall be taken to have been reduced or increased accordingly.

50 (9) Where any amounts contained in a partnership statement are reduced under subsection (6) above or increased under subsection (7) above, an officer of the Board shall by notice to each of the relevant partners amend—

(a) the partner's self-assessment under section 9 of this Act, or

(b) the partner's company tax return,

so as to give effect to the reductions or increases of those amounts.

Finance Act 1998, Schedule 18

Amendment of self-assessment during enquiry to prevent loss of tax

30(1) If after notice of enquiry has been given and before the enquiry is completed the Inland Revenue form the opinion—

(a) that the amount stated in the company's self-assessment as the amount of tax payable is insufficient, and

(b) that unless the assessment is immediately amended there is likely to be a loss of tax to the Crown,

they may by notice to the company amend its self-assessment to make good the deficiency.

30(2) In the case of an enquiry which under paragraph 25(2) is limited to matters arising from an amendment of the return, sub-paragraph (1) above only applies so far as the deficiency is attributable to the amendment.

30(3) An appeal may be brought against an amendment of a company's self-assessment by the Inland Revenue under this paragraph.

30(4) Notice of appeal must be given—

(a) in writing,

(b) within 30 days after the amendment was notified to the company,

(c) to the officer of the Board by whom the notice of amendment was given.

30(5) The appeal shall not be heard and determined before the completion of the enquiry.

Finance Act 1998, Schedule 18
Amendment of return after enquiry

34(1) The company has 30 days beginning with the day on which the enquiry is completed in which—

- (a) to amend the return that was the subject of the enquiry—
 - (i) to accord with the conclusions stated in the closure notice, and
 - (ii) in the case of a return for the wrong period, to make it a return appropriate to the designated period, and
- (b) to make any amendments of other company tax returns delivered by it which are required to give effect to the conclusions stated in the closure notice.

The time limits otherwise applicable to amendment of a company tax return do not prevent an amendment being made under paragraph (a) or (b).

34(2) If after the end of that period of 30 days the Inland Revenue are not satisfied—

- (a) that the return that was the subject of the enquiry—
 - (i) is correct and complete, and
 - (ii) in the case of a return for the wrong period, is a return appropriate to the designated period, and
- (b) that any necessary amendments have been made to any other return delivered by the company that are required to give effect to the conclusions stated in the closure notice,

they may, within the following period of 30 days, by notice to the company make such amendments of that return or those returns as they consider necessary.

34(3) An appeal may be brought against any such amendment of a company's return.

34(4) Notice of appeal must be given—

- (a) in writing,
- (b) within 30 days after the amendment was notified to the company,
- (c) to the officer of the Board by whom the notice of amendment was given.

34(5) In this paragraph "the designated period" means the period designated in the closure notice.

Commentary

- 7.11.1 Under self-assessment, the taxpayer may appeal only against certain assessments made by the Revenue, usually in the context of enquires by the Revenue. If the taxpayer has simply failed to send in his tax return and the Revenue have made a determination under TMA s28C, that determination takes effect as a self-assessment and the taxpayer has no right of appeal. If he thinks the determination is wrong, he can correct it simply by sending in his tax return.
- 7.11.2 Similar rules apply to appeals against Corporation Tax Self-Assessment determinations, as set out in Schedule 18, Finance Act 1998.
- 7.11.3 There may still be a few outstanding appeals in respect of estimated assessments made for 1995/96 and earlier years (before self-assessment). In these cases, the taxpayer always has a right of appeal, although if he does submit a tax return for the year under appeal it may then be possible for him to settle it by agreement with the Revenue. But in the absence of an

agreement, an appeal against an estimated assessment made before self-assessment must be determined by the Tribunal.

- 7.11.4 Under TMA s50(6) the taxpayer must produce evidence to show that the Revenue's estimate or determination is wrong. If he does not, the Tribunal must confirm the estimate or determination. There is judicial authority that the Tribunal may increase an assessment if the Revenue produces evidence to support an increase, whether or not the taxpayer has produced any evidence.
- 7.11.5 If the taxpayer does produce some evidence in support of the appeal, then the Tribunal has a wide discretion to reduce or increase the assessment, according to the evidence presented.
- 7.11.6 Under s31(5) the taxpayer is not restricted to the grounds of appeal set out in his notice of appeal; he may introduce other grounds with the consent of the Commissioners. In most cases, Commissioners should allow further grounds of appeal to be argued, bearing in mind Article 6 of the European Convention on Human Rights.

7.12 Consent to Section 20 notices

The Law

Taxes Management Act 1970 s20

Power to call for documents of taxpayer and others

20 (1) Subject to this section, an inspector may by notice in writing require a person—

(a) to deliver to him such documents as are in the person's possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to—

(i) any tax liability to which the person is or may be subject, or

(ii) the amount of any such liability, or

(b) to furnish to him such particulars as the inspector may reasonably require as being relevant to, or to the amount of, any such liability.

20 (3) Subject to this section, an inspector may, for the purpose of enquiring into the tax liability of any person ("the taxpayer"), by notice in writing require any other person to deliver to the inspector or, if the person to whom the notice is given so elects, to make available for inspection by a named officer of the Board, such documents as are in his possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to any tax liability to which the taxpayer is or may be, or may have been, subject, or to the amount of any such liability; and the persons who may be required to deliver or make available a document under this subsection include the Director of Savings.

20 (7) Notices under subsection (1) or (3) above are not to be given by an inspector unless he is authorised by the Board for its purposes; and—

(a) a notice is not to be given by him except with the consent of a General or Special Commissioner; and

(b) the Commissioner is to give his consent only on being satisfied that in all the circumstances the inspector is justified in proceeding under this section.

20 (7AB) A Commissioner who has given his consent under subsection (7) above shall neither take part in, nor be present at, any proceedings on, or related to, any appeal brought—

(a) in the case of a notice under subsection (1) above, by the person to whom the notice applies, or

(b) in the case of a notice under subsection (3) above, by the taxpayer concerned,

if the Commissioner has reason to believe that any of the required information is likely to be adduced in evidence in those proceedings.

Article 8 of ECHR – Right to Respect for Private and Family Life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Commentary

- 7.12.1 TMA ss20 and 21 give the Revenue extensive powers to obtain information from third parties to assist their enquiries into a taxpayer's affairs. The powers can be exercised ex parte (ie without the taxpayer being notified of the application) and there is no requirement for there to be any current proceedings between the Revenue and the taxpayer, either before the Commissioners or the courts. Where the powers are exercised against a third party, the Revenue is required to obtain leave of a General or Special Commissioner. There are special safeguards where a notice is to be issued against an advocate, solicitor, or barrister because issues of legal professional privilege may arise – TMA s20B(3).
- 7.12.2 The powers given by TMA s20 are restricted by TMA s20B. Under s20B(1) the inspector must first give the intended recipient of the notice a reasonable opportunity to deliver or make available the documents in question, and the inspector may not apply for consent from a Commissioner until that opportunity has been given. The Revenue usually complies with s20B(1) by issuing what is known as a precursor notice.
- 7.12.3 S20B(1A) requires the inspector to give a copy of any notice issued under s20(3) to the taxpayer unless the Commissioner directs that a copy need not be given. Before making such a direction the Commissioner must be satisfied that the inspector has reasonable grounds for suspecting the taxpayer of fraud - s20B(1B)
- 7.12.4 After a s20(3) notice has been issued, the inspector must give the taxpayer (not the third party recipient of the notice) a written summary of his reasons for applying for consent to the giving of the notice - s20(8E). The notice is not required to disclose any information which might identify the source of the information or information which the Commissioner giving the required consent has directed need not be disclosed - s20(8G). In the latter case the Commissioner must be satisfied that the inspector has reasonable grounds for believing that disclosure of the information in question would prejudice the assessment or collection of tax - s20(8H).
- 7.12.5 The conditions for the issue of notices under s20 have been considered extensively by the courts in recent years and the following principles can be derived from the case law:
- Judicial review will not be granted of a precursor notice - the General Commissioner who consents to the issue of the s20 notice should consider the issues that the recipient of precursor notice raises in response to it.
 - There is no requirement that the General Commissioner who consents to the issue of a s20 notice must be a Commissioner for the division which has jurisdiction to deal with the taxpayer.
 - The General Commissioner's function is to supervise the Revenue's exercise of its powers under s20 and the courts will not readily interfere with the Commissioner's discretion.
 - The inspector is only required to have a reasonable opinion that the documents might contain information relevant to the taxpayer's affairs. This is not the same thing as a correct opinion, so the recipient of the notice has no redress if the inspector does not find what he is looking for.
 - The recipient of the notice must be given reasons for its issue, and the reasons must be given with the notice even if they have been extensively canvassed in earlier correspondence.
 - When issuing a notice, the Revenue must take into consideration the likely burden of compliance and ensure that there is proportionality between burden and benefit.
 - Settlement of a previous investigation based on similar circumstances does not preclude the Revenue from issuing further notices to the same party.
 - A s20 notice can require the production of documents which may exist but are not known by the Revenue to exist for certain.
 - 'Particulars' are not confined to facts; they can include analysis or explanations.

- A s20 notice does not require the recipient of the notice to obtain documents which he does not have in his possession or power.

7.12.6 When considering the burden of compliance, the Commissioner should have Article 8 ECHR in mind. The exceptions in Article 8(2) justify the issue of a section 20 notice, so the Commissioner should only consider whether any particular requirement of the proposed section 20 notice might be excessively burdensome for that particular person.

7.12.7 Applications are made to a single Commissioner when required; the Revenue will not normally wait until the next scheduled Commissioners' meeting. The Revenue will arrange an appointment through the Clerk. The Clerk should be present at the meeting, to record what is discussed and to advise the Commissioner on the legal points that arise.

7.12.8 Under no circumstances should a General Commissioner hear an application under s20 without the Clerk being present.

7.12.9 S20 also applies to the repayment of student loans (see below).

7.12.10 The Commissioner who consents to the issue of a section 20 notice may not be present at or take part in any hearing of an appeal where the documents required by the notice are likely to be adduced in evidence.

7.13 National Insurance Appeals

The Law

Social Security Contributions (Transfer of Functions, etc.) Act 1999

s8 Decisions by officers of Board

8 (1) Subject to the provisions of this Part, it shall be for an officer of the Board—

- (a) to decide whether . . . a person is or was an earner and, if so, the category of earners in which he is or was to be included,
- (b) to decide whether a person is or was employed in employed earner's employment for the purposes of . . . (industrial injuries),
- (c) to decide whether a person is or was liable to pay contributions of any particular class and, if so, the amount that he is or was liable to pay,
- (d) to decide whether a person is or was entitled to pay contributions of any particular class that he is or was not liable to pay and, if so, the amount that he is or was entitled to pay,
- (e) to decide whether contributions of a particular class have been paid in respect of any period,
- (f) subject to and in accordance with regulations made for the purposes of this paragraph by the Secretary of State with the concurrence of the Board, to decide any issue arising as to, or in connection with, entitlement to statutory sick pay, statutory maternity pay, statutory paternity pay or statutory adoption pay,
- (g) to make any other decision that falls to be made under Parts 11 to 12ZB of the Social Security Contributions and Benefits Act 1992 (statutory sick pay, statutory maternity pay, statutory paternity pay and statutory adoption pay),
- (ga) to make any decision that falls to be made under regulations under section 7 of the Employment Act 2002 (funding of employers' liabilities to make payments of statutory paternity or adoption pay),
- (h) to decide any question as to the issue and content of a notice under subsection (2) of section 121C of the Social Security Administration Act 1992 (liability of directors etc. for company's contributions where there has been fraud or neglect),
- (i) to decide any issue arising under section 27 of the Jobseekers Act 1995 (employment of long-term unemployed: deductions by employers), or under any provision of regulations under that section, as to—
 - (i) whether a person is or was an employee or employer of another,
 - (ii) whether an employer is or was entitled to make any deduction from his contributions payments in accordance with regulations under section 27 of that Act,
 - (iii) whether a payment falls to be made to an employer in accordance with those regulations,
 - (iv) the amount that falls to be so deducted or paid, or
 - (v) whether two or more employers are, by virtue of regulations under section 27 of that Act, to be treated as one,
- (j) to decide whether a person is liable to pay interest . . . [for various breaches of regulations]
- (k) to decide whether a person is liable to a penalty . . . [for various breaches of regulations]
- (l) to decide the amount of interest or penalty payable under any of the provisions mentioned in paragraphs (j) and (k) above, and

(m) to decide such issues relating to contributions, other than the issues specified in paragraphs (a) to (1) above or in paragraphs 16 and 17 of Schedule 3 to the Social Security Act 1998, as may be prescribed by regulations made by the Board.

s11 Appeals against decisions of Board

11 (1) This section applies to any decision of an officer of the Board under section 8 of this Act or under regulations made by virtue of section 10(1)(b) or (c) of this Act (whether as originally made or as varied under regulations made by virtue of section 10(1)(a) of this Act).

11 (2) In the case of a decision to which this section applies—

(a) if it relates to a person's entitlement to statutory sick pay, statutory maternity pay, statutory paternity pay or statutory adoption pay, the employee and employer concerned shall each have a right to appeal to the tax appeal Commissioners, and

(b) in any other case, the person in respect of whom the decision is made and such other person as may be prescribed shall have a right to appeal to the tax appeal Commissioners.

s12 Exercise of right of appeal

12 (1) Any appeal against a decision must be brought by a notice of appeal in writing given within 30 days after the date on which notice of the decision was issued.

12 (2) The notice of appeal shall be given to the officer of the Board by whom notice of the decision was given.

12 (3) The notice of appeal shall specify the grounds of appeal, but on the hearing of the appeal the tax appeal Commissioners may allow the appellant to put forward any ground not specified in the notice, and take it into consideration if satisfied that the omission was not wilful or unreasonable.

12 (4) . . . any appeal under this section shall be heard by the General Commissioners, except that the appellant may elect in accordance with section 46(1) of the Taxes Management Act 1970 to bring the appeal before the Special Commissioners instead of the General Commissioners.

12 (5) Subsections (5A) to (5E) of section 31 of the Taxes Management Act 1970 (which relate to an election to bring proceedings before the Special Commissioners) shall have effect in relation to an election under subsection (4) above as they have effect in relation to an election under subsection (4) of that section.

The Social Security Contributions (Decisions and Appeals) Regulations 1999

Determination of Appeals by Tax Appeal Commissioners

Regulation 10

If, on an appeal to the tax appeal Commissioners under Part II of the Transfer Act or Part III of the Transfer Order, it appears to the majority of the Commissioners present at the hearing, by examination of the appellant on oath or affirmation or by other evidence, that the decision should be varied in a particular manner, the decision shall be varied in that manner, but otherwise shall stand good.

Commentary

7.13.1 Following the merger of the Contributions Agency with the Inland Revenue on 1st April 1999, appeals against decisions by the Revenue relating to National Insurance Contributions (NICs),

Statutory Sick Pay (SSP), Statutory Maternity Pay (SMP), Statutory Paternity Pay (SPP) and Statutory Adoption Pay (SAP) are dealt with by the General and Special Commissioners in the same way as tax appeals. The statutory provisions relating to appeals are set out above, and mirror the rules for tax appeals.

7.13.2 The Revenue can make decisions on the matters listed in s8, Social Security Contributions (Transfer of Functions, etc.) Act 1999, as set out above. All these decisions may be appealed to the Commissioners.

7.13.3 In practice most appeals are likely to fall into the following categories:

- Category of earners
- Liability to pay contributions and the amounts
- Entitlement to pay contributions and the amounts
- Whether contributions have been paid
- Decisions on entitlement to SSP, SMP
- Decisions on recovery of SSP, SMP, SPP and SAP by employers

7.13.4 **Category of earners**

Decisions on the categorisation of earners as employed (and thus liable to Class 1 contributions) or self-employed (and thus liable to Class 2 and Class 4 contributions) raise similar issues to decisions on whether a person is employed or self-employed for tax purposes, and appeals on both tax and NICs affecting the same taxpayer may be heard together. But note that the Social Security (Categorisation of Earners) Regulations 1978 make specific provisions for the NIC status of certain workers which do not necessarily apply to that worker's income tax status.

Appendix F summarises the issues which commonly arise in disputes over a person's employment status.

7.13.5 **Liability to pay**

There are six classes of contributions and it is possible for a person to pay more than one class of contribution at the same time. The classes of contributions are:

- | | |
|----------|--|
| Class 1 | Paid by employees and employers |
| Class 1A | Paid by employers on cars provided for the private use of employees |
| Class 1B | Paid by employers on small non-cash payments to employees which are part of a PAYE settlement arrangement. |
| Class 2 | Flat rate contributions paid by self-employed people with earnings over a specified threshold. |
| Class 3 | Voluntary contributions paid by people who are not liable for any other class of contribution and who wish to protect their pension entitlement. |
| Class 4 | Profit related contributions paid by the self-employed. These have always been assessed and collected by the Revenue. |

7.13.6 **Entitlement to pay**

Sometimes non-earners or those earning less than the thresholds for Class 1 or Class 2 contributions wish to pay Class 3 contributions to protect their pension entitlement. There are time limits (as to how far Class 3 contributions can be backdated) and residence tests to be met, and disputes often relate to these matters. If the appellant wishes to make Class 3 contributions outside the time limit, issues of misinformation by officials often arise and the Commissioners will need to consider how far the appellant exercised due care and diligence.

Since the rate for Class 2 contributions is now less than the rate for Class 3 contributions, many self-employed people with earnings below the Class 2 threshold may now elect to make voluntary Class 2 contributions.

7.13.7 **Whether contributions have been paid**

Short-term incapacity benefit, Jobseeker's allowance, invalidity benefits, maternity allowance, widow's and widower's benefits and retirement pension are all subject to contribution conditions – a minimum number of NICs must have been made before the benefit can be paid. Often a person does not find out that he or she has not made enough contributions until a claim for benefit is refused or the benefit is paid at a reduced rate.

If a previous employer has defaulted on accounting for NICs deducted from a person's pay, or has gone bankrupt, that person may have a shortfall in his contribution record. In some cases the person can require the DSS or the Revenue to deem or treat contributions as paid.

7.13.8 **Married women's reduced rate contributions**

Many married women elected to pay reduced rate NICs from 6th April 1975. From 11th May 1977 the option for married women to pay reduced rate contributions was abolished, except for women who were already paying at the reduced rate. The problem is that reduced rate contributions do not count towards retirement pension.

There were a number of reasons why married women elected to pay reduced rate NICs, especially the large difference between the full rate and the reduced rate (62p and 4p a week respectively in early 1975) which made a significant difference to take home pay for women in low paid work. Some women also chose to rely on their husband's contributions to qualify for a retirement pension at 60% of her husband's entitlement.

It is only now, as such women retire and find that their pension is less than they expected, that women are seeking to re-open the issue by way of appeal. Questions of record keeping by the DSS and due care and diligence by the appellant are likely to arise in these appeals.

7.13.9 **Statutory Sick Pay**

SSP is a flat-rate sum paid by employers to employees who are sick for four or more days in a row. The employee must work under a contract of employment which lasts for 13 weeks and earn an amount at least equal to the lower earnings limit for NICs. Payment is then made for a maximum of 28 weeks.

Employers can set off the SSP in excess of 13% of the NICs they have to pay to the Revenue as part of their PAYE liabilities against those NICs.

Difficulties often arise with contract or agency workers and these cases will probably give rise to most of the appeals.

7.13.10 **Statutory Maternity Pay**

SMP is paid by employers to pregnant employees who have stopped work with them and who were employed in the 15th week before the expected week of birth. At the 15th week, the employee must have completed at least 26 weeks continuous employment with that employer. SMP is paid for a maximum of 18 weeks, starting between the 11th week before the expected date of birth and the Sunday following the actual birth. Payment is at the rate of 90% of the employee's average earnings for 6 weeks followed by 12 weeks at a flat rate.

Employers may deduct 92% of the SMP they pay from NIC and tax due under PAYE; small employers may deduct 100% of SMP paid.

As with SSP, difficulties can arise with contract or agency workers. There may also be disputes about the amount of the week's pay on which SMP for the first 6 weeks is based.

7.13.11 **Statutory Paternity Pay**

SPP is paid by employers to employees who take paternity leave within 56 days after the birth of their child. An employee must satisfy the following conditions to qualify for paternity leave. He must:

- have or expect to have responsibility for the child's upbringing
- be the biological father of the child or the mother's husband or partner
- have worked continuously for his employer for 26 weeks leading into the 15th week before the baby is due.

An eligible employee may take one week or two consecutive weeks paternity leave – he cannot split it into odd days. He is only entitled to one period of paternity leave even if more than one child is born as a result of the same pregnancy.

SPP is paid by the employer for the one or two weeks of paternity leave taken by the employee and is paid at the same rate as statutory maternity pay. Employers may deduct 92% of the SPP they pay from NIC and tax due under PAYE; small employers may deduct 100% of SMP paid. As with SSP and SMP, difficulties can arise with contract or agency workers.

7.13.12 **Statutory Adoption Pay**

SAP is payable to employees who adopt a child. An individual who adopts or one member of a couple who adopt is entitled to SAP; the other spouse or partner may be entitled to paternity leave and pay.

To qualify for adoption leave and hence for SAP, an employee must:

- be newly matched with a child for adoption by an approved adoption agency
- have worked continuously for their employer for 26 weeks leading into the week in which they are notified of being matched with a child for adoption
- Adoption leave and pay is not available in circumstances where a child is not newly matched for adoption, for example when a step-parent is adopting a partner's children.

Adopters are entitled to up to 26 weeks paid leave and a further 26 weeks of additional adoption leave, which is unpaid. Adoption leave starts either from the date of the child's placement or from a fixed date up to 14 days before the expected date of placement. The employee must produce a certificate from the adoption agency to prove their entitlement to SAP.

The employee must inform their employer that they intend to take adoption leave within seven days of being notified by their adoption agency that they have been matched with a child for adoption, unless this is not reasonably practicable. They must tell their employer when the child is due to be placed with them and when they want their adoption leave to start. If they change their mind about when they want the leave to start they must give their employer 28 days notice unless this is not reasonably practicable. General Commissioners may be asked to determine whether notice was given within the time limit of whether it was not reasonably practicable to do so.

SAP is paid by employers for up to 26 weeks at the same rate as statutory maternity pay. Employers may deduct 92% of the SPP they pay from NIC and tax due under PAYE; small employers may deduct 100% of SMP paid. As with SSP, SMP, and SPP difficulties can arise with contract or agency workers.

The spouse or partner who does not take adoption leave is entitled to paternity leave and SPP on the same basis as set out in paragraph 7.13.11

7.13.13 **Record keeping**

The current National Insurance scheme has been in operation since 1948. Entitlement to benefits depends on a person's contribution record throughout their working life.

Before records were computerised in 1975, National Insurance records were kept on a paper based system. The details of each person's annual NICs were transferred to record cards and the original contribution cards destroyed. Stringent audit checks were carried out when the records were transferred to cards to maintain the accuracy and integrity of the records.

Nevertheless, the accuracy of the records may be challenged in appeal proceedings which relate to a person's contribution record.

7.13.14 **Due care and diligence**

A person must show that he took all reasonable steps to maintain his or her contribution record. Where this is an issue in an appeal, Commissioners should consider the following:

- If the appellant stopped paying NICs, he should have enquired about maintaining his record unless prevented from doing so by exceptional circumstances. A period abroad would not normally amount to an exceptional circumstance.
- The appellant's standard of intelligence, mental capacity, state of health, age and other characteristics should be taken into account. For example, a lower standard of care and due diligence might be expected from a person who is illiterate.
- Failure to take care and due diligence does not necessarily imply dishonesty or an attempt to avoid compliance.
- A person may have been given wrong advice by an official, or may have misunderstood the advice given and genuinely considered that the advice did not apply to him.

7.14 Failure to register as self-employed

The Law

The Social Security (Contributions) Regulations 2001 Regulation 87

87 (4) Subject to paragraph (9) of this regulation, where a person becomes liable to pay a Class 2 contribution and fails to notify immediately the Inland Revenue in accordance with paragraph (1) of this regulation, he shall be liable to a penalty of £100.

87 (5) The penalty referred to in paragraph (4) of this regulation shall be incurred on the following date -

(a) in the case of a failure which first occurs on or after 31st January 2001 and continues throughout the period of 3 calendar months beginning with the first day of the calendar month following that in which he becomes liable to pay a Class 2 contribution, the date after the day on which that period ends; or

(b) in the case of a failure which first occurs before 31st January 2001 and continues throughout the period beginning with that date and ending on 30th April 2001, 1st May 2001.

87 (6) The penalty referred to in paragraph (4) of this regulation may be imposed by a notice of decision by an officer of the Inland Revenue under section 8(1)(k)(ii) of the Social Security Contributions (Transfer of Functions, etc.) Act 1999 within 6 years after the date on which the penalty is incurred in accordance with the provisions of paragraph (5) of this regulation.

87 (7) The penalty referred to in paragraph (4) of this regulation -

(a) shall be due and payable at the end of the period of 30 days beginning with the date of the issue of the notice of decision referred to in paragraph (6) of this regulation; and

(b) shall be recoverable as if it were a Class 2 contribution due and payable.

87 (8) The Inland Revenue may, in their discretion, mitigate or remit any penalty imposed in accordance with the provisions of this regulation, or stay or compound any proceedings for it.

87 (9) For the purposes of paragraph (4) of this regulation, a person shall be deemed not to fail to notify immediately the Inland Revenue in accordance with paragraph (1) of this regulation if that person -

(a) notifies the Inland Revenue within such further time, if any, as the Inland Revenue may allow;

(b) has a reasonable excuse for not notifying the Inland Revenue and, if that excuse ceases, notifies the Inland Revenue without unreasonable delay after it ceases; or

(c) shows to the satisfaction of the Inland Revenue that his earnings met the conditions set out in regulation 25(1) of these Regulations . . .

Commentary

- 7.14.1 From 31st January 2001 newly self-employed taxpayers must register with the Revenue within three months of becoming self-employed. The obligation takes effect as an obligation to register for Class 2 NICs, but the Revenue will treat the registration as notification of the taxpayer's self-employment for the purposes of tax and Class 4 NICs.
- 7.14.2 There is a £100 penalty for failure to register. The penalty is imposed the Social Security Contributions (Transfer of Functions, etc.) Act 1999 and there is a right of appeal to the Commissioners under the appeal provisions in that Act.
- 7.14.3 The taxpayer may appeal either on the grounds that he has a reasonable excuse or that his earnings are below the Class 2 NIC threshold.
- 7.14.4 It is for the Commissioners to decide whether the taxpayer has a reasonable excuse and as with all other appeals where the taxpayer claims a reasonable excuse the Tribunal is not bound by any guidelines published by the Revenue as to what they will or will not accepted as a reasonable excuse.

7.15 Student Loans

The Law

Education (Student Loans) (Repayment) Regulations 2000

4 Functions of the Inland Revenue

4 (1) The Board shall collect repayments from borrowers in accordance with Parts III and IV, and the provisions of section 1 of the 1970 Act shall apply for those purposes as they apply for the purposes of income tax.

7 Penalties etc.

7 (1) Section 98 of the 1970 Act (special returns etc.) shall apply for the purposes of repayments under Part III or IV as if any reference to a provision in the Table in that section were a reference to a provision in those Parts other than regulation 16.

7 (2) Section 99 of the 1970 Act (assisting in the preparation of incorrect returns etc.) shall apply in the case of returns, statements, declarations, accounts, information or documents for the purposes of repayments under Part III or IV as they apply for the purposes of income tax.

7 (3) Sections 100 and 100A (determination of penalties by officer of Board), 100B (appeals against penalty determinations), 100C (penalty proceedings before Commissioners), 100D (penalty proceedings before court), 102 (mitigation of penalties), 103(3) and (4) (time limits for penalties), 103A (interest on penalties), 104 (savings for criminal proceedings) and 105 (evidence in case of fraudulent conduct) of the 1970 Act shall apply to penalties in connection with repayments under Part III or IV as they apply to penalties in connection with income tax.

7 (4) Sections 112 to 115A of and Schedule 3A to the 1970 Act (documents) shall apply to assessments, returns or any other documents made, required, issued, served, sent or lodged for the purposes of or in connection with repayments under Part III or IV as they apply to documents for the purposes of or in connection with income tax.

7 (5) Section 118(2) of the 1970 Act (failure to act within limited time) shall apply in relation to anything required to be done under Part III or IV as it applies in relation to anything required to be done under that Act

7 (6) For the purposes of these Regulations the amount of a repayment covered by any assessment under Part III shall not be deemed to be finally determined until that assessment can no longer be varied, whether by any Commissioners on appeal or by the order of any court.

14 Repayments of student loans by persons required to submit a tax return

Repayments by a borrower who in respect of any year of assessment is required to make and deliver to the Board a return under section 8 of the 1970 Act shall be made, accounted for and recovered in like manner as income tax payable under the Taxes Acts; and in such case the provisions of this Part (which with extensions and modifications include provisions of the Taxes Acts) shall apply to and for the purposes of such repayments

15 Amount of repayments

15 (5) In calculating a borrower's total income for the purposes of paragraph (1) there shall be excluded:

- (a) the first £10,000 of that income;
- (b) income on which the borrower could not become liable to tax under a self-assessment made under section 9 of the 1970 Act for that year;
- (c) unearned income unless the amount of such income for that year exceeds £2,000;
- (d) incapacity benefit . . .

- (e) . . . (benefits in kind);
- (f) . . . (pension schemes, social security benefits, life annuities etc.);
- (g) the amount of any loss in respect of which relief is given under section 380 of the 1988 Act (trade etc. losses set-off against general income); and
- (h) the amount of any payment in respect of which relief is given under section 109A of the 1988 Act (relief for post-cessation expenditure).

22 Surcharges

Section 59C of the 1970 Act (surcharges on unpaid income tax and capital gains tax) shall apply to repayments which have become payable by a borrower under this Part as it applies to income tax payable in accordance with section 55 or 59B of that Act.

Commentary

- 7.15.1 Grants are no longer available to students in higher education and those students who require financial assistance from the State are given assistance by means of student loans. Student loans are repayable once the student is earning more than £10,000 per annum and are repayable at the rate of 9% of total taxable income per annum. Repayments are collected by the Revenue through the tax system and the Education (Student Loans) (Repayment) Regulations 2000 quoted above apply the provisions of the Taxes Management Act 1970 to the repayments. In the regulations, the person who is liable to make the repayments is referred to as 'the borrower'.
- 7.15.2 Appeals relating to student loans will generally raise the same issues as other tax appeals. There is, however, scope for arguments over whether the threshold for repayments has been reached in any particular year, particularly for the self-employed. Note also that late repayments are subject to the 5% surcharge, which can be appealed against in the usual way.
- 7.15.3 The information powers in s20 and s20(B) TMA apply to student loans as they do in respect of tax. A Commissioner could therefore be asked to authorise the issue of a s20 notice relating to a student loan.
- 7.15.4 When the student loan has been repaid in full the Scottish Ministers (or in England, the Secretary of State for Education) will issue a certificate to the borrower confirming that no further payment is due. If an appellant contends that he has repaid his loan in full, but the Revenue is still insisting on repayments, the Commissioners should adjourn the proceedings to allow the borrower time to request a certificate from the Scottish Ministers. At the time of writing it is not known how long it will take the Scottish Ministers to reply to such requests.
- 7.15.5 In accordance with a determination made by Scottish ministers on () acting under the provisions of paragraph 5 of The Repayment of Student Loans (Scotland) Regulations 2000, Parts III and IV of the Education (Student Loans) (Repayment) Regulation 2000 apply throughout the United Kingdom, except that where the loan has been made under the provisions of the Education (Scotland) Act 1980, the Scottish Ministers exercise the functions which are otherwise allotted to the Secretary of State (for Education).

7.16 Application for late appeals

The Law

Taxes Management Act 1970, s49

Proceedings brought out of time

49(1) An appeal may be brought out of time if on an application for the purpose an inspector or the Board is satisfied that there was a reasonable excuse for not bringing the appeal within the time limited, and that the application was made thereafter without unreasonable delay, and gives consent in writing; and the inspector or the Board, if not satisfied, shall refer the application for determination by the Commissioners.

49(2) If there is a right to elect to bring the appeal before the Special Commissioners instead of before the General Commissioners, the Commissioners to whom an application under this section is to be referred shall be the General Commissioners unless the election has been exercised before the application is so referred.

Commentary

- 7.16.1 S49 applies to any appeal provision where a time limit is specified for bringing an appeal. In those cases where the taxpayer has what the Revenue regards as a reasonable excuse for making a late appeal, the Inspector will normally allow the appeal to be made.
- 7.16.2 If the Inspector is unwilling to allow a late appeal then the taxpayer may appeal to the Commissioners. On the hearing of an application for a late appeal the Commissioners are considering why the taxpayer did not lodge the appeal within the time limit; they should not consider the merits of the appeal.
- 7.16.3 The taxpayer must explain why he did not lodge the appeal in time. If he did not know he had a right to appeal until after the time limit expired, how soon after learning of his right to appeal did he in fact make an appeal? A taxpayer who delayed appealing for two years after discovering that he could appeal may be less deserving of sympathy than one who lodged an appeal within a week or two of knowing he could appeal. But each case must be considered individually – if there has been a long delay, what was the reason?
- 7.16.4 Occasionally the Revenue may have refused to allow a late appeal because the delay is such that they do not feel able to give consent themselves, but they may be content for the Commissioners to give such consent, especially if they have agreed revised figures with the taxpayer to allow the appeal to be determined immediately if it is allowed as a late appeal. That is a relevant matter for the Commissioners to take into account but they are not bound by it.

7.17 Children's Tax Credit

- 7.17.1 From April 2001 a tax allowance can be claimed by taxpayers who have a child under 16 living with them. If the taxpayer is a higher rate taxpayer the allowance is reduced by £1 for every £15 of income taxed at the higher rate.
- 7.17.2 A couple living together (whether or not they are married) may only claim one children's tax credit between them, and if one of them is a higher rate taxpayer, that person must claim the tax credit – which automatically leads to a reduction in the allowance.
- 7.17.3 This leads to a well-publicised anomaly that a couple both earning £30,000 per annum, ie having a joint income of £60,000, are entitled to the children's tax credit in full, while a couple where one party earns £42,000 per annum and the other has no income receive no children's tax credit. It is likely that some taxpayers in the latter category may appeal against the refusal of the children's tax credit, relying on Article 14 ECHR – prohibition of discrimination. General Commissioners cannot declare the legislation incompatible with the ECHR and may not therefore allow an appeal based on this ground, although they may wish to mention the point in any case stated requested by the taxpayer.
- 7.17.4 Appeals may also arise on the question of whether or not a couple are living together, usually because one of them is a higher rate taxpayer and they wish to avoid the reduction of the allowance. Such disputes are questions of fact and the Tribunal must consider the evidence in the usual way.

Appendix A

Appointing a New Clerk

This is an outline of the appointment process and each part is described in more detail on the following pages.

My Clerk is leaving. What should I do?

- First contact the secretary of Commissions for Scotland. His address and telephone number is at the end of this guidance.
- Also inform the Tribunals Policy Branch – payments Section at the Lord Chancellor’s Department and inform them of your Clerk’s last day of service. They are responsible for paying your Clerk. The address and telephone number of the Tribunals Policy Branch is also at the end of this guidance.
- Next, prepare to advertise the vacancy.



Why should I do that?

- Appointments of this nature need to be made open to all suitable applicants to ensure that the best candidate is found in the fairest possible way.



What do I need to do before I advertise?

- Write a job description for the vacancy and an application form.
- Decide who will be on the interview panel with you.
- Devise a candidate description with your other panel members. This should be a list of the criteria and abilities that will be required by the successful applicant.



How do I advertise the job?

- Decide where an advertisement should be placed.
- Find out the likely cost of advertisements.
- Write a suitable advertisement.
- For financial help with advertising the post, contact Payments Section in Tribunals Policy Branch.
- They can only contribute if the advertisement, the advertising programme (schedule of publications) and costs have been agreed with them first.



What should happen at the interviews?

- Interviews should test the required abilities and criteria for the post.
- Your decision to appoint an individual to the post should be made on merit.
- Candidates must perceive the process to be open and fair.



How do I appoint an individual?

- When the Clerk has accepted the offer, advise the Secretary of Commissions for Scotland of the new appointment
- Also let the Tribunals Policy Branch know of the new appointment.
- Tribunals Policy Branch will then write to the Clerk to confirm rates of remuneration.

In the next few pages, you will find more detail about individual parts of the appointment process

Selecting the interview panel

It is likely that the Divisional Chairman will make the arrangements for appointing a new Clerk. If this is your area of responsibility, you will also have to select the panel members. The usual composition of the panel is a chairman with one or preferably two other members. Where possible, panel members should be chosen who have experience in interviewing and you should ensure that they are available both when the applications are being considered and the period when the interviews will be held.

Writing the job description

Writing a job description helps you to start to think about the person you really want, where to advertise and how candidates should be tested by those who interview. It also makes sure that applicants have up to date information about the job. When writing the job description, you will find it important to consider exactly what the role of the Clerk is going to be and, given the nature of the work, it is likely that the role should not differ greatly around the country. This list will give you a starting point from which to prepare a full job description.

The Clerk has the following responsibilities:

Pre- Hearing

- Setting up hearings, agreeing dates with Inland Revenue and booking accommodation;
- Setting up in agreement with the Commissioners an attendance schedule for Commissioners in the most user-friendly way;
- Sending out hearing notices (received from the Inland Revenue) to the appellant giving 28 days notice;
- Dealing with correspondence received from appellants and on occasion obtaining information from the Inland Revenue;
- Issuing reminders to those Commissioners attending the hearing (1 to 2 weeks before the hearing);
- Setting up the room ahead of the hearing, drawing up a list of attendees and ushering the appellant and the representatives of the Revenue into the room, ensuring that the independence of the Tribunal is clear to all users;

• **The Hearing**

- Introducing the appellant to the General Commissioners and explaining their role (unless the chairman wishes to make a statement);
- Advising the Commissioners of the legal parameters within which they can make a decision;
- Reminding the Commissioners of the legal implications and the range of penalties available for all cases involving Precepts and Penalties;
- Signing a certificate of value or apportionment of value in connection with chargeable gains as described in paragraph 4.10 of the Guidance Notes for General Commissioners of Income Tax;
- Advising the General Commissioners on the law and general procedural matters;
- Keeping a record of the hearing for the chairman's signature.

Post Hearing

- Writing to each of the parties informing them of any directions made by General Commissioners;
- Writing to each appellant detailing the Commissioners' decision and providing an information sheet explaining the taxpayer's rights to further appeal;
- Drafting all requests for a case to be stated for the approval of the Commissioners within the prescribed time limits.
- Advising Commissioners whether there are grounds under Regulation 17 of The General Commissioners (Jurisdiction and Procedure) Regulations 1994 to set aside a decision.

Other

- Advising new Commissioners on their duties and responsibilities and the practical factors of their appointment, i.e. travel and subsistence claims.
- Keeping all appropriate records.
- Submitting annual returns to the Advisory Committee detailing the number of sittings by each Commissioner and figures of penalty, contentious and other cases;
- Reporting to the Secretary of the Advisory Committee and the Judicial Appointment Division of the Lord Chancellor's Department any deaths, resignations and changes of address of General Commissioners;
- Copying and circulating information received from the Advisory Committee, the Lord Chancellor's Department and the National Association of General Commissioners and advising Commissioners about new legislation.
- Attending the Commissioners Annual General Meeting
- Keeping abreast of changes in Revenue law and practice.

For the purposes of a job description, it would be possible to summarise the job into say 5 main duties and to include information about the working conditions, such as hours to be worked and details of the Division for which the jobholder would be responsible.

The test of a good job description is to look at it from the perspective of an applicant. If you were applying for this job, what would you want to know about it?

Setting criteria for the job – creating a candidate description

It is important to know what level of ability you are looking for in the candidate for the post. It is helpful to write a description of the ideal candidate for the job. To do this you may have to answer the question:

‘The person I am looking for must be able to...’

and you may want to find a candidate who:

- Gives clear and concise legal advice
 - Demonstrates an ability to interpret legislation
 - Thinks quickly and responds promptly to questions
 - Creates effective links with Commissioners
 - Puts the appellant at ease
 - Promotes the independence of the tribunal
 - Demonstrates the ability to write clearly
 - Has good organisational skills
 - Possesses adequate office facilities

In the event of receiving several applications where applicants meet the criteria, there needs to be some way of deciding which candidates are at the top of the list. To do this you will need to decide which talents you cannot do without in your new Clerk. This will help to list the requirements in order of importance.

Advertising the vacancy

There are many different places that a job can be advertised and probably the most suitable place for the post of Clerk to be advertised are a newspaper which is widely read in your area and the Journal of the Law Society in Scotland. Here is an example of an advert that could be adapted to fit your needs.

XYZ Division of the

GENERAL COMMISSIONERS OF INCOME TAX Require a Tax Appeal Clerk

The General Commissioners of Income Tax are a lay tribunal that hear appeals from taxpayers against the Inland Revenue. The appeals are against assessments, penalties for late return, decisions under the Construction Industry Scheme and other matters.

The Clerk to the Commissioners plays a key part in the operation of the tribunal. The post involves providing legal advice for the Commissioners and serving as the contact point for appellants and the Inland Revenue. It also includes arranging hearings, booking accommodation, scheduling Commissioners, setting up the hearing room, receiving parties at the hearing, sending decisions to appellants and keeping minutes of the hearing.

The post is a part-time appointment and will involve the Clerk in tax hearings for approximately xx hours per annum. The Clerk provides office facilities and stationery for the preparation and administration of tax hearings and the remuneration reflects this service.

The Clerk is paid in relation to the workload. The pay is reviewed on appointment. The annual remuneration is expected to be in excess of £xxx. This includes an element for out of hearing work and costs.

Further particulars and an application form are available from:

Address

Telephone number

The closing date for requesting an application form is:

The closing date for receipt of applications is:

The interviews will be held on ...

The appointment will be available from ...

The General Commissioners of Income Tax are committed to equality of opportunity in appointments on the basis of ability, qualifications and fitness for work. Applications are invited from all qualified persons, irrespective of race, gender, marital status, disability or sexual orientation.

Commissioners should make it clear to Clerks who are applying for the post that the Division is responsible for appointing the Clerk and the remuneration and payment of Clerks is the responsibility of the Payments Section in Tribunals Policy Branch. Candidates will want to know about the remuneration rates and the Chairman will be able to find out about the likely rates from the Payments Section of Tribunals Policy Branch who will undertake to provide as accurate a figure as possible to appear in the advert. Candidates can be informed that for fuller information on remuneration they should contact the Payments Section of Tribunals Policy Branch.

The application form must ensure that applicants are asked to declare any information which might make them unsuitable for the post. The form should also ask applicants if they have any special needs, for example, wheelchair access, so that the interview can be arranged to accommodate candidates needs. An example of an application form is an appendix to this guidance and the most up to date version can be obtained from Tribunals Policy Branch at the time it is needed.

The closing date for applications should allow enough time for the panel to meet and consider the applications before the interviews take place. It is a good idea for your advertisement to state when you will be holding the interviews. However, before fixing those dates it should be ascertained when the advertisement is likely to appear in the Journal of the Law Society, as it is only published monthly.

Selection for interview

After the closing date for applications, your interview panel should sift the applications and decide which applicants meet the criteria for the job. This is done by looking at the job description and the candidate description and deciding whether the applicant shows that he has the required ability. Those that meet the essential criteria should be invited to attend. If your list of candidates is still too long, you will need to trim it by selecting those who show they have the abilities that you consider are most important.

You will find it helpful to keep a record of the decisions made when sifting the applications so that it can be seen that selection was made on merit through open and fair competition. It is always good practice to write not just to those applicants who you are inviting to interview but also to those whose application has not been successful. When inviting candidates to interview, ask them to confirm whether or not they will be attending.

The interview

Some possible questions to ask the candidate could include:

- What professional experience do you have in tax matters?
- What qualifications do you have?
- Do you have any experience of tribunals rules and procedures?
- Do you have sufficient office resources to undertake the job?
- Do you have a record of satisfactory conduct of your own tax affairs?
- Do you have sufficient time to devote to the post?

The interview length is your decision, but remember to allow time for preparation before each interview. Also, interviews need to be spaced so as to allow discussion after each. An overcrowded timetable is unfair to the panel and to the candidates.

Confirming the appointment

As the General Commissioners are responsible for the selection and appointment of the new Clerk, a letter should be sent by the Chairman of the Division to the successful applicant as soon as possible after the decision has been made. The important points to mention in the appointment letter are:

- The date that the appointment takes effect, subject to references
- The terms and conditions of service. The following letter is suggested:

Letter of appointment

Dear Mr/Ms xxx

We are pleased to offer you the position of Clerk to the General Commissioners of Income Tax xxx Division with effect from the ___ day of _____ 2003. We have discussed with you the duties and responsibilities involved in this post and attach a schedule detailing these for reference.

An inventory of the files, papers, contact list and books that will be handed over to you is attached. Please contact _____ to arrange the handover and to discuss the work.

Your remuneration is calculated by Tribunals Policy Branch in accordance with the current pay formula for Clerks and I understand that you are aware of the amount that has been calculated for the Division. I am notifying the Payments Section of Tribunals Policy Branch of the appointment and they will in turn write to you confirming remuneration rates.

The appointment is made under Section 3 of the Taxes Management Act 1970, a copy of which is attached.

A copy of the remuneration letter will be sent by Tribunals Policy Branch to the Chairman of the Division to which the Clerk is appointed.

Some important things to remember

In any appointment campaign, the panel needs to understand the need to avoid discrimination and give equal opportunity to all candidates.

It is illegal to discriminate against any eligible person because of their race, ethnic or national origins, gender, religion, sexual orientation, disability or age as covered by statute in the Disability Discrimination Act 1995, Race Relations Act 1976 and Sex Discrimination Act 1975.

If you are going through the process of appointing a new Clerk, the address and telephone number of the Secretary of Commissions for Scotland is:

*Secretary of Commissions for Scotland
1 West Rear
St Andrew's House
Regent Road
Edinburgh
EH1 3DG*

*Tel 0131 244 2691
Fax 0131 244 2623*

Alternatively, the contact point in the Lord Chancellor's department is:

*Payments Section
Tribunals Policy Branch
Lord Chancellor's Department
5th floor, Selborne House
54-60 Victoria Street
London SW1E 6QW*

*Tel: 020 – 7 210 0680
Fax: 020 – 7 210 0681*

Appendix B

APPEALS EXCLUSIVELY TO THE SPECIAL COMMISSIONERS

Appeals on the following matters can only be heard by the Special Commissioners.

- The value of UK unquoted shares or securities for capital gains tax
- Where 'charges' exceed income
- Overseas life assurance companies: charge to tax on investment income
- Exemption for certain friendly societies, trade unions and employers associations
- Unremittable overseas income
- Settlements
- Deceased persons' estates in administration
- Anti-avoidance: cancellation of tax advantages from certain transaction in securities
- Transfer of assets abroad
- Controlled foreign companies: apportionment of income to a UK resident company
- Petroleum companies: transactions at under/over value
- Territorial sea and designated areas
- Inheritance tax: notices of determination
- Most decisions by the Board of Inland Revenue on claims

Appendix C

KEY DATES IN THE SELF-ASSESSMENT TIMETABLE

End of tax year	5.4.2003	5.4.2004	5.4.2005	5.4.2006	5.4.2008
Filing date if taxpayer wants the Revenue to calculate his liability	The later of 30.9.2003 or two months after the date the return was issued	The later of 30.9.2004 or two months after the date the return was issued	The later of 30.9.2005 or two months after the date the return was issued	The later of 30.9.2006 or two months after the date the return was issued	The later of 30.9.2008 or two months after the date the return was issued
Filing date otherwise (First £100 penalty charged for tax return outstanding after this date).	The later of 31.1.2004 or three months after the date the return was issued	The later of 31.1.2005 or three months after the date the return was issued	The later of 31.1.2006 or three months after the date the return was issued	The later of 31.1.2007 or three months after the date the return was issued	The later of 31.1.2009 or three months after the date the return was issued
Date for payment of tax (first Payment On Account)	31.1.2004	31.1.2005	31.1.2006	31.1.2007	31.1.2009
5% surcharge on tax still unpaid at this date	28.2.2004	28.2.2005	28.2.2006	28.2.2007	28.2.2009
Second £100 penalty charged if tax return is still outstanding	The later of 31.7.2004 or six months after the filing date	The later of 31.7.2005 or six months after the filing date	The later of 31.7.2006 or six months after the filing date	The later of 31.7.2007 or six months after the filing date	The later of 31.7.2009 or six months after the filing date
Last possible date for taxpayer filing on time to receive a notice of enquiry for a return	The later of 30.1.2005 or end of twelve month period beginning with the filing date.	The later of 30.1.2006 or end of twelve month period beginning with the filing date.	The later of 30.1.2007 or end of twelve month period beginning with the filing date.	The later of 30.1.2008 or end of twelve month period beginning with the filing date.	The later of 30.1.2010 or end of twelve month period beginning with the filing date.

Taxpayer sends in return after filing date – Enquiry Timetable

End of tax year	5th April 2003
Filing date	31st January 2004
Taxpayer files return	4th February 2004
Anniversary of date return was filed	4th February 2005
Last possible date for taxpayer to receive a notice of enquiry is the quarter day following anniversary of date return was filed*	30th April 2005

*The other quarter days are 31 July, 31 October and 31 January.

Appendix D

SPECIMEN CHRONOLOGIES IN REASONABLE EXCUSE APPEALS

See paragraph 6.10.11

Summary of dates in a late filing appeal

Mr A. Jones	20 June 2000	List No 36
7 April 1997	1996/97 return issued	
31 January 1998	Due date for filing	
31 January 1998	Return received	
16 February 1998	Returned – because self-employed pages not completed and supplementary employment page missing	
20 August 1998	Reminder	
21 August 1998	1 st & 2 nd automatic penalties of £100 each imposed	
6 May 1999	Appeal received	
25 May 1999	Letter to Mr Brown explains that return required when issued and particularly as he was self-employed until May 1996. Advised re capping relief on penalty if no additional tax due.	
9 September 1999	Letter to taxpayer re employment pages for later years and encloses duplicate returns, including 1996/97 for completion.	
22 March 2000	Letter to taxpayer reminds for return and warns of listing of appeal for personal hearing before General Commissioners.	
No response received		

Summary of dates in a late filing appeal where return issued late

MR B. SMITH	20 JUNE 2000	LIST NO 39
25 February 1999	1997/98 return issued	
25 May 1999	Date by which return has to be filed (3 months after issue as issued “late”)	
22 June 1999	£100 automatic penalty issued	
30 June 1999	Return received and appeal against penalty. Appeal states “tax returns were not issued by the date they had to be submitted”.	

16 August 1999	Letter to agent explains penalty because over 3 month delay and asks for withdrawal of appeal
30 March 2000	Revenue letter advises appeal to be listed for hearing by General Commissioners
20 June 2000	Appeal heard and postponed
No response	

Summary of dates in a surcharge appeal

Mr C. Patel	20 June 2000	List No : 49
6 April 1998	1997/98 Tax return issued	
23 June 1998	Return received	
27 December 1998	Statement of account issued	
31 January 1999	Payment due	
18 February 1999	Statement of account issued	
2 March 1999	Payment £1039.11 received	
19 March 1999	Surcharge £51.95 issued	
30 March 1999	Appeal received on basis that cheque sent on 27 February 1999 (Sunday)	

Appendix E

TABLE OF PENALTIES

Offence	Penalty	Imposed by	Commissioners' powers	Authority
Failure to notify chargeability to income tax or capital gains tax	Up to amount of tax under assessments not paid before 1 st February after tax year	Revenue	Reduce or increase the penalty to the amount they consider appropriate	TMA s7(8)
Failure to notify chargeability to corporation tax	Up to amount of tax payable for the accounting period and still unpaid 12 months after the end of the period	Revenue	Reduce or increase the penalty to the amount they consider appropriate	FA 1998 Sched 18 Para 2(3)
Failure to notify self-employment within three months	£100	Revenue	Confirm or cancel.	Social Security (Contributions) Regulations 1979 as amended
Failure to maintain records	Up to £3,000	Revenue	Reduce or increase the penalty to the amount they consider appropriate	TMA s12B(5)
Failure to send in income tax return	£100 (or tax due, if less)	Revenue	Confirm or cancel.	TMA s93(8)
	Further £100 if return still outstanding 6 months after filing date	Revenue	Confirm or cancel.	TMA s93(8)
	Further penalty of up to £60 per day	Revenue after a direction by Commissioners	Confirm, cancel, or vary	TMA s93(3) s100B(8)
	Further penalty of up to the amount of tax due, if return still outstanding one year from filing date	Revenue	Confirm, cancel, or vary	TMA s93(5) s100B(8)
Failure to send in corporation tax return	£100 if return delivered within 3 months of filing date Otherwise £200	Revenue	Confirm or cancel.	FA 1998 Sched 18 Para 17
	Tax geared penalties may also be charged if the return is more than 18 months late	Revenue	Confirm, cancel, or vary	FA 1998 Sched 18 Para 18 TMA s100B(8)
Fraudulent or negligent return or claim	Up to the amount of tax underpaid for the tax year in which the return was delivered, the following year and any previous year	Revenue	Confirm, cancel, or vary	TMA ss 95 - 97 s100B(8)
Failure to send in other returns, documents or particulars listed in TMA s98	Up to £300 when the failure is declared If the failure continues after the initial penalty has been imposed, a continuing penalty of up to £60 per day	Commissioners	Determine the level of penalty	TMA s98 s98A s100C
Negligently or fraudulently delivering a return or information within TMA s98				

Offence	Penalty	Imposed by	Commissioners' powers	Authority
Failure to comply with a Commissioners' notice under Regulation 10	Up to £300 when the failure is declared If the failure continues after the initial penalty has been imposed, a continuing penalty of up to £60 per day	Commissioners	Determine the level of penalty	Reg 10(3)
Failure to submit PAYE or subcontractor's returns	£100 per 50 (or fewer) employees or subcontractors per month the return is overdue	Revenue	Confirm or cancel.	TMA s98A s100B(8)
Failure by a contractor to check the validity of a construction industry scheme registration card	Up to £3,000	Revenue	Confirm, cancel, or vary	ICTA 1988 s566(2A) – (2E) TMA s100C
Making false statements to obtain a sub-contractor's certificate or misusing a certificate	Up to £3,000	Revenue	Confirm, cancel, or vary	ICTA 1988 s561(10) – (11) TMA s100C
Assisting in the preparation of a false return	Up to £3,000	Revenue	Confirm, cancel, or vary	TMA s99 s100C
Witness refusing to appear before the Commissioners	Up to £1,000	Commissioners	Determine the level of penalty	Reg 4(12)

This table lists the penalty provisions which General Commissioners are most likely to encounter in the course of their duties. There are other penalty provisions not listed here, and the Clerk will advise on these as necessary.

Appendix F

Employment and self-employment

- 1 Commissioners are often asked to decide whether an individual is employed or self-employed. The point is relevant in determining what expenses an individual can claim against income for tax purposes. Self-employed taxpayers can claim a wider range of expenses than an employee and pay their tax later than an employee whose earnings are subject to PAYE. The distinction is also relevant for determining whether a person is liable to pay Class 1/1A or Class 2 and 4 National Insurance Contributions (NICs) and whether the engager is liable for employer's Class 1 NICs.
- 2 Note that for the purposes of NICs, the Revenue has power to determine an individual's status (that determination is subject to appeal to the Commissioners) but as yet they have no power to issue a determination of a person's status for income tax purposes. However, it is unlikely that the Revenue will be content to accept that an individual has a different status for NICs and income tax unless there is specific statute indicating otherwise e.g. the NICs Categorisation Regulations. This is because most cases will rely on the common law in this area which applies equally to employment status for tax and NICs.
- 3 Statute law does not provide a definition of what constitutes employment or self-employment. Each case therefore turns on its own facts. Usually it will be obvious whether someone is an employee or self-employed and the employment status can be agreed without difficulty. However, there will be cases where agreement cannot be reached and which will have to be referred to Commissioners to determine the correct employment status.
- 4 A number of general principles have been developed in case law over the years. Traditionally, an employee works under a contract of service (or employment) while a self-employed person has a contract for services. A good starting point is to ask yourself whether the individual is in business on his/her own account. Some of the main factors raised in status cases are as follows.

Control

- 5 How much control is or could be exercised over how the taxpayer performs the duties of the job? Can the engager direct how the job is done? The answers depend on the job involved – for instance a surgeon may be an employee of a hospital but the hospital managers would not tell him/her how to perform an operation. Can the engager tell the individual where to do the work? Can the engager tell the individual what to do and move him or her between tasks? But, if the engager has no right of control whatsoever, the individual will not be an employee.

Provision of equipment

- 6 Does the individual provide equipment, which is fundamental to the job, or is such equipment provided by the employer? Generally self-employed people provide their own equipment, but note that in the building trade it is customary for tradesmen to provide their own hand tools whether they are employed or self-employed.

Personal service

- 7 It is a requirement of a contract of service that an individual gives personal service to the engager. Can the individual engage other people to do the job or help the individual to do the job? If he/she can, it is likely that the individual is self-employed.

Financial risk

- 8 Does the individual take a financial risk? Can a loss be made on the job? If he or she has to provide expensive equipment for the job (such as a lorry) or quote a fixed price for a job there will be a risk of making a loss if costs overrun. Risk-takers tend to be self-employed.

Opportunity to profit from sound management

- 9 Can the individual 'profit from sound management'? In other words, if the individual finds a more efficient way of doing the job, is the income affected as a direct consequence? Again, quoting a fixed price means that there may be an opportunity to increase profits.

Sick pay, holiday pay etc

- 10 The fact that an individual is paid for holidays, sickness and receive maternity pay is an indicator of how the parties view their relationship. Self-employed people do not normally qualify for these benefits.

Length and number of engagements

- 11 Does the individual undertake a number of short-term engagements for different engagers? If so, this is a pointer to self-employment.
- 12 Be careful where the individual is a casual worker. Casual workers do not have permanent employment with an employer but may be called upon to work when the employer needs them. This does not make them self-employed. The same questions must be asked as for any other worker.

Mutual intention

- 13 What were the parties' intentions? Where there is mutual intention for self-employment (or employment) this will be decisive in borderline cases. Commissioners must look at the reality of the relationship between the parties, not the label the parties have chosen to put on that relationship. Consequently, where the factors point clearly one way, the fact that mutual intention points the other way cannot alter the nature of the relationship.
- 14 It is possible for an individual to have more than one employment, both taxed under PAYE. The fact that an individual works a normal 40-hour week for an employer does not mean that if he has another part-time job he is self-employed in respect of that job. Equally, it is possible to have two self-employed businesses.
- 15 Finally, remember that status is not a matter to be determined by running down some form of check list or adding up the number of factors pointing toward employment and comparing that result with the number pointing toward self-employment. It is a matter of evaluating the overall picture that emerges from a detailed review of all the facts and then deciding whether that person is in business on their own account or is an employee.

Personal Service Companies and other Intermediaries ("IR35")

- 16 The distinction between employment and self-employment is also relevant where the legislation on intermediaries such as personal service companies applies. The legislation is contained in Schedule 12, Finance Act 2000 and SI No. 727 of the Social Security Contributions (Intermediaries) Regulations 2000, and came into force on 6th April 2000. It is commonly known as "IR35" after the number of the Revenue's Budget press release in which it was first proposed.

- 17 The purpose of the legislation is to prevent individuals providing their services through an intermediary
- who would have been an employee had they worked direct for the client, from claiming more expenses than they would be permitted to claim as employees, and
 - where they are shareholders in a company, from gaining the benefit of dividends rather than salary, thereby minimising their liability to NICs.
- 18 The legislation may apply where a worker supplies personal services to a client through an intermediary for a particular engagement in circumstances such that, had the worker been engaged directly by the client, he/she would have been an employee of the client. Commissioners have to remember that they are not dealing with an actual contract between the worker and the client. They are dealing with a notional contract and, in deciding the nature of that contract, have to take account of all the arrangements under which the services are provided but having regard to the terms of any contracts forming part of those arrangements. When doing so the existing common law test for determining employment status should be applied.
- 19 Where the intermediaries legislation applies, the intermediary is deemed to have made a payment to the worker which is taxable under Schedule E and subject to Class 1 NICs.
- 20 The Schedule E payment is normally deemed to be made by the intermediary and received by the worker at the end of the tax year i.e. 5 April. It is based upon the income of the company that is subject to the legislation less certain deductions.
- 21 The legislation can only apply where the worker would have been regarded as an employee if he/she had worked for the employer direct. Therefore, if the individual can show that he/she would have been self-employed in relation to a particular engagement, using the common law tests, the legislation cannot apply. This is the issue that is likely to come before Commissioners on appeal.

Appendix G

JURISDICTION BEFORE 1996/97

The law relating to the jurisdiction of General Commissioners changed for the tax year 1996/97 onwards. Before then the provisions were as follow.

1. Appeal proceedings must be brought before the General Commissioners for the division which contains a 'place' as specified in TMA 1970 Schedule 3. According to which tax is involved, the 'place' is
 - (a) for appeals against assessments under Case I or II of Schedule D, or other proceedings relating to a trade, profession or vocation, the place where the trade, profession or vocation is carried on or in which the head office or principal place of business is situated; or
 - (b) for employees taxed under Schedule E, the place of employment or such other place as may be assigned by the Board under PAYE regulations, but the employee taxpayer has the right to elect his place of residence; or
 - (c) where the annual value of land is concerned, the place where the property is situated; or
 - (d) for Schedule A; Schedule D, Case III, IV, V, VI; corporation tax; capital gains tax; higher rate income tax; Schedule F; interest on back tax under TMA 1970 section 88; penalties: the place in which the trade etc is carried on or in which the head office or principal place of business is situated or, if the party is employed, the place of employment (with the right to elect for residence) or, in any other case, where the party ordinarily resides.
2. Where more than one taxpayer is a party to proceedings, then jurisdiction is with the body of General Commissioners which has jurisdiction with respect to all the persons, unless all those persons agree to the Special Commissioners, or where different bodies of Commissioners have jurisdiction, it is with such of those bodies as the Board directs, or in any other case, jurisdiction is with the Special Commissioners (ICTA 1988 sections 113(5), 344(10), 783(9)).

The above rules may be altered

- (a) where the Board directs that any particular proceedings are heard by General Commissioners of a specified division, but the direction will not apply if the taxpayer serves notice of objection or, in case of appeal, the appellant has elected for his place of residence (TMA 1970 section 44(1A)(1B));
 - (b) where the parties agree the proceedings should be heard by the General Commissioners of a specified division (TMA 1970 section 44(2));
 - (c) where the General and the Special Commissioners agree to transfer proceedings, see paragraph 5.7 in main text and
 - (d) where proceedings are heard together (see 6.8 in main text) and where parties are joined (eg for capital gains tax purposes – see 6.7 in main text).
3. The jurisdiction of General Commissioners under the above rules cannot be questioned except by an objection made to them before or during the hearing by a party to the proceedings (TMA 1970 section 44(4)). The General Commissioners will then decide if they have jurisdiction.

Appendix H

USEFUL ADDRESSES

Secretary of Commissions for Scotland St Andrew's House Edinburgh EH1 3DG Tel: 0131 244 2691	Responsible for the arrangements for the appointment of General Commissioners of Income Tax.
Tax Tribunals Policy and Clerks and General Commissioner remuneration and expenses section, Lord Chancellor's Department 5 th floor Selborne House, 54-60 Victoria House, London SW1E 6QW Tel 020 7210 8832	Deals with policy issues relating to General Commissioners and their Clerks including - <ul style="list-style-type: none">• Proposals for Divisional mergers in England and Wales• General correspondence relating to proceedings before the General Commissioners
General enquiries Tel 020 7210 0680	For enquiries relating to <ul style="list-style-type: none">• Processing claims for postage and accommodation from Clerks• Processing claims for travel and subsistence from General Commissioners and their Clerks• Personal record maintenance• Calculation and payments of Clerk's remuneration• Workload statistics
The Council on Tribunals 22 Kingsway London WC2B 6LE Tel: 020 7947 7040	The Council on Tribunals is an independent advisory body which was established in 1958. Its functions include keeping under review the constitution and working of most tribunals, including the General Commissioners of Income Tax.
The Scottish Committee of the Council on Tribunals 44 Palmerston Place Edinburgh EH12 5BJ Tel: 0131 220 1236	The Scottish Committee of the Council on Tribunals is responsible for the functions of the Council on Tribunals in Scotland.
The Special Commissioners 15-19 Bedford Avenue London WC1B 3AS Tel: 020 7631 4242	Have exclusive jurisdiction to hear appeals on certain matters and may hear cases transferred to them by the General Commissioners or by election of the taxpayer.

Appendix I - Outline for a Case Stated

A case stated is required by Regulation 20(2) to 'set forth the facts and the final determination of the Tribunal' so that the Court of Session may decide on the point in law which is being appealed. The document must contain all the relevant facts which led the Tribunal to its final determination and should be in a clear, logical and concise form to help the High Court arrive at a decision. Therefore, careful notes must be taken by the Tribunal and its Clerk during a contentious case which may lead to a requirement for a case stated.

In preparing the case stated, paragraphs should be numbered and sub-paragraphs lettered and all irrelevancies should be excluded

The following is a suggested outline for a case stated. Of course, adjustments should be made for particular circumstances and also see Notes below.

COURT OF SESSION, SCOTLAND

CASE for

THE OPINION OF THE COURT OF SESSION AS
THE COURT OF EXCHEQUER IN SCOTLAND

Under the Taxes Management Act 1970, Section 56 for

AB		Appellant(s)
	Against	
XY		Respondent(s)

Where both parties express dissatisfaction and require a case to be stated there should be added a further heading

and for

XY		Appellant(s)
	Against	
AB		Respondents

CASE STATED

CASE STATED UNDER REGULATION 22 OF THE GENERAL COMMISSIONERS (JURISDICTION AND PROCEDURE) REGULATIONS 1994 BY THE COMMISSIONERS FOR THE GENERAL PURPOSES OF THE INCOME TAX FOR THE DIVISION OF [...] IN THE COUNTY OF [...] FOR THE OPINION OF THE COURT OF SESSION AS THE COURT OF EXCHEQUER IN SCOTLAND.

At a meeting of the Commissioners held on [...] at [...], [taxpayer], a [occupation], of [address] (the Taxpayer) appealed against an assessment to [Income] Tax. *See Note 1.*

Details of the assessment are as follows:

[..]

Shortly stated, the question for our determination was [..]

The Taxpayer was represented at the hearing by his accountant, [accountant's name] ([the Accountant]) of [Firm's name & address]. The Revenue was represented by [Inspector's name], HM Inspector of Taxes, [District etc]

The following documents which were produced and admitted before us do not form part of this case but are available for inspection by the Court if required:

List all documents relevant to the Tribunal’s decision.

From the evidence adduced we found the following facts admitted or proved:

Summarise the facts which the Tribunal found had been proved, in numbered sub-paragraphs for ease of reference.

It was contended on behalf of the Taxpayer:

Summarise the arguments put forward for the taxpayer, in numbered sub-paragraphs.

It was contended on behalf of the Revenue:

Summarise the arguments put forward for the Revenue, in numbered sub-paragraphs.

[We were not referred to any cases in the course of argument.] [We were referred to the following cases in the course of argument. *List the cases but do not comment on them*]

We decided that [*Set out the Tribunal’s decision and the reasons for it*] We then determined the appeal as follows:

[Set out the determination – this will usually be a determination of the amount of tax payable or the amount of a penalty or surcharge]See note 2.

On [*date*] our Clerk received a letter from the Taxpayer’s accountant requesting us to state a case for the opinion of the High Court under Regulation 20 of the General Commissioners (Jurisdiction and Procedure) Regulations 1994, which case we have so stated and sign accordingly.

The question of law for the opinion of the Court is [*..*]*See Note 3*

Dated 2003

.....
[Chairman’s name]

(Chairman)

General Commissioners for Income Tax for
the Division of [*..*]

.....
[Commissioner’s name]

.....
[Commissioner’s name]

See Note 4.

NOTES

1 State the nature of the proceedings whether:- an appeal against an assessment or any other appeal under the Taxes Acts (eg a claim) or proceedings which relate to a penalty or any other proceedings which, under the Taxes Acts, are to be heard and determined in the same way as an appeal.

2 Nothing in this draft is intended to prejudice the practice, in appropriate cases, and with the consent of both parties, of stating a decision in principle.

3 Note the power in Regulation 20(3) to serve notice on a party requiring the case to be stated, for him to identify the relevant question of law. It is desirable, in any event that that party should draft that question. The Courts have often deprecated non-specific questions. A fallback, although less than desirably specific, form of words, is:- ‘Whether or not on the facts we found there was evidence on which we could properly arrive at our determination in so far as it was a question of fact, and whether, on the facts found, that determination was correct in law’.

4 To be signed by each Commissioner who heard the case, but if one has died or ceased to be a Commissioner, then signed by the continuing Commissioner or Commissioners or, if there is no continuing Commissioner, by the Clerk.

5 The Inland Revenue should be identified in ‘The Commissioners of the Inland Revenue’ – without any reference to the identity of the particular Inspector of Taxes.