



Tax Appeals Stakeholder Group

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Paper No. 4 – Summary of Principles

SG02/04

Foreword

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Version No.: 1.0
Author: Vicky Molloy / Steve Wade / Andrew Digby

Document Approver Tax Appeals Stakeholder Group

Signature _____

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Document Purpose This document provides a summary of the responses to the principles questionnaire contained in paper SG02/01.

Amendment History

Issue	Date	Amended By	Amendment Details
0.1	22/03/05	Vicky Molloy	First draft for comments.
0.2	29/03/05	Steve Wade	Amended to include late returns
0.3	30/03/05	Steve Wade, Andrew Digby	Amended to include comments from Leueen Fox and Vicky Molloy
1.0	31/03/05	Steve Wade	Final version for circulation

Purpose

This paper summarises the responses from Stakeholder Group members to the principles questionnaire (SG02/01). It attempts to identify where there are areas of broad agreement on issues, and where there are points for discussion.

At the end is a list of questions that remain to be resolved and which will form the basis for a presentation and discussion at the meeting.

1. Local access

1a. *What does local mean?*

Most respondents thought that local meant within reasonable travelling distance for appellants. In terms of time, examples of reasonable ranged from around an hour to no more than two hours. In terms of distance, it was suggested that about 50 miles from the appellant's home or place of business would be a reasonable test of local, although some considered up to 100 miles as acceptable given adequate reasonable transport links. One respondent thought that local should mean county or major city, rather less local than the General Commissioners.

Some responses also pointed out that we needed to consider this issue was likely to impact differently upon different users. Large business users, especially those who have representation, are less likely to be concerned with travel times. Individuals or small businesses, especially when representing themselves, are more likely to prefer a more local option.

1b. *How important is choice in terms of local access? e.g. is speed of hearing at a centralised venue a legitimate trade off?*

Most of the respondents thought it was important to give people a choice where practicable and it was suggested that speed of hearing was a legitimate consideration. One respondent felt that speed of hearing was not a legitimate trade-off and that local access for the unrepresented appellant is very important. It was expressed that length of time to hearing was not important to appellants who simply want their point of view listened to and are not unduly concerned with waiting a few months. Others felt that speed of hearing was far more important than locality of access. It was mentioned that it would be necessary to consider the needs of the respondent as well as the appellant.

1c. *Should all cases be heard locally as the norm? – Similar to the current General Commissioner network*

There was large variation in opinion on this issue. One respondent felt that all hearings involving an appellant giving evidence should be heard locally, while another felt that it was not necessary for all cases to be heard locally. It was suggested that first tier hearings might more likely be heard locally, while second tier cases be heard in larger more centralised locations.

1d. *Should there be the ability to hear cases locally but that local is not the norm unless otherwise directed?*

All respondents except one felt that this depended on what turned out to be “local”, but felt that the taxpayer should be able to express a preference. It was mentioned that current VAT and Duties tribunals operate along these lines and that they receive few complaints concerning locality of venues. A number of responses also highlighted the importance of regular sitting opportunities for the judiciary. They thought that the extent to which hearings could be local will be dependent on both the volume of hearings at a locality and the ability of the judiciary to sit at other locations to keep their knowledge up to date.

The one respondent who disagreed felt that this was only appropriate in instances where the issues in dispute are legal issues and the taxpayer is represented by a professional person.

2. Judiciary (both legal and non-legal)

2a. *What does non-legal mean?*

There were two types of response: those that defined the term by reference to qualifications or experience and one that defined it by reference to how the member had been appointed. Where respondents did refer to qualifications and experience, there was little agreement about what these should be. One respondent defined it as a person without a legal, accountancy or CIOT qualification. A second suggested a person with less than ten years experience after having qualified as a solicitor, barrister or advocate. A third gave the definition as a person either with no training or whose training does not equip him to work impartially with nothing but the evidence to hand.

The one respondent defined ‘non-legal’ by reference to how the member of the panel had been appointed, arguing that it should mean ‘not on the panel by virtue of legal qualifications but not excluded from panel by virtue of legal qualifications’.

2b. *Should the judiciary include both legally qualified and non-legal members?*

The majority view was that the judiciary should include both legally qualified and non-legal members. One respondent noted tribunals need legally qualified members if they were expected to determine points of substantive and procedural law; they also needed non-legal members with relevant business and professional experience to help a tribunal understand the facts of a case. There was a general theme that pointed out cases may require a range of legal input from general procedural knowledge, ability to pick up wider legal issues (e.g. human rights) and enable unrepresented appellants to raise points they may have missed, through to highly specialised knowledge of discrete areas of tax law. One respondent pointed out that, at the very least, one would expect a broad tax base for legal members rather than a simply a general legal qualification.

2c. *Should the judiciary only include legally qualified members?*

Generally the respondents agreed that the judiciary should not be composed only of legally qualified members although one response suggested there should at least be a panel of legally qualified members and then a further panel of non-legal members if required. Previously it has been argued that given the complexity of financial information it is often necessary to have someone who understands the technical and financial context within which such evidence is offered on the panel. The alternative may be to run the risk that the only person present with sufficient technical knowledge to understand fully the financial evidence would be the Revenue presenting officer.

2d. Should the judiciary only include non-legal / lay members?

All of the respondents agreed that the judiciary should not be composed only of non-legal members. One response suggested that the current complexity of tax law meant that, in effect, the days of the interested amateur were over. One respondent noted as a point of fact that tribunals did not need lawyers to decide cases which turn primarily on matters of fact and that in these cases non-legal members may be better able to determine the issues at hand. Generally, no respondents mentioned the value of “purely” lay members but talked instead in terms of experts (such as accountants or land valuation specialists) or at the very least as possessing relevant knowledge of business.

3. Legal Advice

3a. Should legal expertise always be provided from within the judiciary?

There was broad and categorical agreement that legal expertise should be provided from within the judiciary. Only one respondent argued that there was merit in an independent legal advisor. This was on the grounds that this would allow the taxpayer to remain confident that the tribunal was working with an adequate and reasonable understanding of the points in law in question, and that a legal member had not taken an unsustainable view of the law.

3b. Should legal advice be provided by an independent advisor? Who? When?

With the exception of one respondent all the respondents were firmly of the belief that legal advice should come from within the judiciary. One reply argued strongly that legal advice from an expert would need to be put to the parties, and argument upon it invited, or otherwise run the risk of the tribunal being open to challenge. Similarly, it was argued that any adviser could not be a government lawyer as one or the parties to the appeal will always be the state. One of the respondents did think that there may be exceptional occasions when a tribunal might need highly specialist legal knowledge and that in these instances it should be able to call upon the services of an *amicus curiae* or a member of the wider tribunal judiciary community. One respondent's preference was that the tribunal should be able to call on the advice of an independent legal advisor with experience in tax law, and felt that they should be present at the tribunal in the same way as the clerk is at present. The legal advisor should be available to open challenge by either party.

4. Panel Composition

4a. Which of the following panels should be able to be deployed to appropriate cases?

Legally qualified chair sitting alone

All respondents felt this type of panel had a role in the new system particularly where legal points are predominant or the only issue, or where the facts of the case are relatively clear.

Legal chair sitting with non-legal wingers

There was broad consensus that this was a viable option for at least some cases – particularly if the facts of the case were complex or where it was not simply a point of

law that was at issue. However, one respondent noted that given the current complexity of tax law we need to consider what material benefit non-legal members actually bring to the table (while accepting that they may still have a part to play in a limited number of cases). Two respondents suggested that flexible compositions of panels could mean having two legal members sitting together as well as a legal members with 1 or more non-legal wingers.

It is fair to say that the biggest disagreement in responses probably came around the issue of whether this option, or the following option, should be the “default” panel for hearing most cases. One broad trend in the responses suggested that legal members either sitting alone, with another legal member, or with one or more non-legal members as required, should be the basic model for the new system. Indeed some responses stated explicitly that all panels should be legally chaired (for example, it has been argued that with the permission requirement for onward appeals means there is a need for all panels to include a legal member, preferably as the chair). However, it was also argued that instead, the norm should be for panels of non-legal members (or possibly non-legal members and a lawyer who was not also the chair). This view suggested that cases not involving legal issues don’t need a lawyer on the panel on the grounds that legal training is not necessarily of help in determining issues of fact.

A panel of non-legal members sitting with a suitably qualified chair

More than one respondent suggested that it is sometimes difficult to determine in advance of the hearing which cases would be likely to raise legal issues (see summary of responses to questions 5a, which follows) and therefore define which cases would not need a legal member sitting.

In general there were two schools of thought on this option (similar to the split mentioned above). One school of thought suggested quite clearly that a panel with a legal chair would be preferable or that, in practice, a panel with no legal expertise would only be suitable for dealing with a very few cases. The alternative school of thought suggested that this option should be the norm unless a matter of law is likely to be important, and, in particular, matters of law not relating to taxation.

A panel that included a legally qualified member who is not the chair

There was a general feeling that this option was not suitable unless, perhaps, the legally qualified member was not a tax law specialist.

However it was also argued (as above) that generally cases that did not rest predominantly on a legal issue should normally be dealt with by non-legal panels with suitably qualified chairs, or panels that included legal members but who were not also the chair.

A single non-legal member sitting alone

No respondents felt this type of panel was a viable option stating variously that there would be no public confidence in such a panel or that there was always a need to have legal expertise available and that this should come from within the panel.

5. Types of Cases

5a. *Are there any obvious examples of cases that should be heard by specific panels (as set out above)? What are they?*

Legal members sitting alone – suggestions for this panel included cases where the issue was predominantly a legal issue and / or the facts of the case were not complex or, more broadly, the range of cases currently dealt with by the Special Commissioners

Legal chairs with non-legal wingers – suggestions here were for cases where the facts are complex or related to a particular business or profession, or where the issues are a mixture of law and fact. It was also suggested that if credibility is an issue, this option may be preferable to legal members sitting alone. S20 notices, business expansion scheme appeals, some construction industry scheme appeals, some postponement applications, some PAYE issues, penalty appeals where the issue is whether the penalty is exigible in law, and substantive appeals involving legal issues were all suggested as issues requiring legal input in some way. Possibly other cases in this category would be those dealing with employment status or sub-contractor certificates.

There was a general point made that it is difficult to be specific about where legal input might be needed and a sense of cases not readily falling into convenient boxes.

Legal / non-legal mix but lawyer not chairing – there was little in the way of substantive suggestions for this type of panel (perhaps as few saw it as a viable option). However cases involving appeals against amended assessments or those dealing with fairly technical matters were suggested as areas that may benefit from professionally chaired (but not necessarily legally chaired) panels.

Wholly non-legal tribunals – generally opinion was split (as for Q4) between those that thought the number of cases suitable for hearing by a non-legal panel would be small and those who thought such a panel would be the norm. Amongst those who felt such panels had a role was the view that taxpayers should be allowed to express a preference to have their case heard by a “lay” tribunal. Particular examples of suitable cases mentioned by a number of respondents were those involving penalties or reasonable excuse (although it was pointed out that current General Commissioners acting as non-legal chairmen would need training to enable them to hear these without a clerk). Other cases suggested as suitable for such panels included: broadly those cases turning on interpretation or application of accountancy principles, those involving information powers (excluding S20), discovery assessments (those not involving fraud), some PAYE cases, perhaps some postponements applications (although it was suggested there may be an argument for needing a lawyer to assess likelihood of appeal succeeding), closure applications, late appeals, some construction industry appeals, S93(3) appeals and substantive appeals not involving points of law.

Single non-legal members – no cases identified (no respondent saw this as a viable panel option)

5b. *What are the particular skills of the different panel members that you think make them most suitable for hearing a particular type of case?*

General skills needed by all panel members – patience, an ability to understand the facts, a sympathetic approach, an ability to absorb and sift information, analysis, objectivity and integrity, ability to question witnesses.

Legal members – ability to identify legal issues involved, knowledge of tax law specifically (in order better to identify the legal issues and ensure that legal issues

not identified by unrepresented appellants are raised). Should expect a minimum number of years in the broad tax field (example given of not expecting a purely criminal lawyer to sit as a tax tribunal chair).

Non-legal members – demonstrable experience of the business / professional environment within a case or specific skills relevant to particular case types, e.g. chartered surveyors, land valuers, share valuers, actuaries etc. Accountancy skills considered particularly useful in VAT cases involving calculations of assessments. Accountancy skills are also useful generally where accounts are produced as evidence (e.g. when requiring an examination and understanding of books and records) and in more complex company cases or those involving property or banking transactions. Practical experience of specific business areas may be useful for particular individual cases but, against this, there is the danger of a panel substituting their own view for that of the evidence. Some experienced general commissioners suggested that they would feel comfortable about taking a wide range of existing general commissioner cases without legal expertise being available.

6. Format of Justice

6a. *What types of cases might be suitable for hearing solely on the papers?*

Those who broadly agreed that there are cases that might be suitable for hearing solely on the papers, mentioned the following: prima facie issues dealt with by the Section 703 Tribunal, reasonable excuse, mitigation, preliminary or procedural issues, interlocutory decisions and cases where an agreed statement of facts had been received and the issue was solely a legal one (the response to question 6b reflected the legal element). It was also suggested that cases could be dealt with on the papers if both parties agreed to this but that if one party wished to have an oral hearing this should always be adhered to.

One respondent felt that hearings solely on the papers were unfair to the taxpayer and should not happen in any instance and another felt moves in this direction were against the thinking in Leggatt, and possibly the White Paper, in terms of justice being seen to be done. These responses did not specifically address *ex parte* applications where the taxpayer would not be in attendance but the decision-making Department would be.

One response to this question picked up on the PDR issue and suggested that there needs to be more consideration of the appropriateness of mediation or arbitration as alternative formats within the new framework.

6b. *Who should decide cases on the papers alone?*

Most of the respondents felt that a legal chair sitting alone was the most appropriate panel for hearing cases solely on the papers, although it was suggested by two respondents that a multiple member panel rather than a lone chair would be most suitable.

Conclusions

1. Local access

- There was broad agreement that some degree of choice should be offered to appellants and that speed of hearing is a legitimate trade-off against local access provided the choice of a more local hearing is available if requested.
- There was little agreement about what “local” would mean in practice. The median response was that it meant a journey of either about fifty miles or a couple of hours.

2. Judiciary

- There was agreement that there should be legal members and that they should range from those with a more general tax base, through to specialists in particular areas of tax law.
- There was agreement that there should be some non-legal “expert” members, and that they should range from those with broad accountancy knowledge to those with more specialist skills (e.g. share valuation, chartered surveyors etc.).
- There was no explicit suggestion that there should be purely “lay” members.
- There was a broad split between those that thought virtually all panels should be legally chaired as a matter of course and those that felt predominantly non-legal panels ought to be the norm.

3. Legal Advice

- All but one response agreed that legal advice should come from within the panel.

4. Panel Composition

- There was agreement that single legal chairs should hear cases that rest predominantly on legal issues, cases where the facts are agreed and cases where there was little dispute over the facts.
- There was also agreement that single non-legal members should not hear cases.
- There was broad agreement that a specialist accountancy member might be useful for cases where the facts were complex, which required analysis of the books and cases which involved complex calculations.
- The main area of disagreement concerned the principles governing the composition of the standard panel: should panels normally be composed of non-legal members who could draw on legal expertise as necessary; or of non-legal members plus at least one legal member?

5. Types of cases

- The consensus was that it is possible to identify some cases that can be heard by particular panels (s703 cases and reasonable exception cases, for example) although it is sometimes difficult to determine in advance of the hearing which cases would be likely to raise legal issues.
- The consensus was that legal chairs alone hear cases involving predominantly legal cases without complex facts; and that there was no place for non-legal members sitting alone.
- There was disagreement about whether some cases should go to wholly non-legal panels and, if so, which cases these should be.

6. Paper or oral hearings

- The general feeling was that appellants should be offered the chance to have some cases heard on papers alone. Paper hearings would be most suitable for cases where the facts were agreed.

Annex: Questions to be decided

General Issues

1. Have we adequately considered the needs of businesses as opposed to individual users? (When discussing local access some respondents pointed out that locality of hearing is not likely to be as great a concern for large businesses but are there other areas where we've concentrated only on individuals?)

Local access

2. Is 50 miles or 1-2 hours travelling time a reasonable definition of local? (Some views seem to suggest a commitment to a level of local access at least as local as GCITs but others seem quite happy with concept of at least an hour travelling time.)
3. Is a reduced level of local access (more than 50 miles or 1-2 hours travelling time) an acceptable trade-off to gain faster hearings, if there are options in place to allow more local hearings if requested? (Some seemed against this in principle, others have expressed the view that the wait itself is not an issue for people – what is important is that the issues are properly dealt with. Additionally, amalgamations of divisions have meant that for some regions General Commissioner access is less “local” than it may have been previously.)

Judiciary

4. What sorts of non-legal members does the new system need? Is there a role for the purely “lay” member in a new system? What will non-legal members do? (Few responses mentioned specifically lay members as opposed to experts so we assume that lay members *qua* lay do not have a role. Broad agreement that accountancy members are useful in a number of cases but little consensus on value of general business experience.)
5. If we were to have “suitably chaired” panels, what do we mean by suitably qualified?
6. Where non-legal members are assumed to add value beyond their professional experience could this value be achieved by other means? (E.g. through better training, introduction of simpler procedures - perhaps akin to fast tracked small claims procedures in courts etc.?) (Where people have felt single legal chairs are insufficient they've sometimes suggested that hearings would be overly legalistic, that people would not feel justice had been done, that there would be “credibility” issues or that unrepresented appellants would not feel as adequately protected – does this *require* additional non-legal panel members or could training and procedural changes accommodate these concerns?)

Legal Advice

7. Should legal input always come from within a panel? (Broad consensus but one dissenting voice in responses suggesting a need for legal advisers.)

Panel Composition

8. Should all panels have a legal member on them? (Opinion is split. Some think clearly that they should because legal issues may always crop up or because the procedural aspects of a hearing / ability to spot possible HR issues etc. require them. Others are of the view that a properly chaired panel need not require any legal input, if suitably qualified chairs are available, to decide factual cases and may in fact be better at providing a sympathetic, proportionate level of justice.)
9. Where panels have legal members on them should they also chair? (Broad consensus that they should but one view that "suitably qualified chairs" should be the norm even if legal members sitting.)

Types of cases

10. Do you agree the following types of case could generally be dealt with without legal input?
 - penalty or reasonable excuse cases
 - cases turning on interpretation or application of accountancy principles
 - those involving information powers (excluding S20)
 - discovery assessments (those not involving fraud),
 - some PAYE cases
 - some postponements applications
 - closure applications
 - late appeals
 - some construction industry appeals
 - S93(3) appeals
 - substantive appeals not involving points of law
11. Do you agree the following cases will generally need legal input?
 - current Special Commissioners' exclusive jurisdiction (e.g. inheritance tax, proceeds of crime, questions relating to value of shares, Section 703 appeals etc.)
 - cases above a certain value
 - cases that are representative or test cases (regardless of value)
 - S20 notices
 - business expansion scheme appeals
 - some construction industry scheme appeals
 - some postponement applications
 - some PAYE issues
 - penalty appeals where the issue is whether the penalty is exigible in law
 - substantive appeals involving legal issues
 - cases dealing with employment status or sub-contractor certificates
 - most current VAT appeals (excluding reasonable excuse for example)
12. What cases specifically require non-legal input? What kind of input will be required? (Similar to issues raised by Question 4 above but exploring specifically which actual cases / types of case *need* specialist input as opposed to it being helpful.)

Paper or oral hearings

13. Is it possible to expand the range of cases suitable for hearing on the papers? (Are, for example, those dissenting considering the full range of cases such as 93(3) applications?)
14. How should paper cases be identified? (Can we safely define some cases as always to be dealt with on the papers (e.g. *ex parte* applications)? Ought we always to offer taxpayers the choice of an oral hearing? Or should we offer a paper hearing as the default option and the option of an oral hearing on request? (cf. CICAP's process.)