



Tax Appeals Stakeholder Group

Paper No. 1 - Costs and Expenses in First Tier Tax Appeals – Summary of Responses to the Consultation - Updated

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SG 07/01

Foreword

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Document Purpose This document summarises the responses received to the consultation on options for costs regimes in the tax tribunal

Amendment History

Issue	Date	Amended By	Amendment Details
0.1	27/09/2005	Andrew Digby	For internal review
1.0	27/9/2005	Andrew Digby	For discussion by the Stakeholder Group
2.0	28/9/2005	Andrew Digby	Minor changes to clarify scope of consultation
2.1	31/10/05	Andrew Digby	Revised to include responses received since publication of original paper

Costs and Expenses in First Tier Tax Appeals - consultation with tax appeals users – updated

1. Bodies invited to comment on the Stakeholder Group paper

All members of the Stakeholder Group were invited to comment on the paper. In addition, the following bodies were invited to comment:

- Institute of Chartered Accountants of Scotland
- The Ulster Society of Chartered Accountants
- Law Society Scotland
- The Law Society of Northern Ireland
- The Faculty of Advocates
- VAT Practitioners Group
- Institute of Indirect Taxation
- Accountax Consulting
- The General Council of the Bar of Northern Ireland

2. Bodies who responded

- Institute of Chartered Accountants of Scotland
- The Faculty of Advocates
- VAT Practitioners Group
- Local Authority VAT Consultative Group

3. Other comments

- The Law Society sent a representative to the Stakeholder Group meeting of the 6th October to give their initial view that was summarised in the first version of their paper. Their full response is summarised in this revised version of the paper.
- CBI (Ian Menzies-Conacher was unable to attend the next meeting and sent a written response)
- Low Incomes Tax Reform Group
- The Chartered Institute of Taxation response was received before the Stakeholder Group meeting but too late to be included in the original version of this paper. Penny Hamilton represented the Institute at the meeting itself. Their response is summarised in this revised version of the paper.
- The Revenue Bar Association sent a response too late to be included in the original version of this paper. Their response is summarised in this revised version of the paper.

4. Summary of responses

Faculty of Advocates

- Preferred **option three** on the grounds that this would allow appellants expenses if successful but would not generally expose them to the risk of an award of expenses against them. This would avoid deterring appellants from pursuing small value appeals
- The decision to extend the statement of current practice for VAT appeals would be for HMRC to take

- **Option four** introduces an element of gambling – it is preferable for appellants to know at outset that no costs will be awarded against them unless the appeal is decided to be vexatious
- The expenses of state's representatives may reasonably be regarded as collection costs

Institute of Chartered Accountants of Scotland

- Preferred **option three** on the grounds that the fear of costs may deter some appellants
- It is essential that taxpayers have an accessible, convenient and cost efficient means to appeal
- Desirable for HMRC will give an undertaking, similar to that given by Peter Brooke for VAT & Duties costs, across the tax jurisdiction, varied so that the maximum costs that can be awarded shall not exceed amount of tax at issue
- There is a need for a mechanism to allow HMRC to bear appellants' costs for test cases on obvious points of principle regardless of outcome

Local Authority VAT Consultative Group

- Wants existing VAT & Duties costs mechanisms not to change
- Appellants can budget if they have the possibility of costs being awarded to them. This is particularly important for local authorities which have to fund appeals from the public purse
- Not to be awarded costs would increase the reluctance to appeal amongst some taxpayers

VAT Practitioners Group

- **Option three** is the preferred option
- **Option one** is not acceptable on the grounds that not being awarded costs would be a deterrent to some taxpayers with legitimate appeals.
- **Option two** is not acceptable on the grounds that it would be difficult in many cases to establish that one side had acted unreasonably.
- **Option four** is not preferred. This is on the grounds that an opt-in system would mean that a taxpayer who made a mistake filling an appeal form would have to waive costs.
- There is a need to have HMRC confirm that the Brooke undertaking holds for all cases across the tax jurisdiction
- There will always be a cost to the taxpayer because very rarely do they have their full costs awarded against HMRC.

5. Other comments

CBI

- **Option four** is preferable on the grounds that it allows the Tribunal to cater for a wide range of appellants and appeals. This option would also preserve the best features of the current regime.
- **Option one** gives the appellant a clear view of the economics of pursuing a claim. However, it may not offer sufficient encouragement to those wishing to pursue cases that raise only points of principle
- The prime objective is not to do anything to discourage taxpayers from using their appeal rights and appellants should not be deterred by the risk of paying costs hanging over them

LITRG

Comments from the perspective of the low-income unrepresented appellant

The fear of incurring costs is a deterrent for would-be appellants of low income

Option four and the default position of no costs, with a self-denying undertaking from HMRC, offers the most favourable environment for low-income appellants

Some low income appellants will have a problem finding out-of-pocket expenses and the cost of representation for cases where the point at issue is difficult or technical. The tax tribunal should offer reimbursement for out-of-pocket expenses, as at the Appeal Tribunal. This is particularly so if Tax Credit appeals transfer to a tax jurisdiction.

CIOT

Some CIOT members prefer **option three**. But it could be argued that as HMRC has made tax law, it is unfair for to ask taxpayers to pay costs in cases where the law is substantial and complex law.

Now that HMRC has more tools against tax avoidance schemes, the rule awarding costs against the appellants in these cases may no longer be appropriate.

Other CIOT members prefer **option four**. This would preserve the best features of the regimes currently in operation at the Special Commissioners and at the VAT & Duties Tribunal, and also provide flexibility. It comes close to ideal situation where successful appellants are awarded costs, and any costs awarded against unsuccessful appellants are restricted by a self-denying statement on the part of HMRC.

But this option runs the risk that those litigating avoidance schemes will never opt for the costs option. It also runs the risk of different taxpayers ending up with different costs for similar appeals because they have opted into different regimes.

A desirable variation on option four would be for each party on the 'no costs' track to be responsible only for their own costs, except when the Tribunal considers that one of them has acted unreasonably or HMRC has been dilatory. Taxpayers would have the right to elect for the costs track but HMRC would not have this right.

Taxpayers should not bear the cost of establishing a point of law. It could be argued that HMRC should issue certificate to the effect that it will not pursue costs in a test case.

Options one and **two** are not preferred because they run the risk that cases raising points of principle will not be pursued if the amount of money at stake is small.

Law Society – updated response

Option three is the preferred approach. A similar regime works well for VAT & Duties appeals for a wide range of cases. This option would ensure that a fear of costs did not deter a taxpayer from bringing a meritorious but small appeal.

A self-denying statement on the part of HMRC would not be sufficient and should be formalised by a statutory rule. The rule should set out that the HMRC could only apply for costs in substantial and complex cases involving a large sum of money or where there is a misuse of the tribunal's proceedings.

It should be a condition of HMRC being able to recover costs that it has first warned the appellant taxpayer that it will seek to recover costs if successful. HMRC should not be able to pursue costs in test cases.

Option four would also be acceptable, provided there is also a statutory rule denying HMRC costs. However, some appellants may have difficulty understanding the choices offered by this regime.

The no-costs track should be the default, with appellants required to opt onto the costs track.

On the costs track, HMRC should not to seek costs up to Tribunal even where the Department appeals and is successful at a higher court. On the no-costs track, a party should be able to apply for costs (or the Tribunal award them of its own motion) where the other party has been dilatory.

Option one is not preferred because taxpayers would have to bear their own costs even if successful. It risks encouraging some taxpayers not preparing properly or seeking representation in the attempt to minimise costs. This option does not allow the tribunal the power to award costs where a party has acted unreasonably.

Option two is not preferred on the grounds that an appellant would have to bear their own costs, even if successful. It presents the same risk of a taxpayer not preparing or not seeking representation as option one.

Tax rules are complex and legal representation is often necessary. It is vital that successful appellants have the right to claim costs. Appellants will not appeal some cases that raise points of principle if they have no prospect of getting costs.

The costs regime should be geared towards ensuring HMRC brings cases to the tribunal only when they are sure that it has sufficient evidence to justify an assessment and that it can handle cases expeditiously.

Where substantial amounts of tax are in issue for the taxpayer concerned it may be desirable HMRC to be able to obtain costs.

Revenue Bar Association

The Chairman of the Revenue Bar Association solicited comments from Gray's Inn Tax Chambers.

A successful taxpayer should be entitled to his costs and should only have to pay the Revenue's costs if he loses where he has behaved unreasonably or in other exceptional circumstances. For this reason, there was little enthusiasm for either **option one** or **option two**.

Option four suffers the drawback of presenting the would-be appellant, who has already had to face a decision about whether or not to appeal, with a further difficult decision about costs.

Option three is unsatisfactory in as far as it relies on a self-denying statement by a minister. Any rule should be incorporated into properly drawn rules of procedure or a statutory rule. A rule allowing HMRC costs should be nearer the 'exceptional circumstances' rule now in operation at the Special Commissioners than the self-denying rule applicable at the VAT and Duties tribunal