



## **Tax Appeals Stakeholder Group**

### **Paper No. 1 Costs and Expenses in First Tier Tax Appeals**

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**SG 06/01**

# Foreword

## Document Control

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Document Purpose This paper describes the costs regimes currently in operation across the tax appeals system and identifies four options for a new costs regime for the reformed first tier tax appeals tribunal

## Amendment History

Issue	Date	Amended By	Amendment Details
1.0	05/09/2005	Stephen Oliver	Version for discussion by the Stakeholder Group

## **Costs and Expenses in First Tier Tax Appeals**

1. Replacing the present three Tribunals with a single first tier tax tribunal will mean that their three different costs regimes will need to be rationalized. I refer to “costs” in this note, but this should be taken as referring also to “expenses” in Scotland.
2. The costs issue is of importance to appellants and their advisors. It would, therefore, be of the greatest value to receive a response from all interested parties.
3. It may be convenient to start by summarizing the present situation.

### **General Commissioners proceedings**

4. A person appealing to the General Commissioners will not in any circumstances be required to pay costs if he is unsuccessful. Correspondingly, he will never recover his costs if he succeeds.

### **Special Commissioner proceedings**

5. Subject to one point, the costs regime for appeals to the Special Commissioners is the same as that of appeals to the General Commissioners. The appellant neither risks having to pay costs nor stands to recover them if successful. Rule 21 of the Special Commissioners (Jurisdiction and Procedure) Regulations (SI 1994/1811) provides that the Tribunal may award “the costs of, or incidental to, the hearing of any proceedings” against a party, “if it is of the opinion that the party has acted wholly unreasonably in connection with the hearing in question”.

### **VAT and Duties Tribunal proceedings**

6. There is no restriction on the Tribunal’s power to award costs. Rule 29(1) of the Value Added Tax Tribunals Rules 1986 (1986/590) enables the Tribunal to direct that a party shall pay to the other party “such sum as it may determine on account of the costs of such other party of and incidental to and consequent upon the appeal or application”: the costs may be assessed by a High Court Taxing Judge. In Scotland these are dealt with by the Auditor of the Court of Session if the parties do not agree to the Tribunal awarding a fixed sum.
7. The Commissioners do not normally ask for costs if successful in proceedings before the VAT and Duties Tribunals. Their practice is based on a written Answer by the Minister of State, Treasury (the Hon. Peter Brooke MP), (Hansard Vol 102 24 July 1986 Cols 459-460) to a Parliamentary Question:

“As a general rule, Customs and Excise do not seek costs against unsuccessful appellants. They do, however, ask for costs in certain narrowly defined cases so as to provide protection for public funds and the general body of taxpayers. They will, therefore, seek to continue to ask for costs at those exceptional tribunal hearings of substantial and complex cases where large sums are involved and which are comparable with High Court cases, unless the appeal involves an important general point of law requiring clarification. They will also continue to consider seeking costs where the appellant has misused the Tribunal procedures – for example in frivolous or vexatious cases, or where the appellant has failed to appear or to be represented at a mutually arranged hearing without sufficient explanation, or where the appellant has first produced at a hearing relevant evidence which

ought properly to have been disclosed at an earlier stage and which could have saved public funds had it been produced timeously.

The new penalty provisions and right of appeal to the Value Added Tax Tribunals have made no change to this policy”.

8. In the writer’s experience, Customs and Excise always notify appellants in advance if they intend to ask for costs; they ask for costs, if successful, where eg the appellant is appealing against a civil penalty assessment and where the appeals involve tax avoidance schemes. In all cases, however, they keep their position open in case something done in the course of the proceedings calls for an award of costs

### **Proceedings before the Financial Services and Markets Tribunal – for comparison**

9. Neither the “appellant” nor the Financial Services Authority can obtain costs of proceedings before the Tribunal unless the Tribunal considers that the party in question “has acted vexatiously, frivolously or unreasonably”.

### **What are the options?**

10. Two preliminary points are relevant here. First, it would be unthinkable to force upon all appellants a costs regime that exposed them to the risk of having to pay HMRC’s costs. This could deter the small appellant from pursuing a meritorious appeal. Second, all appeals relating to all taxes should be covered by the same costs rules. There is to be one Tribunal. To preserve costs for appeals so far as they relate to an appellant’s VAT liability while excluding costs for appeals (which might be parts of the same proceedings) so far as they relate to corporation tax liabilities would be anomalous and practically unworkable. With those points in mind, I come to the options.
11. **Option One** is to have no costs regime whatever. Taxpayers would inevitably and always bear their own costs whatever the nature of the case and whatever the outcome of the appeal.
12. **Option Two** is to have no costs regime save in the exceptional circumstances now found in Rule 21 of the Special Commissioners Rules or under the rules applicable to the Financial Services and Markets Tribunal.
13. **Option Three** is to have a regime similar to that at present applicable to appeals before the VAT and Duties Tribunals. To “protect” the ordinary appellant there would have to be a self-denying statement on the part of HMRC similar to that given by the then Minister of State in relation to the VAT Tribunal appeals.
14. **Option Four** gives the appellant a choice between two regimes. One regime, like that of the General Commissioners at present, keeps the appellant clear of any possibility of a costs award against him but excludes him from any possibility of recovering his costs if successful. I refer to that regime as the “default position”. The other regime is similar to that of the VAT and Duties Tribunals; he recovers his costs, if successful, but, if unsuccessful, he will be exposed to a claim for the costs of HMRC – subject always to the constraints imposed by a Parliamentary Answer similar to that applicable to proceedings before the VAT and Duties Tribunals. The appellant who prefers to remain in the former “costs-free” regime does nothing; he remains in the default position unless and until the Tribunal gives him leave, at his request, to change to the latter regime.

15. Under Option Four the appellant that wishes to enter the costs regime, and so stand to obtain his costs if he wins (with the consequent possibility of having to pay costs of HMRC if he loses), ticks a box in the Notice of Appeal. A note to the box draws the appellant's attention to the Parliamentary Answer and explains that he may have to bear the costs of HMRC if he loses.
16. The four options summarized above should in no sense be regarded as exhaustive. There may be different combinations and there may be complete alternatives. The great majority of Tribunals that are to be brought into the First Tier of the proposed system will have no costs regime whatever. The framers of the new system may prefer to keep all proceedings for all Tribunals in a costs-free state. It is important, therefore, that if you have views on this matter that these should be expressed at an early stage.