



Tax Appeals Stakeholder Group

Paper No. 2 - Start of Jurisdiction of the First-tier Tax Tribunal

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Foreword

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Author: Steve Wade

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Document Purpose This document discusses different approaches to the start of jurisdiction at the first-tier tax tribunal

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Introduction

1. At the sixth meeting of the Stakeholder Group it was agreed that DCA and HMRC would table a paper examining issues around the start of jurisdiction of the proposed unified tax jurisdiction and the lodgement of appeals. This paper outlines the current different ways in which appeals reach the existing tax tribunals and then considers some ways in which a unified approach might operate in the future.

Background

2. Up until now thinking has been that, at least in the early days of the new tax jurisdiction, appeals would be lodged in much the same way as they are now. Thus direct taxation appeals and applications would be sent direct to HMRC, with an opportunity for HMRC and taxpayer to negotiate a settlement under Section 54 of the 1970 Taxes Management Act before being passed to the tax tribunal in due course. Whereas VAT and Duties appeals would be lodged directly with the tribunal (either straight away or after a statutory review period as at present).
3. Part of the reason for taking this approach has been because HMRC is currently carrying out a review of powers across the unified Department. This review is considering the whole range of powers and sanctions currently operating within the department with a view to determining how best these should operate in the future. Amongst the things to be considered will be appeal rights and review processes and how these interrelate. In addition, HMRC is currently carrying out a pilot study across three tax areas to try to determine how long it takes at present for direct taxation appeals sent to HMRC to reach the tribunal. The intention would be to determine how feasible it would be to set a time limit on the Section 54 process and, if so, what time limit would be most appropriate.
4. The results of HMRC's review of powers, as well as the outcome of the Section 54 pilot, will be useful not only in understanding how the appeals process operates at present but how HMRC processes up to the point of appeal will operate in the future. Without pre-empting the results of these activities it is useful for the group to begin to consider now what general principles need to be accommodated within any start of jurisdiction process and how any future system might best operate.

Aims

5. There are four main aims that any start of jurisdiction process needs to achieve if the needs of taxpayers, HMRC and the Tribunal are adequately to be met:
 - to ensure that all disputes are settled at the earliest practicable point in the process;
 - to ensure that taxpayers who wish to appeal have unfettered and timely access to the tribunal;
 - to ensure that the tribunal is in effective control of all appeals from lodgement to disposal;
 - to ensure that the tribunal only receives those cases requiring judicial input.

Current position

6. At present the pre-tribunal process varies considerably depending on the tribunal and the type of appeal being lodged.
7. Legislation requires appeals against direct taxation decisions (for ease of reference those decisions previously made by the Inland Revenue rather than HM Customs and Excise) to be sent direct to HMRC. HMRC treats a large number of objections as appeals under this system. This is because it has taken the view that, under current legislation, it is unable to change a decision once made unless a formal appeal is lodged. A large number of such appeals, perhaps when relatively simple errors have been made or when

the issue is easily resolved, are therefore disposed of within a relatively short period. A good example would be an appeal against an incorrect notice of coding. Section 54 of the 1970 Taxes Management Act allows HMRC and the taxpayer to reach an agreement on the appeal which then acts as if it were the decision of the tribunal. Assuming no such agreement is reached, it is the responsibility of HMRC to transfer the case to the General or Special Commissioners to be heard. Although either party can request the clerk to the tribunal to list the case to be heard at any time throughout this process, in practice the decision of when to list the appeal is made by HMRC.

8. Indirect taxation appeals by contrast are made direct to the VAT and Duties Tribunal. However, there is a difference in approach depending on whether the appeal is an excise or VAT matter. With the former cases appellants must first request a statutory review of the decision that HMRC must then carry out within another 45 days. If the appellant is still unhappy with the decision, there is a right of appeal (within 30 days) direct to the tribunal against the reviewed decision. In contrast, VAT cases have no statutory review procedure and appeals against VAT decisions are made direct to the tribunal with no statutory review process. However, appellants may still request an "informal" review of the decision by HMRC if they so desire prior to making an appeal direct to the Tribunal.

Possible approaches for the future

9. There are three broad approaches that suggest themselves as possible templates for the pre-tribunal processes in the future.
10. **Approach 1.** The first approach would be for all tax cases across the unified jurisdiction to follow broadly the same process that excise appeals to the VAT and Duties Tribunal currently follow. Under this proposal a taxpayer disagreeing with any tax decision would first lodge a request for a review of that decision with the Department. This notice of objection would allow, but not require, HMRC to amend or uphold the original decision and would also allow, but not require, both parties to attempt to reach a negotiated settlement during the same period. The period within which HMRC would have to review the decision, or for a negotiated settlement to be reached, would be timebound. As with excise cases at present, a failure to issue a revised decision would be treated as if the original decision had been upheld. If at the end of this period the taxpayer is still unhappy with the decision (whether varied or not varied) they would then have a formal right of appeal against the reviewed decision. That appeal would then be lodged direct with the Tax Tribunal and it would enter the proposed case categorisation and listing process. Under this approach there would be no possibility of either party taking the appeal to the Tribunal prior to the review process completing its course but it would be possible for the review period to include a degree of negotiation between the parties similar to that which occurs at present under Section 54.
11. **Approach 2.** The second approach would be to leave the existing systems to operate much as they do now for each type of appeal but to formalise the existing process for direct taxation cases to create a more structured and consistent system. Thus, VAT and Duties appeals would continue to be made direct to the new Tribunal (either with or without a prior statutory review as now). Direct taxation appeals would continue to be sent to HMRC but, building upon the Section 54 pilot currently underway, with a formal time limit set upon the period before which they would have to be transferred to the tribunal. This time limit could be set by legislation (most likely within rules) and could vary depending on the type of case. There is no reason why the time limit could not be extended with the agreement of both parties and the consent of the tribunal if it was felt that further time to negotiate would be beneficial. In this case such an agreement to continue to negotiate would need to find some way of preserving the appeal right of the appellant and ensure any future appeal would not end up being made out of time as a result of the further negotiation.
12. **Approach 3.** A third possible variant, would be to have a process that broadly follows approach 1 above but which offers the taxpayer the choice to go directly to the tribunal if they wish. This would mean that the default position for all cases would first be to lodge a

notice of objection against a decision, followed by a right of appeal if the taxpayer remained unhappy at the end of the review period. For most cases then, the process would be the same as that of approach 1 above. However under this approach, taxpayers would also have the choice, throughout the review / negotiation period, of appealing directly to the tribunal. This would not necessarily be as of right. For example it may be necessary to offer reasons to the tribunal as to why it should accept an appeal prior to the review period having been completed (for example evidence that there is little to be gained by further negotiation). The period for review would, in any event, be timebound and if at the end of this process the taxpayer still wishes to contest the decision they would retain the right of appeal direct to the tribunal.

Discussion

13. Each of these proposals has advantages and disadvantages and there are likely to be a number of alternative options not covered above. Some initial thoughts on the approaches outlined above and how they relate to the aims in paragraph 5 are summarised below.
14. **Approach 1** offers a degree of consistency of approach for all tax decisions and also offers a high degree of flexibility. It would be possible to allow different time limits for different appeal types and there would be no restrictions as to how individual cases are reviewed or negotiations carried out. (Although HMRC may wish, internally, to design a standard process or set of protocols as to how cases are dealt with). This type of process would filter out those cases that do not require judicial input and allow cases to be settled as early as possible. As the same time there would be a clear division between a disputed (but potentially resolvable) decision and an appeal and a degree of clarity for the taxpayer as to how the system operates.
15. However this approach would mean a difference in approach to the way VAT cases are dealt with (currently there is only an informal review process) and also direct taxation cases. (However for the latter cases, it is arguable that in terms of HMRC practice there may be little practical difference with the way cases are treated under this approach as compared with the way cases would be dealt with by approach 2.) In addition, taxpayers would lose the option that currently exists of requesting their case is listed immediately for hearing. They would instead have to wait until the end of the review period or until a revised decision is issued by HMRC. It might be argued that ease of access to the tribunal for those tax payers that wish it would be reduced under this option.
16. **Approach 2** has the merit of requiring minimal change to existing processes for most tax cases but would still provide more structure and coherency to the way that direct taxation cases are dealt with. As with approach 1, cases would be settled as early as possible and only those cases that required the tribunal to make a decision would actually reach it. This option would also retain the option for taxpayers to request their case be listed for hearing and thus bring an end to the review period earlier than is offered by approach 1.
17. However, the control of appeals by the tribunal would not be as clear-cut as with approach 1. It might be argued that, regardless of the controls that are in place, this option still blurs the distinction between an objection to a decision and an appeal and that the latter ought to be lodged directly with the tribunal, which would then be in control from the outset. In addition, the possibility of the taxpayer requesting the case be listed to be heard before the end of the review period would mean that, potentially, more cases would reach the tribunal when they do not need to than under approach 1.
18. **Approach 3** offers most choice to the tax payer. The default route through the system, mirroring as it does approach 1, would ensure that cases are generally settled as early as possible but are still progressed to the tribunal when it is clear that judicial input is necessary. It also offers clear and unfettered access to the tribunal for the taxpayer. As with approach 1, the tribunal would have clear control over appeals as soon as they are lodged and would not be reliant upon HMRC to forward appeals to it once the review time limit has expired (as would be the case with approach 2).

19. However, although this degree of choice is beneficial in some respects, there is a much higher risk with this approach of cases reaching the tribunal when they do not need to. Even with the best information available to appellants, some will still be confused or mistaken about what is the best route open to them. It is inevitable that offering the choice to progress straight to the tribunal from the off will mean a higher number of cases reaching it than do now and that many of these cases could actually be resolved far more easily and simply with some negotiation.

Next Steps

20. To an extent the aims described above in para. 5 are in tension and it is inevitable that no one option will achieve all of the aims perfectly. Nevertheless it is possible from the approaches outlined above to begin to see how it may be possible to balance the differing needs in various ways.
21. The stakeholder group is now asked to consider to what extent the approaches above, or any possible alternative approaches, meet the aims defined above and to provide DCA and HMRC with a steer on the main issues that need to be addressed as work is taken forward in this area.