THE CHARTERED INSTITUTE OF TAXATION

LOW INCOMES TAX REFORM GROUP

Transforming Tribunals: Implementing Part 1 of the Tribunals Courts and Enforcement Act 2007
RESPONSE TO MINISTRY OF JUSTICE CONSULTATIVE DOCUMENT

1. Executive summary

1.1. In structuring the new Tribunals system, there is an opportunity to resolve some of the existing problems experienced by appellants in securing their right to justice.

1.2. This response to the consultation on Tribunals reform focuses on Tax Tribunals and Social Security Tribunals, to the extent that the latter covers tax credits appeals.

1.3. A number of reforms are vital to the success of the new Tribunals system as an improvement on the status quo. We highlight the following as key areas to address:

- *Case management* – A number of the questions posed in this consultation can be answered with the introduction of effective case management at an early stage. This is essential to ensure that special needs are catered for, that cases are heard efficiently and by the most appropriate panel.

- *Mediation* – Introduction of a mediation facility offers the potential to minimise costs both to the appellant and the public purse, resolving disputes more quickly and efficiently than through recourse to a full hearing.

- *Representation for those on low incomes* – Appeals can be biased against those unable to afford professional representation. This response suggests a means of providing a facility for tax and accountancy professionals to provide assistance on a pro bono basis.

1.4. Costs can be a barrier to accessing justice. Appellants of low or modest means will struggle to meet their own costs. The possibility of an adverse costs award against them is therefore a further disincentive to pursuit of their case. We therefore favour a costs-free environment at the First Tier and an optional costs regime at the Upper Tier. We do think the 'no costs' regime should be capable of being overridden for wholly unreasonable behaviour and that it must be made clear to potential appellants that the rule can be applied against HMRC. To assist with the costs of a low-income appellant, HMRC could provide seedcorn funding to establish a pro bono advice and

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representation network which could then be developed by the tax profession.

1.5. One of the advantages of the existing General Commissioners system for tax appeals is its local accessibility, both in terms of hearing location and panel composition. Whilst ensuring technical expertise of tribunal panels, this important factor should not be entirely lost in the new system.

1.6. Tax credits are initially to be transferred to the Social Entitlement Chamber in the new system, according to the proposals, but with potential for a later transition to the Tax Chamber. This response calls for a clear strategy at the outset in relation to tax credits rather than this uncertain position, and our preference would be for tax credits to remain in the Social Entitlement Chamber unless there are clear advantages for suggesting otherwise.

1.7. On the definition of 'lay member', we believe that Tax Tribunals could comprise a variety of 'non-legal' members, provided always that the membership includes at least one qualified and appropriately experienced tax adviser or accountant with a tax specialism. We also think that members of the Tribunals should simply be referred to as 'members', without further qualification.

2. Introduction

2.1. The Low Incomes Tax Reform Group (LITRG) was set up by the Chartered Institute of Taxation to be a voice for the unrepresented in the tax system.

2.2. We welcome this opportunity to respond to the Ministry of Justice's consultation document entitled *Transforming Tribunals: Implementing Part 1 of The Tribunals Courts and Enforcement Act 2007*. We approach this consultation from the perspective of taxpayers and tax credits claimants on low incomes and without access to professional representation.

2.3. We have long been interested in appeals and Tribunal reform, initially responding to Sir Andrew Leggatt's consultation paper *Tribunals for Users* and again in September 2004 responding to the Department for Constitutional Affairs' White Paper *Transforming Public Services: Complaints, Redress and Tribunals*. In September 2006, we then published a report *Tax Appeals – a low income perspective*[1] in which, drawing on a survey of the views of members of the CIOT involved in tax appeals, we assessed the needs and expectations of unrepresented users, and made recommendations as to what kind of tax appeals system would best serve their interests. We have also recently responded to the consultative document entitled *Tax Appeals against decisions made by HMRC* issued by Her Majesty's Revenue and Customs (HMRC) in October 2007.

2.4. We see the key principles underlying reform of the Tax Tribunals are to ensure:

- actual and perceived independence from HMRC, unlike the current system whereby appellants may incorrectly perceive a link between HMRC and the Commissioners due to the way in which the system operates;
- accessibility of the system for all;
- that appellants are fully advised of their appeal rights and are provided with adequate and neutral information and guidance on the process.

[1] See http://www.litrg.org.uk/reports/reports.cfm?id=384

2.5. In light of these key themes, we now turn to answering the specific areas addressed in the consultative document. Please note that we have only answered those questions pertinent to our interest in this consultation, ie primarily those relating to the structure of the Tax Tribunals and how it is proposed tax credits appeals will be dealt with in the short and longer term.

3. Chapter 7: Overview of Tribunal Structure

Assignment

3.1. ***Q 1: Do the proposals on assignment of judges and members strike the correct balance between maintaining judicial expertise and encouraging judicial career development?***

3.2. Both the First and Upper Tiers are to be divided into Chambers. The primary reason for this – amongst others of staffing and cost efficiency – must be to ensure that cases will be heard by members and judges with relevant expertise.

3.3. Provided there are sufficient safeguards in the structure so that expertise is maintained, we have no objection in principle to the 'ticketing' and assignment systems proposed in this consultation. Indeed it could be helpful where the subject matter of an appeal crosses over the brief of different chambers: tax credits, where there are elements of both tax and social entitlement, is a case in point. The safeguards for appellants appear to have been carefully considered to ensure that the judiciary is properly assessed, trained and skilled.

3.4. A wider degree of expertise allows for flexibility and this can be advantageous for the Tribunals system to be able to meet fluctuating demand within its varying jurisdictions and Chambers, assuming skills are maintained to a high level rather than being diluted as a result.

Proposed Chambers Structure

3.5. ***Q 2: Do you agree with this general approach for Chambers?***

3.6. Whilst noting that our interest is restricted to tax and tax credits matters, we agree with this approach to Chambers in the First Tier.

3.7. ***Q 3: Is the allocation of jurisdictions to Chambers the right one?***

Tax cases

3.8. A thorough review of the tax appeals structure is being considered, on which we comment more fully under the Chapter 11 questions below.

Tax credits cases

3.9. Paragraph 302 of the consultation suggests

'In the short term, Tax Credit appeals will be transferred to the Social Entitlement Chamber with Child Benefit and non-tax Child Trust Fund (CTF) appeals. …in the longer term Tax Credit appeals will move to the Tax Chamber.'

3.10. As tax credits do fall more under the category of 'social entitlement' than 'taxation', we agree that it is sensible for appeals to fall under this Chamber at the outset. Whether there is merit in transferring these to the tax chamber in the longer term is a matter for further debate. The view that tax credits appeals should be so transferred is based on a ministerial statement during the passage of the Tax Credits Bill in the House of Lords (see Official Report of the Grand Committee of the House of Lords, 22 May 2002, CWH 156). In the six years since that statement was made, the tax credits system has developed to such a degree of complexity that to train a new chamber of judges to hear appeals is likely to require far greater resources than was envisaged in 2002, to no particular purpose other than to fulfil a very old ministerial commitment which has outlived its rationale.

3.11. Tax credits have features of both income tax and welfare benefits. They are a form of welfare support and have important interactions with more traditional welfare benefits; however, the outcome of an income tax appeal can have direct consequences for the appellant's tax credits award. Where a tax credit appeal raises tax issues, the proper course would be for it to be decided by panel comprising judges or members of both the tax and the social entitlement chambers. This being the case, there seems little point in transferring tax credit appeals from a chamber where the judges already possess the necessary expertise, to a chamber whose judges would have to be trained to deal with them. Our view is that tax credit appeals should remain where they are unless there are compelling practical reasons for their removal.

4. Chapter 8: The Upper Tribunal

Structure of the Upper Tribunal

4.1. ***Q 4: Do you agree with the proposed three-chamber structure for the Upper Tribunal?***

4.2. Again, we have no objection in principle to the three-chamber structure proposed.

4.3. We would however again stress the need for a clear strategy to be developed in terms of tax credits appeals. Reading through the consultation document, we assume that tax credits appeals from the First Tier would go on to the Administrative Appeals Chamber in the Upper Tier, following *'the normal route for appeal from all decisions of the three administrative chambers of the first tier (Social Entitlement…'* (para 180).

4.4. There is scope for confusion and dilution of expertise resulting in disruption for the tax credits appeals process if in the longer term these are transferred to the Tax Chamber, as this consultation document suggests.

Location

4.5. ***Q 5: Do you agree with this approach to where the Upper Tribunal is located?***

4.6. The suggestion is that the Upper Tier should have permanent locations in London and Edinburgh but *'The government will however ensure that hearing facilities are available throughout the United Kingdom, organised according to business need and the position of the parties.'*

4.7. In terms of Tax Tribunals, what we are considering is a substitution of the Upper Tier for the Special Commissioners. The current facility is described in HMRC Manuals[1] as follows:

'The Special Commissioners normally hear English and Welsh appeals in London, Birmingham and Manchester, Scottish appeals in Edinburgh and Northern Ireland appeals in Belfast. However they will consider applications to hear appeals in any city or town if suitable accommodation is available and the need for a local hearing can be demonstrated (for example because a large number of witnesses all reside in the same location or the appellant is not well enough to travel). If the taxpayer indicates that he wishes his appeal to be heard away from London, Birmingham, Manchester, Edinburgh, or Belfast then you should advise him to get in touch with the Clerk to the Special Commissioners.'

4.8. We are glad to read that the government agrees that *'reasonable access from the taxpayer's home or place of business'* should be promoted in the revised structure. In terms of the Upper Tribunal, we would hope the commitment would be to at least maintain a similar spread of locations to those currently used by the Special Commissioners.

First Tier Tribunal locations

4.9. As suggested in the consultation document, it seems sensible to promote local hire of facilities and use of video-conferencing equipment in more remote locations provided this does not affect the quality or conduct of the hearing. We comment on this further in our responses to the Chapter 11 questions on Tax Tribunal reform.

Jurisdictions of the Upper Tribunal

4.10. We have no comments to make regarding questions 6 and 7.

Proposed Changes to and Exclusions from Appeals

4.11. Questions 8 to 14 are outside our area of interest, so we have not answered them.

5. Chapter 9: The Role of Non-Legal Members

Appointments and Tribunal Composition

5.1. ***Q 15: Do you agree that this is the right approach to tribunal composition?***

5.2. In answering this question, we comment in turn on each of the principles bulleted in para 231.

5.3. We agree that the maximum hearing a case should be three as an unrepresented claimant might otherwise feel overwhelmed by the numbers on the bench.

5.4. Where more than one judge is to be present, we can agree with this where there is a significant question of law. Where it is for training purposes, agreement of the parties should be sought in advance.

[1] HMRC Appeals Handbook AH1660 – see http://www.hmrc.gov.uk/manuals/ahmanual/AH1660.htm

5.5. We maintain the view that non-legal members have an important role to play in the composition of Tribunals, iterated in our September 2006 report *Tax Appeals – a low income perspective*. Downsides to the General Commissioners being composed entirely of lay members were, however, the lack of finality at the first tier and a perception that the commissioners were reliant on the presenting Revenue officer for their understanding of tax matters. Consequently we recommend that at least one panel member should always have relevant technical qualification or experience - which may well be through a tax or accounting qualification rather than legal.

5.6. The benefits of the General Commissioners system should be retained in the transition to the new First Tier. The 'local' nature of the existing panels is generally welcomed, and this should be maintained both in terms of location of hearings and membership of the panel.

5.7. We note that in tribunals of two, it is proposed that the Chair will have the deciding vote. From the appellant's point of view, if differing views are held among panel members it is less unpalatable if a decision against the appellant is handed down by a clear majority than by means of a casting vote. The casting vote method of determining the outcome is also presumed to be demotivating for the 'junior' panel member; yet it is difficult to see how this situation might be avoided, short of avoiding panels comprised of two members altogether.

5.8. We agree that 'expertise comes in many forms' and 'it is not confined to those with professional qualifications'. But to ensure finality in the first instance, it is preferable to ensure the tribunal composition is gauged to the needs of the case by matching expertise – professional, legal or otherwise – to the case. This can be achieved through a robust case management process and by clearly identifying the skills of each tribunal member so they are appropriately deployed.

5.9. Although we agree that 'analytical and chairing skills are not confined to judges', we believe it would be preferable to always have a qualified or legal member on the panel for the reasons previously stated. This is particularly important as it is proposed that the chair will have the casting vote in tribunals of two.

5.10. We agree that *'Non-legal experts can and should be used outside formal hearings…'*, perhaps as part of a mediation process provided for under Section 24 of the 2007 Act. In this context, we note from Chapter 3 (para 86 et seq) that Early Dispute Resolution processes are being trialled on a limited basis and results are expected in early 2008 and summer 2008 for the two separate pilots. We look forward to hearing the outcome of the pilots and the Ministry's proposals as to how mediation processes will be implemented across the new tribunal structure, including the tax chamber.

5.11. Changes to the composition of a tribunal panel during a hearing should be avoided if possible to ensure consistency and minimise delays. Where a change is proposed, it is right that the consent of both parties should be sought.

5.12. Effective case management is a necessity. In the present tax tribunals, lack of case management is a barrier to justice. We comment on this further under the Chapter 11 questions below.

5.13. ***Q 16: Should there be different principles for certain Chambers or appeal rights, and if so, why?***

5.14. Our focus is solely on the tax chamber, and the social entitlement chamber to the extent that it deals with tax credits. Our remarks in 5.2 to 5.12 above apply equally to

both. As a general principle, though, we think it is important that the principles and rights applying to all Tribunals should be the same, unless there is a good reason for a difference being introduced.

Categories of Non-Legal Member

5.15. ***Q 17: Do you agree that these are the appropriate categories for members?***

5.16. The proposed categorisation of members seems confined to those with expertise of a particular area of professional or industrial practice other than law. In the case of the tax chamber, the obvious category would be suitably qualified accountant or tax adviser.

5.17. However, the suggestion (para 238) that 'there is no place for a purely lay category' rather depends upon what is understood by 'lay'. One of the main advantages of the General Commissioners for Income Tax from the point of view of the unrepresented appellant is their *local* knowledge, and their experience in business locally; these qualities should not be completely jettisoned in the new tribunals. The First Tier should continue to be locally-based and should be comprised mainly of local people who are suitably qualified; we would include local business people, 'experts through experience', in that category. There must, however, be at least one member of the panel with appropriate competency in tax law and practice.

5.18. The issue of disability is also mentioned in para 238. We believe it is important that any special needs of the tribunal user are taken into account as early as possible in the process and that case management should identify where these might influence the tribunal membership.

5.19. For example, tax appeals can turn on a point of 'reasonable behaviour'. What is reasonable could well be affected by the individual circumstances of the taxpayer. Using the Family Resources Survey for 2005/06, the former Disability Rights Commission estimated that there are approximately 10.8 million people in Britain who have rights under the Disability Discrimination Acts[1]. It is therefore highly probable that a good proportion of appellants before the tax tribunals will have such rights which should be taken into account when reviewing the skills and experience of the tribunal members hearing their case.

5.20. We also believe there is a case for assessing the representative nature of the panel in terms of gender, ethnicity, age and social origin. This recommendation is given in the context of appellant's complaints that they are intimidated by the complexity of the law and the appeal process. A more diverse make-up in the tribunal panel could make the experience less forbidding.

Titles

5.21. ***Q 18: What should the description be? and***
Q 19: Would the term 'member' suffice?

5.22. We agree that the term 'non-legal member' is rather clumsy and has negative connotations. It does nothing to provide reassurance as to the expertise of the tribunal and gives a certain second class aura to such members.

[1] See http://83.137.212.42/sitearchive/DRC/docs/Disability_Briefing_May2007.doc (page 34 et seq)

5.23. There are perhaps other options such as 'skilled member' or 'special member' to consider. On its own the term 'member' is preferable to 'non-legal member' as it removes the negative aspect but again fails to suggest the presence of any particular expertise. Overall, we would prefer that, in public, all members of the Tribunals are just that: members. Their background could be disclosed and would obviously be known to those running the service but appellants need to see those hearing their appeal as equals.

6. Chapter 10: Tribunal Procedure

Improving the Service to Tribunal Users

6.1. ***Q20: Do you agree that where a function of a tribunal is carried out by staff there should always be right of access to a judge?***

6.2. To ensure a robust framework is in place for the new tribunals, we agree that there should always be a right of access to a judge. In addition, any delegated functions need to be regularly reviewed to ensure accuracy and consistency.

6.3. ***Q21: Are there any functions of a tribunal which should never be performed by staff, whatever the safeguards?***

6.4. Clearly judicial functions in determining issues of fact or law cannot be exercised by a non-judicial member of staff. Subject to that, we see no objection to pre-hearing reviews and other case management processes, or mediation, being supervised by suitably-qualified staff members provided that the appellant's right of access to a judge is not restricted.

Costs

6.5. ***Q22: Are these the right criteria against which a costs regime should be judged? Is there good reason for inclusion of other principles?***

6.6. We comment further below on the subject of costs in the tax tribunals, but in general we agree the principles outlined in paras 266 and 267. For the low-income appellant, costs can be a significant barrier to justice and it is for this reason we have previously suggested that a facility for support and representation is provided by the tribunal system. Again, this was raised in our report of September 2006 and we expand on this at para 7.29 et seq below.

6.7. In terms of differing costs regimes across Chambers, para 268 states:

'…there is much to recommend the eventual introduction of a single broad scheme for the award of costs within which exemptions might apply rather than setting up a series of Chamber specific regimes.'

6.8. In this context, we would note that although it is only the tax tribunals which are currently subject to a review of costs, this review cannot be considered in isolation. There may be an influence from the new structure for tax on the costs regime in other Chambers which needs to be borne in mind. Or if an alignment of costs into a single scheme across Chambers is considered at a later point, the regime for tax could be changed again, unless it is one of those exempted.

6.9. An individual in dispute with HMRC might appeal in the tax chamber or, on a tax credits matter, in the social entitlement chamber, and the respective costs regimes in those chambers should not differ so markedly as to prejudice the interests of that appellant in any way. For example, The Appeals Service can make a contribution towards an appellant's out-of-pocket expenses in attending a tribunal hearing, such as travel, loss of wages, child-minding, etc. The rules of the social entitlement chamber are likely to follow suit. Unless the tax chamber does the same for low-income unrepresented users, the same appellant would be subject to different treatment depending not upon the merits of his case but upon the purely procedural question of where his appeal would be heard. That would be unacceptable.

7. Chapter 11: Tax Appeals Modernisation

7.1. ***Q23: What features of the present system should be retained in the new one?***

7.2. In our September 2006 report (which featured the results of a survey of, and interviews held with, members of the Chartered Institute of Taxation) there were a number of comments supporting certain features of the existing system.

7.3. Helpfulness of tribunal members and staff was a highly-rated aspect of the current system.

7.4. Accessibility, a 'common sense' approach, local base and knowledge of problems faced by small businesses and individuals were all aspects of the General Commissioners' service which were welcomed by respondents. As discussed above, we therefore believe the First Tier should retain a base of predominantly (but – to enhance technical expertise of the panel – not exclusively) non-legal and local membership.

7.5. We also comment here regarding the location of hearings at the First Tier. A particular strength of the existing General Commissioners structure in the tax tribunals is local access. This means local venues for hearings as well as local representation on the panels.

7.6. We note from Chapter 3 that operational delivery is under review. We are concerned that in any rationalisation of estates, local venues for hearings at the First Tier should be maintained.

7.7. Para 80 refers to Hearing Centres being located in 'major towns and cities throughout the UK'. According to research on the Commission for Rural Communities website, one-fifth of the population live in rural areas and 22% of rural households live in poverty[1]. We are therefore concerned that those living in rural areas should not be disadvantaged and that as far as possible venues close to the appellant's location should be available.

7.8. We have already mentioned that in certain circumstances appellants in social security and child support appeals can be reimbursed out-of-pocket expenses in attending the hearing. Presumably this practice will continue in the social entitlement chamber. The tax chamber should seriously consider adopting the same practice, so that distances between the appellants' homes and the nearest hearing centres do not become a barrier to justice for low-income unrepresented users.

[1] http://www.ruralcommunities.gov.uk//projects/financialinclusion/overview

7.9. ***Q24: What are your views on the type of cases that could be heard by non-legal members?***

7.10. We have consistently acknowledged the benefits of non-legal members in composition of tribunal panels, but we do recommend that all tribunals should include at least one member with relevant technical – ie tax, legal or accountancy as appropriate – qualification and experience. The purpose of this is twofold.

7.11. Firstly, it will reduce the extent to which the tribunal is seen to rely on the presenting Revenue officer for their understanding of tax matters (as is perceived in the current General Commissioners system), thereby making first instance decisions more independent.

7.12. Secondly, it will facilitate a regime where the correct decision is reached at the first instance, thereby enabling early achievement of finality in most cases. We believe that the 'expert' member should chair the panel, particularly if they are to have the casting vote in panels of two.

7.13. We assume in this area 'non-legal members' includes tax advisers or qualified accountants with a specialism in tax. As such people will be experts in the subject matter of the appeal, then very few cases coming before the tax chamber of the First Tier will be unsuitable for hearing by non-legal members. For example, there is no reason why non-legal members in the tax chamber should not hear appeals on status, trading or not trading, most penalties appeals, enquiries, and compliance matters generally, as well as some appeals turning solely on points of tax law. Early case management should be used to determine the appropriate makeup of the panel depending on the complexity of the case at hand. We believe such non-legal experts should also be eligible for the Upper Tribunal: legal procedural expertise is more easily learned than tax expertise.

7.14. ***Q25: What types of cases should go straight to the Upper Tribunal?***

7.15. The minority of appeals that involve particularly complex issues of general law (for example, human rights law where allegations of dishonesty are made, administrative law issues and trust law, amongst others) as part of the tax appeal are more likely to warrant a first hearing in the Upper Tribunal. Again, case management should determine this. There are a number of complex tax areas that would also warrant going straight to the Upper Tribunal but these are less likely to concern low income appellants. (Examples would be cases relating to Section 703 of the Income and Corporation Taxes Act, Insurance Company taxation and Petroleum Revenue Tax.)

7.16. The taxpayer should have a say in whether the case starts in the Upper Tribunal and should have an opportunity to put his or her case (even if the present practice of the taxpayer having the option does not continue). In general it is undoubtedly better for the unrepresented low-income appellant to start and finish in the First Tier which is accessible and where there is no risk of an adverse costs order, except perhaps to the extent of wholly unreasonable behaviour.

7.17. If HMRC wish to take a case directly to the Upper Tribunal to establish a precedent, the taxpayer should not have to bear potentially higher costs in preparing their case. If HMRC wants to start a case in the Upper Tribunal, they should bear any increased costs in so doing and this should be written into the costs regime. This might occur for example in contentious cases of public interest (such as that seen in the *Arctic Systems* case), which could involve taxpayers of limited means. This raises the issue that such cases should allow access to costs for the taxpayer but without risk of

an adverse costs order against them.

7.18. ***Q26: What types of case will require early case management?***

7.19. Priority of case management should be judged according to the urgency of the case and needs of the appellant. For example, those cases where the appellant is of slender means and there are material sums at stake will need early attention, particularly where a delay in resolution of the dispute is causing hardship. In this context, we reiterate comments in our September 2006 report regarding case management and the current lack of a facility for such appellants to obtain assistance.

Case management

7.20. At present, unrepresented appellants receive no instruction about how to prepare a case. In addition, the first time the General Commissioners themselves see the papers is generally on the day of the hearing.

7.21. Case management will enable the appellant to prepare their case, with help in identifying the kind of appeal, formulating the grounds of appeal, help in understanding the preparatory work required of them, and help in obtaining from HMRC information which might be relevant to the appeal.

7.22. The process should be subject to the overall supervision of a tribunal member, to the extent that the papers in each case would cross the desk of a panel member at least once. Such a process could provide an opportunity for resolving the issues and determining the appeal with the consent of parties before it gets as far as a hearing. Even where the appeal does proceed to a hearing, the case management stage will have been useful in providing directions for the conduct of the appeal.

Mediation

7.23. We consider that mediation facilities are important in formulating the revised tribunal procedures. Whilst HMRC has stated an intention to introduce an internal review process as an interim stage before a formal tribunal (which may be either optional or mandatory, depending on the outcome of consultation – we favoured an optional system), there is a strong argument to include a further mediation stage in the tribunal system.

7.24. There is a risk that this would introduce too many layers into the system. Mediation should therefore be an optional process; otherwise it could be seen as a delaying tactic.

7.25. But mediation through the Tribunal system does offer opportunities which do not exist in the proposed internal review by HMRC, such as the opportunity for the parties to come face to face with the help of a trained mediator and reach a mutually agreed solution. While many tax appeals are susceptible of a right or wrong answer, not all are (for example penalties cases). This latter category is where a mediation stage would: (a) serve the interests of justice in being truly impartial; and (b) save public funds by offering the chance to resolve the dispute before the expense of a full hearing is incurred. One solution might be for the Tribunal to have oversight of HMRC's internal reviews to ensure the process is robust.

7.26. We understand that Section 24 of the 2007 Act provides principles within which a mediation system could be developed.

7.27. The consultation document states that the intention to introduce a mediation facility is dependent upon the outcome of trials taking place to assess the benefits of 'Early Dispute Resolution' processes. We believe that a mediation stage would prove invaluable for the unrepresented appellant in providing fair and low-cost resolutions to appeals.

7.28. For example, tax cases may be settled with HMRC before they reach appeal, under Section 54 of the Taxes Management Act 1970. The section 54 procedure is a very useful one, but an unrepresented appellant may risk being pressurised by HMRC into accepting a settlement which might not be in their best interests. Some independent oversight would minimise that risk.

Support for advice and representation

7.29. Most lay people, of whatever means, require professional assistance to present complex cases (and tax cases are invariably complex); furthermore, good presentation in the early stages will save costs further up the line.

7.30. Without some form of assistance, the unrepresented appellant is faced with unfamiliar surroundings, forced to deal with a complex and technical system in which their opponent is well versed, often hampered by their own lack of skill in presenting a case. At stake may be forfeiture of a sum of money (by way of a penalty) they can ill afford, the survival of their business or livelihood, or entitlement to a tax credit they can barely manage without.

7.31. The need for representation may be reduced if the case management and mediation processes enable a proportion of cases to be settled so that they do not proceed to a hearing. Funding for advice on preparation will save money at the hearing stage.

7.32. But what form of assistance should there be, and who will provide it? If, as responses to the survey undertaken with our September 2006 report appear to suggest, the usual voluntary sector bodies to whom one would turn for advice – such as Citizens Advice – are not always appropriate sources of assistance in tax matters, the role must be filled by tax professionals acting pro bono. Responses to the survey showed that a good proportion of tax professionals do such work at least occasionally, and that proportion is likely to increase if a formal structure were provided within which they could operate. While we would not recommend the use of public funds to pay fees to tax professionals for carrying out such work, a modest outlay would provide the necessary scheme, premises, equipment, administrative support and cover any out-of-pocket expenses to enable those who wished to participate to do so.

7.33. Pre-hearing stages or mediation (following on from comments above) would provide a suitable framework in which an independent adviser could play a role. The involvement of a professional adviser at the opening stages of a case management process, or even as part of the Section 54 settlement procedure, would have the following advantages:

- it would give the appellant access to similar expertise to HMRC's officers in both tax and the appeal processes;
- it would provide an early opportunity to resolve issues which might be creating deadlock between the parties;

- it might even facilitate a resolution of the dispute before any of the major costs and expenses involved in a full-blown appeal had been incurred;
- it would reassure any tribunal member supervising the case that the appellant's interests were being taken care of.

7.34. We recommend that consideration be given to incorporating in the early preparatory stages of an appeal an opportunity for an unrepresented appellant to receive independent professional advice on the merits of their appeal. If a panel of local professionals were prepared to volunteer their time and skills in each area, and the local tribunal service were able to support their efforts by arranging interview premises and providing administrative or secretarial help, a modest outlay could secure what would amount to an effective early dispute resolution service before costs had a chance to mount up.

Special needs

7.35. In addition, we mentioned above the additional difficulties faced by disabled people in accessing justice. Their cases will require careful management to identify and address any particular requirements. In addition to all premises used for hearings being required to fulfil the access requirements of the Disability Discrimination Acts, provision should be made for accommodating special needs: for example, by providing appropriate aids, or assistance with any additional costs of travel incurred by a carer or other helper accompanying the appellant.

7.36. ***Q27: What are the types or features of cases that you think should be subject to an award of costs?***

7.37. From the perspective of the appellant on low or modest means, the priority must be to obtain a resolution as speedily and as inexpensively as possible. While the expense of funding their own costs is potentially a barrier, exposure to an adverse costs order making the appellant liable for their opponent's costs as well as their own is arguably a bigger barrier. Therefore, a costs-free regime is preferable to a costs regime at first tier. However, consideration should also be given to giving seedcorn funding, perhaps through HMRC, for a pro bono scheme of advice and representation to be developed by the tax profession as suggested at 7.29ff. This would make professional help available to those whose inability to afford it might have dissuaded them from pursuing an otherwise meritorious appeal.

7.38. However, we think it is important that costs can be awarded to penalise wholly unreasonable behaviour by either side. It should be open to the appellant to put their case for costs subsequent to the decision in the appeal proper, with the possibility of bringing forward additional evidence. The tribunal should have discretion to award some or all of an appellant's costs, not just all or nothing. Experience shows that to prove 'wholly unreasonable behaviour' is a very high hurdle, with justice not always being served by its application.

7.39. Regarding the suggestion that complex or difficult cases should attract costs, it does not follow that the means of the taxpayer correlates to the complexity of the case. In our experience, cases involving low-income unrepresented taxpayers can be complex and difficult. We therefore favour judicial discretion over whether or not a given 'complex or difficult' case should be subject to an order for costs, making the means of the appellant a significant consideration in exercising that discretion.

Interaction with HMRC Internal Reviews

7.40. In the event of HMRC introducing an internal review process, the appellant may well incur costs in putting their case forward before appealing to a formal tribunal.

7.41. Depending on the final structure of the review process, it might be necessary for the appellant to apply to the tribunal during the internal review (eg in the event of HMRC delay). In which case, if there is to be a costs regime at the First Tier (which we do not accept should be the case), it should extend to costs incurred during the internal review. A large proportion of the costs may have been incurred in the internal review process, hence if there were a costs regime, not to be able to recover that proportion of the costs would be a further barrier. If the review costs cannot be awarded, then they should become tax deductible, which is not the case for enquiry costs at present.

7.42. If the award of costs is to be limited to wholly unreasonable conduct, arguably there should be power to award pre-hearing costs in cases where it can be demonstrated that HMRC have mishandled the internal review to the extent that the appellant would not have had to appeal at all but for HMRC's mishandling. HMRC should publish guidance (approved by the Tribunal) on what is regarded as wholly unreasonable behaviour, so that taxpayers are aware of how their actions may be construed.

Particular types of cases where costs might be appropriate

Inappropriate behaviour of the taxpayer

7.43. We understand the rationale that cases in which taxpayers have acted inappropriately, for example failing to make proper disclosure, should be considered amongst the category where costs might be appropriate. But this needs to be balanced against whether the taxpayer can reasonably be expected to have known how they should have acted, particularly if unrepresented.

7.44. HMRC might argue that the taxpayer should follow HMRC guidance; but this is valid only where HMRC guidance is relevant to the point at issue, clear, accurate, and accessible. A frequent problem in practice is that there is no HMRC guidance on the matter in question (or there was once but it has been withdrawn); or it is badly written; or it is wrong or misleading; or it is only accessible on-line and even then difficult to locate on HMRC's website. All these factors need to be taken into account in determining whether an award of costs against the appellant is justified. After all, in the recent high profile case *of Gaines-Cooper,* HMRC argued against their own guidance.

Tax avoidance

7.45. We do not agree that tax avoidance should be a factor in determining costs. Anti-avoidance legislation is drafted widely and can catch those who, on a strict construction, fall within its terms, but are not intending to avoid tax. (We have, for example, seen this happen in certain cases involving pre-owned assets tax.)

7.46. Where this is the case, adding costs to the extra tax which the taxpayer is faced with will merely add insult to injury. This becomes even more relevant with the ever-widening of anti-avoidance legislation, including for example the income-shifting proposals which will catch many unwitting taxpayers if they are brought in as

currently drafted.

7.47. The only time when avoidance should be a factor is when it is proved the taxpayer's behaviour was wholly unreasonable. But that would be unreasonable behaviour in the context of the way the tax matters were conducted – perhaps obfuscation or concealment – rather than that avoidance was being attempted.

7.48. ***Q28: How do you think the award of costs should operate in practice?***

7.49. As above, we would hope that there would be no costs regime at the First Tier, in which case the question would only arise on further appeal. But if there is to be a costs regime at First Tier, or where first instance cases are heard at Upper Tier, it would be preferable for the appellant to be able to opt into or out of it. It would not be desirable for HMRC to have such an option and thereby put the appellant at risk of an adverse costs order.

7.50. There is an argument for an 'unbalanced' position on costs when looking at a case between an unrepresented individual or small trader and HMRC to reflect the difference in strength, resources, influence, and ability to call on specialist representation. Even if HMRC is not represented by Counsel, any official appearing on behalf of HMRC is likely to be better versed in tax law and in tribunal procedure than the unrepresented appellant, thereby giving HMRC the advantage.

Transitional provisions

7.51. For existing appeals that transfer into the First Tier tribunal at the commencement date, presumably the decision to appeal will have been taken on the basis of the costs regime in place in the old tribunal. From the point of view of the unrepresented appellant, it is hoped that the no-costs environment of the General Commissioners will be replicated in the First Tier.

7.52. However, if there is to be a costs regime at the First Tier, any appeal which had started under the costs-free regime of the General Commissioners should be allowed to proceed on the same basis. The default position should therefore be to maintain the status quo, but the taxpayer could be given the option to switch to the new regime if they so wish.

8. Chapter 12: Land, Property and Housing

8.1. Questions 29 and 30 are outside our area of interest, so we have not answered them.

LITRG
February 2008