THE CHARTERED INSTITUTE OF TAXATION

LOW INCOMES TAX REFORM GROUP

Ministry of Justice draft documents:
The First-tier Tribunal (Tax Chamber) Rules 2009 and
The Upper Tribunal Rules 2008
PRELIMINARY COMMENTS

1. Introduction

1.1. *About us*

1.1.1. The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998 LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes.

1.1.2. The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

1.2. *Our response to the draft rules*

1.2.1. From the above context, we are therefore commenting on the Draft Rules for the new Tribunals from the viewpoint of an appellant on a low income who cannot afford to pay for professional assistance with their case.

1.2.2. Below we make preliminary comments on the Draft Rules, in advance of the anticipated public 12-week consultation over the summer.

2. Comments on the Draft Rules

2.1. *General comments*

Tax Credits

2.1.1. Following on from our previous submissions, we remain concerned about the treatment of tax credits in the new Tribunals structure. In this context, we reiterate our earlier suggestion that tax credits appeals might best remain with the Social Entitlement Chamber rather than transfer to the Tax Chamber, on the basis that appellants could be better served in the former. We recommend that the pros and

cons are fully debated before any final decision is taken.

2.1.2. In the event that the transfer does go ahead, there are a number of points in the Draft Social Entitlement rules which are not there for tax, for example about medical examinations. Whilst it is probably right that the Tax Chamber rules are not designed at the outset to cater comprehensively for tax credits (but rather should be amended/augmented if and when tax credits appeals are transferred), we would make the general point that the rules should be designed with a possible future transfer in mind. In this respect, the rules should pave the way for later transfer and care taken that they do not include inappropriate contradictions with the Social Entitlement Chamber rules.

2.1.3. A crucial difference between the Social Entitlement and Tax Chamber rules is that Social Entitlement has a no-costs regime without exceptions, unlike Tax. If and when tax credit appeals are transferred to the Tax Chamber, it is essential that appellants should not be deterred by any perceived risk of costs.

2.2. ***The First-tier Tribunal (Tax Chamber) Rules 2009***

Overriding objective and parties' obligation to co-operate with the tribunal

2.2.1. As a general context for the rules, these objectives are mostly encouraging. Particularly for the unrepresented party, it is important that the Tribunal process deals with them fairly in order to achieve the overriding objective of ensuring that justice is served.

2.2.2. In terms of the parties' responsibilities, we note that Rule 2(4)(a) states that they must *'help the Tribunal to further the overriding objective'.* We do not believe this requirement is feasible or fair for unrepresented appellants, and it should be deleted.

Directions

2.2.3. Rule 6(6) states *'Unless the Tribunal considers that there is a good reason not to do so, the Tribunal must send written notice of any direction to every party to the proceedings…'.* We are doubtful whether there would ever be justification to not send written notice of directions and it would be useful to have some indication of the type of circumstances in which it is envisaged that this would be used. Presumably it would only be in extremely rare cases?

Failure to comply with rules, practice directions or tribunal directions

2.2.4. We feel that Rule 7(2) should include a further qualification that the Tribunal should take into account the circumstances of the party and any reason given for failure to comply.

2.2.5. There is a need for leniency where the reason for failure to comply was that the party was, for example, unrepresented, or had not the means to travel to attend to give evidence, etc.

Strike out of a party's case

2.2.6. Rather than striking out, reference should be made to the Upper Tribunal in a case where the First-tier Tribunal does not have jurisdiction but the Upper Tribunal would (such as a case susceptible of judicial review). For instance, an appellant might appeal against the validity of a notice, and against a penalty for non-compliance: the

First-tier Tribunal could refer the first matter to the Upper Tribunal if it felt it did not have jurisdiction itself.

2.2.7. We comment below (para 2.3.6) on the issue of reinstatement, but at the very least we think it should be made clear here that the Tribunal has a duty to advise the party of the intention to strike out the case and provide an opportunity for representations. If the case is struck out before such an opportunity is given, the party must be clearly notified of their ability to apply for reinstatement. Why do the Upper Tribunal rules impose a 28-day deadline on such application for reinstatement but no deadline is specified for the First-tier? Further consideration should be given to whether a time limit is appropriate and, if so, whether this should be consistent between the First-tier and Upper Tribunals.

Costs

2.2.8. Rule 11(1)(b) refers to making an award of costs in cases where 'the Tribunal considers that a party has acted unreasonably in bringing or conducting the proceedings'. We are concerned about the use of the term 'bringing' in this context, as we would not want to see this used to penalise, say, an unrepresented appellant who brought a hopeless case in the absence of being able to engage the services of an adviser in bringing the proceedings.

2.2.9. Rule 11(1)(c) implies that the appellant has to take positive action to exclude themselves from the cost regime at outset. If this is the case, it must be made very clear indeed to appellants that doing nothing could result in a costs award. A procedure for notifying them of this fact should be written into the rules and more detail needs to be given about the basis on which costs will be awarded in complex cases.

2.2.10. Rule 11(2) gives some reassurance for appellants of limited means, suggesting that the tribunal has to assess their ability to pay and allow them an opportunity to make representations before making an order against them. This is therefore a welcome addition to the rules.

Representatives

2.2.11. Questions are raised under the draft Rule 13(5) as to the authorisation of representatives. It is our view that there should be no bar on an appellant having whoever they wish to represent them, for example as a McKenzie Friend.

Sending and delivery of documents

2.2.12. Rule 15(3) imposes a requirement that a party must accept, for example, electronic delivery of documents if they have provided a fax number or email address. This seems restrictive. We do not see why 15(3) should override 15(2). What happens, for example, if documents are sent in an electronic format that the party is unable to view or access? An alternative must be provided in that instance, at the party's request. If indeed such restrictions are thought necessary, it must be made very clear in the application process, so that the appellant realises the implications before providing fax numbers, email addresses, etc.

2.2.13. There is of course a flipside to this in that this restriction might protect an appellant in the event, say, that HMRC provides an email address which later turns out to be dysfunctional. What safeguards will the Tribunal adopt to ensure that electronic

communications do in fact reach their intended destination? For example, will the recipient be asked to acknowledge receipt?

Starting proceedings

2.2.14. Rule 17 does not mention the possibility of applying to postpone payment of tax, which can be done at the same time as making the appeal.

2.2.15. Rule 17, and also Rules 20 and 21, appear to require the appellant to provide a great deal of information with the appeal. Many unrepresented appellants are likely to find this difficult; they will need help in preparing documents and statements. The requirements should not be so onerous that they deter potential appellants from making an appeal in the first place, nor should they invalidate an appeal if the appellant has not managed to meet all the requirements.

Allocation of cases

2.2.16. As a general point, we have reservations about including a prescriptive list of cases and categories in the Rules. This creates the problem of keeping a list up to date and making sure that it is complete. The Rules should provide guidelines and examples only.

Paper hearings

2.2.17. One example of the immediately preceding point is that the paper category will have to be reviewed when the new penalties regime for failure to notify chargeability takes effect under Schedule 41 of the Finance Bill 2008 – it would be inappropriate for tax-geared, behaviour-based penalties to be relegated to a paper hearing by default.

Simple, standard and complex cases

2.2.18. There are different requirements for the information accompanying an appeal, depending on whether it is a simple case (Rule 20) or a standard or complex one (Rule 21). Does that mean that before making an appeal, the appellant must first decide what sort of case he has? If so, this is unrealistic and contrary to the rule that the Tribunal will allocate the case once the appeal has been received.

Timescale – disparity of treatment for Tribunal and parties to the case

2.2.19. Rule 19 allows the Tribunal 42 days for action, but only 28 to the respondent. This disparity seems inappropriate. The rules are also unfair as time runs against the appellant from when the respondent **sends** the document, while time does not run against the respondent until the document sent by the appellant is **received**.

2.2.20. It is also not clear how the appellant is to know the precise date on which the respondent sends the statement, although that date is crucial in determining when the appellant's 28 days starts to run.

Notices of appeal starting a case

2.2.21. Rules 20 and 21 impose inappropriate requirements on unrepresented appellants, for whom it will be almost impossible to produce all the specified items with the notice of appeal. There should be provision for the appeal notice to be given, and for them to subsequently produce the other required items, with any necessary assistance from the Tribunal staff.

Further evidence and submissions

2.2.22. What is meant by a 'full disclosure process' under Rule 24(1)(a)? This requires clarification.

2.2.23. We can envisage problems with the proposed power to issue directions requesting expert evidence (Rule 24(d)). What will happen where a party cannot afford to appoint an expert?

2.2.24. Rule 24(2)(b) deals with exclusion of evidence in certain circumstances. We feel there is a case for including some further wording along the lines of *'unless there is a reasonable excuse for failing to meet the time limit allowed or for failing to comply in the manner directed'* to safeguard the unrepresented who might inadvertently fail to comply exactly as directed, or take longer to comply.

Time and place of hearings

2.2.25. We feel there should be additional rules here requiring the Tribunal to have assessed any special needs of the parties prior to giving notice of the hearing time or venue. The case management process must take account of factors such as disability, lack of means to attend a hearing at a distant location and so forth in ensuring the hearing takes place at a suitable time and location.

Decisions

2.2.26. There should be a time limit within which the Tribunal must issue a final determination. 'As soon as reasonably practicable' (Rule 31(2)) is not adequate.

Setting aside a final determination

2.2.27. We would like to see provision for setting aside a final determination if a new issue of law emerges subsequently, one which was not known to either party or to the Tribunal at the time of the hearing, and it is in the interests of justice for the matter to be reconsidered in the light of the new issue of law. This may include, for example, a case which was correctly decided in domestic UK law, but it later emerges that domestic UK law is in contravention of EU law, or human rights law, or some other supra-national jurisdiction to which the UK is a signatory.

2.2.28. Given the preceding comments, the 28-day deadline should be made more flexible in appropriate cases.

2.3. ***The Upper Tribunal Rules 2009***

General points

2.3.1. Many of the points made on the First Tier Tribunal rules are replicated in the Upper Tribunal draft rules and, where they are of relevance, our comments above should also be taken as applying to the Upper Tribunal.

Expression of time limits

2.3.2. We query the way the time limits are expressed. The appellant has to send items 'so that they are received' by the Upper Tribunal by a specified date. This will place an impossible burden on appellants if, for example, there is a postal strike, or things

simply get lost in the post. Is it not preferable to simply rely on the Interpretation Act section 7, where if something is sent by post, properly addressed and with postage pre-paid, it is deemed to be received 'at the time at which the letter would be delivered in the ordinary course of post'.

2.3.3. We also view that there is a need for consistency in the expression of time limits. Many instances specify the need for action within X days but the term 'one month' is also used on at least one occasion. Ambiguity should be avoided so perhaps it would be preferable to express all time limits in terms of days.

Overriding objective and parties' obligation to co-operate with the tribunal

2.3.4. *Rule 2(2)(e) – 'avoid delay':* In the First Tier rules, this same clause says 'avoid delay**, so far as compatible with proper consideration of the rules**'. What is the rationale for this being different for the Upper Tribunal?

Case management powers

2.3.5. *Rule 5(2)(f) – 'permit a party to withhold disclosure of a document that the party would otherwise be required to disclose':* We view that this clause requires further discussion and explanation of on what grounds and in what circumstances it is envisaged that it will be used. The same clause does not seem to be included in the First Tier rules. Again, we would like to understand the rationale of having this additional power in the Upper Tribunal.

Striking out a party's case

2.3.6. It seems odd that the wording here is different than the wording of the same provisions in the First Tier rules. What is the rationale for this? For example, the Upper Tribunal rules specify that the party must be given an opportunity to make representations, and gives a deadline for a reinstatement application to be made, whereas the First Tier rules are less specific. The First Tier rules only seem to allow application for reinstatement where the Tribunal has failed to first give the party an opportunity to make representations.

Orders for costs

2.3.7. We query the use of the term 'improperly' in Rule 10(1)(b), and feel that we need to have a better understanding of what this will mean in practice.

Time and place of hearings

2.3.8. We understand that cases before the Upper Tribunal will only be heard in limited locations and that its main base will be in London. For this reason, the rules as to time and place of hearings need to allow some flexibility for the parties to make alternative arrangements if those proposed are inconvenient (whilst of course not unfairly delaying the process). There needs to be provision for the appellant to specify at the outset where they would like their case to be heard. We also question whether 14 days is sufficient as a minimum period of notice, given that parties will have to make travel arrangements to appear at a hearing. We would hope that the case management process will keep parties informed as to the likely date of the hearing so that its confirmation will not be unexpected.

Hearings in a party's absence

2.3.9. Rule 38 refers to the Tribunal being *'satisfied that the party was duly notified of the hearing'.* How will the process ensure that this is the case? For example, if postal or email notification is given, it would be possible that the notification were never received. Will efforts be made to contact the party on the day of the hearing if they fail to appear?

Ex parte hearings

2.3.10. The Rules as they are drafted only appear to envisage hearings with appellants and respondents, not catering at all for ex parte hearings. We therefore believe that ex parte hearings require some additional rules

LITRG
1 July 2008