

LOW INCOMES TAX REFORM GROUP

Tax Appeals against decisions made by HMRC: Technical document, June 2008

**Draft Statutory Instrument 'The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2008'
COMMENTS AND OBSERVATIONS**

Executive summary

The Low Incomes Tax Reform Group (LITRG) is pleased to have this opportunity of commenting on this draft statutory instrument and the technical document accompanying it. As an initiative of the Chartered Institute of Taxation to give a voice to the unrepresented, we approach this consultation from the perspective of the low-income, unrepresented appellant.

Our response to HMRC's proposed internal reviews process was one of qualified support and we are pleased to note that reviews will proceed on an optional but statutory framework, as we originally favoured. Our main reservations about what is proposed by the draft regulations are twofold.

First, it is important for unrepresented taxpayers that processes are developed with clarity and simplicity at their root. Undue complexity will prevent justice from being served as taxpayers will not secure their rights. In its administration of the process, HMRC must support taxpayers through clear communications and by reminding them of their rights at each step in the process.

Secondly, actual and perceived independence from the Government body against whose decision an appeal is made is fundamental to the Leggatt recommendations and the reforms based upon them. But the combined effect of regulations 43D and 43H is to route appeals to HMRC first, and then – only if the appellant does not ask for a review, or HMRC don't offer one – do appeals go to the tribunal. We would prefer a system whereby the appeal goes first to the tribunal, and the tribunal keeps a watching brief while HMRC and the taxpayer try to reach agreement through the internal review process.

Specifically:

- We think it should be the duty of HMRC to offer a review in all cases where the option is available. The appellant should not have to ask for it.
- There is no provision in the draft law stating how the internal review process itself will be organised and overseen within HMRC, nor is there any definition

of a review. A provision to the effect that 'the nature and extent of a review shall be such as appears appropriate to HMRC' gives no reassurance that the review will be in any way preferable to an appeal proper, or that there will be appropriate safeguards for the appellant.

- Those carrying out the review must be independent of the original HMRC decision maker(s) and must be able to come to a different decision. They must be prepared to explain their decision to the taxpayer or tax credit claimant.
- For the review to be effective, the taxpayer must have access to the reviewer during the course of the review.
- Tax credits appeals could prove an ideal candidate for internal review, which could also help HMRC improve their own systems to handle cases better in the first place, and it is unclear to us why they are not to be handled in this way from the outset.
- No clear distinction is made either in the draft legislation or in the process between HMRC's internal review and an appeal to the Tribunal. We recommend that this distinction be defined, perhaps by use of the term 'objection' for the review process as distinct from 'appeal' to the tribunal.
- Throughout, there are imbalances between the time limits as applied to the taxpayer and the longer periods allowed to HMRC. There is a similar imbalance when time runs against the taxpayer from the date of issue of a document, but against HMRC from the date of its receipt.
- It is wholly unsatisfactory that the taxpayer's appeal rights can be prejudiced by HMRC's simple failure to act within 45 days.
- There should be clearer definition of the procedure for HMRC proposing a longer review period than 45 days and agreeing it with the taxpayer. It is important that the taxpayer is aware from the outset that the review might take longer than 45 days to conclude and that his or her appeal rights might be affected by HMRC's delay.
- Where the taxpayer has appointed a representative to act on his or her behalf in the appeal, documents should be issued to both the taxpayer and to the representative.
- It would seem sensible to align the grounds for granting, or refusing, leave to appeal out of time with those to be applied by the tribunal, whether on a direct application or on an appeal against HMRC's refusal to consent to a late appeal. Thus, the grounds on which HMRC arrives at its decision should be the same grounds as those that will in due course be applied by the tribunal.
- We question the desirability of having two parallel sets of rules at the start of the new system, with appeals pending before the commencement date being dealt with under the old rules, and other cases under the new rules. We also query why HMRC should need 90 days to conclude a review in cases which straddle the commencement date.

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 comments on the Technical Document and draft Statutory Instrument***

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

2. **Comments**

2.1. ***General comments***

- 2.1.1. Following recommendations we made on the appeals process in our 2006 report *Tax appeals – a low income perspective*¹, we submitted responses to HMRC and Ministry of Justice consultations launched in late 2007 on the transfer of tax appeals to the new Tribunals system from April 2009².
- 2.1.2. Our response to HMRC's proposed internal reviews process was one of qualified support and we are pleased to note that reviews will proceed on an optional but statutory framework, as we originally favoured. We also welcome the opportunity to comment on the technical aspects of the process and the draft statutory instrument to transfer functions to the new Tribunals.
- 2.1.3. For unrepresented taxpayers, it is important to ensure that processes are developed with clarity and simplicity at their root. Undue complexity will prevent justice from being served as taxpayers will not secure their rights. In its administration of the process, HMRC need to be supportive of taxpayers through clear communications and by reminding them at each step in the process of their rights to either a review or more formal appeal.

2.2. ***Structure of legislation***

- 2.2.1. Actual and perceived independence from the Government body against whose decision an appeal is made is fundamental to the Leggatt recommendations and the reforms based upon them. Our own report *Tax Appeals: a Low Income Perspective* (op cit) contains qualitative evidence of how tax appellants perceive the General Commissioners as a branch of HMRC, and how the fact that an appeal against an HMRC decision is made to HMRC reinforces the view (even if mistaken in fact) that the appeal process lacks independence.
- 2.2.2. We are concerned that the draft regulations do little to dispel the root cause of this perception. The combined effect of regulations 43D and 43H is to route appeals to HMRC first, and then – only if the appellant does not ask for a review, or HMRC don't offer one – do appeals go to the tribunal. The role of the tribunal is thereby downgraded to 'sweeping up' appeals that do not go through the review process. It appears to be secondary to that of HMRC in the appeals process.

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

² See http://www.litrg.org.uk/uploadedfiles/document/1_484_Taxappeals.pdf and <http://www.litrg.org.uk/reports/submissions.cfm?id=504>

- 2.2.3. In our response to *Tax Appeals against decisions made by HMRC* (December 2007) we said that an internal review system should be designed to complement the new tribunal structure rather than conflict with it or be viewed as a substitute for it. Moreover, we cannot support a system that does not, both in fact and in appearance, give primacy to the tribunal rather than to any non-independent body. We think the draft regulations conflict with the spirit of the reforms and would prefer to see a system whereby the appeal goes first to the tribunal, and the tribunal keeps a watching brief while HMRC and the taxpayer try to reach agreement through the internal review process.

2.3. ***Offer of review***

- 2.3.1. The draft regulations provide for (a) the appellant to ask for a review, or (b) HMRC to offer one, and (c), if neither of those happens, for the appellant to have a right of appeal to the tribunal. If (a), then HMRC must state their view within 30 days, and then offer a review.
- 2.3.2. We have already stated our views on treating the tribunal effectively as a default option, when it should be central to the whole process.
- 2.3.3. For the review process to be effective, we think it far better for HMRC to be required to offer a review in all cases in which a review is appropriate, immediately on receipt of the notice of appeal. The appellant will then have the option to accept or refuse the offer. That ensures the review process is brought to the appellant's notice, in cases where they were not aware of it. Automating the process, rather than allowing HMRC to decide whether to offer a review, will help reduce delays.

2.4. ***Conduct of internal reviews***

- 2.4.1. There does not appear to be any provision in the draft law stating how the internal review process itself will be organised and overseen within HMRC. Nor is there any description of what a review is or what its purpose is. We know that HMRC are undertaking trials of the review process in the run up to April 2009, but we would like to see some reassurance as regards the robustness of the system.
- 2.4.2. Draft regulation 43F says that 'the nature and extent of a review shall be such as appears appropriate to HMRC'. There is no reassurance in this wording that the review will be in any way preferable to an appeal proper, or that there will be appropriate safeguards for the appellant. In our response to *Tax appeals against decisions made by HMRC* we cited a number of safeguards that we would expect to see in any review process, and we now list those safeguards for which provision is not made by these draft regulations:
- Those opting for internal review should retain access to the tribunal at any time;
 - Options and rights should be clearly explained to the appellant at the outset, with HMRC playing a vital role in this particularly where the appellant is unrepresented;
 - An internal review must distance itself as far as possible from internal influencing factors and should include external representatives on its panel or be subject to external audit;
 - Timescales should be set and maintained to provide certainty for the appellant, and proper provision made for late appeals;

- A separately identifiable team should be responsible for review, allowing ease of monitoring costs, workload and benefits.

2.4.3. We would reiterate one of our key points from our previous response: that it is vital for the success of the review system that it is, and is seen to be, independent for it to be effective. Those carrying out the review must be independent of the original HMRC decision maker(s) and must be able to come to a different decision. They must be prepared to explain their decision to the taxpayer or tax credit claimant. This is particularly necessary for the unrepresented objector to ensure they have confidence in the system.

2.4.4. We understood from the HMRC team organising trial reviews that the taxpayer would have access to the HMRC reviewer during the review. The efficacy of the review would not be best served by denying the taxpayer access to the reviewer while retaining communication between reviewer and original decision maker. Similarly, the reviewer should be encouraged to contact the taxpayer or agent if anything needs clarification.

2.5. ***Tax credits***

2.5.1. Para 1.18 of the Technical document suggests that the internal reviews process will not be available to tax credits claimants until such time as tax credits appeals might be transferred from the Social Entitlement Chamber to the Tax Chamber of the new Tribunals system. We would appreciate clarification on why this is suggested and the justification for having separate treatment for tax credits, as there are certain administrative decisions in the tax credits application process for which it could be useful to have an internal review process provided that the review is conducted by someone sufficiently senior.

2.5.2. A review facility could, for example, prevent escalation of complaints to the Adjudicator or Ombudsman where the claimant has no other appeal route. Arguably, it is more important to have a review facility for tax credits cases than for tax, as claimants are far more likely to be unrepresented. The Adjudicator's and Ombudsman's roles are to look at maladministration which is unfortunately often the issue in tax credits disputes. This therefore makes tax credits an ideal candidate for internal review, which could also help HMRC improve their own systems so as to handle cases better in the first place.

2.6. ***Terminology in the law – internal reviews versus Tribunal appeals***

2.6.1. The proposals as they are currently drafted could cause confusion in terms of the terminology used and wording of the legislation, as no clear distinction is made between HMRC's internal review and an appeal to the Tribunal. This rather confirms the impression of the appeal to the tribunal as secondary to, or as a default from, the internal review, which as we say at paras 2.2.2 and 2.2.3 gives the wrong emphasis, and is consonant neither with the spirit of the Leggatt reforms nor with the proposed first-tier tribunal rules.

2.6.2. Para 3.15 suggests that one possibility is to define the distinction in legislation, and we would recommend that this distinction is indeed so defined. The term 'objection' has merit: it is clearly distinct from 'appeal' and sounds less confrontational. It also keeps the review process distinct from the formal appeal to the tribunal. Whichever term or terms are used to describe the process to the appellant, great care should be taken to keep it simple. It is vital to avoid the kind of confusion that exists within the tax credits system where a distinction is drawn between 'appeal' and a 'dispute'

against an overpayment; a distinction notorious for its capacity to confuse both claimant and official.

2.7. *Timescale for action*

2.7.1. Throughout, there seems to be an imbalance between the taxpayer's time limits (eg 30 days to respond) and those allowed to HMRC (eg 45 days to complete a review). This produces an element of bias in favour of HMRC, giving them more time to review a case than is allowed to the taxpayer in preparing their 'objection'. The taxpayer may require time to review their case and to seek advice from a third party, be that a paid representative or voluntary sector adviser.

2.7.2. Continuing on this theme, the draft rules say that the taxpayer has to act within 30 days of the **date of issue of a document**, whereas HMRC only has to act within 45 days of the **date of receipt**. Again, this seems unfair. It allows HMRC the benefit of the doubt in terms of postal delays and so forth, but does not provide the same for the taxpayer. This is illustrated in the proposed TMA S43E(2) compared to S43F(1).

2.8. *Concluding a review on the basis of HMRC's inaction*

2.8.1. Para 3.39 suggests that HMRC's inaction is to be treated as a conclusion of the review, apparently without the appellant receiving any notification. Expiry of the review period triggers the start of the 30-day deadline to appeal to the Tribunal. This could easily be missed by the unrepresented appellant if they do not receive a reminder to this effect. This is wholly unsatisfactory: HMRC should be obliged to issue a notice that the review period has expired, even if their review has reached no conclusion or a decision of no action. This should also give details of further appeal options and deadlines. The time for appealing to the Tribunal should not start to run until the appellant has received that notice.

2.8.2. Such a notice is even more relevant if it is possible that the appellant may not actually know precisely when the 45-day period expires. In this respect, it is intended that the review period will commence from the date HMRC receive the request for review. The date of **receipt** could be unknown to the taxpayer, unless HMRC is required by law to acknowledge receipt of the review request and to confirm the exact date and timescale of the review. At present, the draft law does not appear to require HMRC to provide such an acknowledgement; something we recommend should be rectified in revised drafting.

2.8.3. Alternatively, as we recommend in para 2.2.3 above, the initial appeal should be to the tribunal, so that if the review process fails to produce any result, the appellant can still refer back to the tribunal under cover of the existing appeal notice, and not have their appeal rights prejudiced by HMRC's inaction or delay.

2.9. *Period of review other than 45 days*

2.9.1. The drafting of Section 43F 'Conduct of review' is unclear in terms of the flexibility to agree a review period of other than 45 days. Subsection 1 refers to a 45-day review period 'unless another period has been agreed' and then subsection 3 goes on to refer to concluding a review where 'no longer period is **subsequently** agreed'. Does this mean that HMRC could attempt at any stage in the process to agree a longer review period? We believe that there should be clearer definition of the procedure for HMRC proposing a longer review period and agreeing this with the taxpayer so that, wherever possible, the taxpayer is aware from the outset that the review might take longer than 45 days to conclude. Of course, if the appellant does not agree to a

longer period, the review will be deemed to conclude at the expiry of 45 days, which prevents HMRC from prevaricating indefinitely, but it would be preferable to have a clear procedure.

- 2.9.2. Following on from this, para 3.19 confirms that the appellant will not be able to notify the tribunal of his appeal during the internal review process. This makes it important to set out the procedure for agreeing to a longer internal review period, as recommended above. If, for example, the taxpayer opts for internal review on the understanding this will take 45 days, yet HMRC subsequently request a longer period, the taxpayer may wish at that point to instead appeal directly to the Tribunal rather than proceed with the review. Such an option should be provided for in the law.

2.10. ***Persons acting on behalf of the appellant***

- 2.10.1. These provisions permit documents etc to be sent to a representative of the appellant. Normal practice elsewhere in the tax system would suggest that the appellant should be the recipient of anything that affects his or her appeal rights, with a copy to any person acting on the appellant's behalf in relation to the appeal. We trust that that will be the practice under the review procedures too.

2.11. ***Late appeals***

- 2.11.1. The new Section 43H(5) allows an appellant to apply to the tribunal for leave to notify an appeal out of time, and the tribunal may grant leave, presumably under the rules of the appropriate chamber. In comparison, the new Section 49 provides that leave to notify HMRC of an appeal out of time may be granted by HMRC on 'reasonable excuse' grounds, or refused by HMRC whereupon the appellant may appeal to the tribunal. Presumably 43H(5) applies in any case where the appellant chooses to go straight to the tribunal, while Section 49 is relevant where the appellant wants an internal review. It would seem sensible, however, to align the grounds for granting, or refusing, leave with those to be applied by the tribunal, whether on a direct application for leave to appeal out of time, or on an appeal against HMRC's refusal to consent to a late appeal. Thus, the grounds that will in due course be applied by the tribunal should be the grounds which HMRC will arrive at its own decision. Otherwise, HMRC could refuse consent on the grounds that there is no reasonable excuse, but the tribunal could allow an appeal against HMRC's refusal on different grounds, eg the interests of justice, or good prospects that the appeal will succeed.

2.12. ***Schedule 2, transitional provisions***

- 2.12.1. Paragraph 5, read with paragraph 1, provides that where proceedings are 'pending' at the commencement date, appeals should be heard under the old rules. In other cases, appeals will be heard under the new rules. Where notice of appeal is received by HMRC before the commencement date, and a review is either requested or offered after that date, the period allowed to HMRC to complete the review will be 90 days, not 45.
- 2.12.2. There is no definition of when proceedings are 'pending'; we assume it means waiting to be listed or to be heard. We understood that cases which were pending on the commencement date would be dealt with under the new rules if the hearing post-dated the commencement date, but that now appears not to be the case. Is it intended to have two parallel jurisdictions at the start of the new system? Would it not be preferable to have just the one, except where an appeal had already been part-heard before the commencement date?

2.12.3. There is a drafting error in para 6, which we think should read 'Subject to paragraph 7, in all other cases . . .'

2.12.4. Finally, we do not understand why it is necessary to double the time for HMRC to carry out a review simply because the appeal straddles the commencement date.

LITRG
25 July 2008