THE CHARTERED INSTITUTE OF TAXATION

LOW INCOMES TAX REFORM GROUP

Tribunal Procedure Committee draft documents:
The First-tier Tribunal (Tax Chamber) Rules 2009 – Draft 18 August 2008 and
The Upper Tribunal Rules 2008 – Draft 19 August 2008
RESPONSE TO CONSULTATIVE DOCUMENTS

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. We therefore welcome this opportunity to comment 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. Our comments follow the preliminary comments we made in advance of the formal consultation.

2. Comments on the Draft Rules

2.1. *General comments*

Tax Credits

2.1.1. We remain concerned about the proposed treatment of tax credits in the new Tribunals structure. Our firm view remains that tax credits appeals should stay with the Social Entitlement Chamber rather than transfer to the Tax Chamber, on the basis that appellants will be better served in the former. Again, we recommend that the pros and cons are fully debated before any final decision is taken.

12 UPPER BELGRAVE STREET
LONDON SW1X 8BB

REGISTERED AS A CHARITY NO 1037771

Tel: +44 (0)20 7235 9381
Fax: +44 (0)20 7235 2562
E-mail: post@ciot.org.uk
www.tax.org.uk

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CONFEDERATION FISCALE EUROPEENNE

2.1.2. In the event that the transfer does go ahead, the Tax Chamber rules should be adjusted now so that they do not include inappropriate contradictions with the Social Entitlement Chamber rules.

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

2.1.4. Another important difference is that in the Social Entitlement Chamber, provision is made for appellants to be reimbursed out-of-pocket expenses incurred in attending a hearing. It would be unjust for tax credit appellants to lose that right on tax credit appeals being transferred to another chamber that did not make such provision in its rules. In our view, the Tribunal should be empowered to make a direction that appellants on low incomes should receive assistance with the expenses of attending a hearing.

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

Rule 2 – Overriding objective and parties' obligation to co-operate with the Tribunal

2.2.1. We repeat our previous comments that these objectives set the right tone. 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 previously commented that we do not believe this requirement is feasible or fair for unrepresented appellants, and it should be deleted, but note that it remains in the rules. If this is indeed to remain, we would make two recommendations.

2.2.3. First, that the rule be amended to reflect more clearly the limited means of a low-income, unrepresented taxpayer to support the Tribunal in achieving its objective. We would therefore advocate adding '…so far as they are able' or similar. Otherwise, if (for example) the appellant has to forgo a day's wages, or incur additional childcare or other costs which they cannot afford, in order to 'help the Tribunal to further the overriding objective', unfairness could result.

2.2.4. Secondly, that every unrepresented appellant should receive good, plain English guidance as to the Tribunal rules and procedures in order to enable them to fulfil their obligations. Such guidance should be produced in hard copy as well as being available on the web.

Rule 3 – Arbitration

2.2.5. We note that reference to Alternative Dispute Resolution (ADR) has been removed from this rule, when compared to the draft dated 11 June 2008. Throughout consultation to date, we have been in favour of some means of ADR for unrepresented taxpayers to help resolve their case without bearing the full costs of going to the Tribunal. However, now that HMRC are to offer an internal review, there is no need for duplication of the facility at First-tier Tribunal level. But we remain convinced that a pro bono service for low-income, unrepresented appellants to obtain assistance with presenting their case, or directing unrepresented appellants to where such a service can be found, would be in the interests of justice and would also save

costs in the long run. This proposal was outlined in our response to the full Tribunals consultation which closed on 22 February 2008 (para 7.29ff of our response)[1].

Rule 5 – Case management powers

2.2.6. We would encourage the First-tier Tribunal to make maximum use of its case management powers under Rule 5 so as to assist unrepresented appellants unfamiliar with the procedures. This should be absolutely explicit in the rules (for instance, we would prefer 'shall' to 'may' in Rule 5(1)).

2.2.7. On receipt of a notice of appeal, HMRC will normally offer an internal review of its decision. This may help save costs and may often achieve a just result, though as a process it can never, for obvious reasons, be wholly impartial. Appellants may still appeal directly to the First-tier Tribunal either against the initial HMRC decision, or against a decision on internal review.

2.2.8. In order to gain the confidence of unrepresented appellants, it is essential that the Tribunal processes are not only independent of the HMRC process in the spirit of the Leggatt Report, but are manifestly seen to be independent. In particular, appellants should have free access to the Tribunal and its case management service at all times (except when they have opted for internal review and that review is in progress).

2.2.9. The Ministry of Justice must of course also be satisfied that the wording of the rules allows sufficient flexibility to adopt different procedures for different types of appeals and hearings. It might be considered appropriate to 'test' the rules against a range of theoretical cases, or actual former cases heard before the Commissioners, by way of a practicality check.

2.2.10. We realise that Rule 5(3) gives the Tribunal a wide discretion, and we trust that the requirement in Rule 5(3)(i) (that a party should produce a bundle for a hearing) would not be imposed on an unrepresented appellant without providing them with the means to comply, eg the assistance of a court official or a pro bono representative.

Rule 6 – Procedure for applying for and giving directions

2.2.11. Rule 6(4) 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…'.* As mentioned in our preliminary comments earlier this year, we are doubtful whether there would ever be a good reason not to send written notice of directions and it would be useful to have some indication of the type of circumstances in which a Tribunal might be expected to reach such a decision. Presumably it would only be in extremely rare cases?

Rule 7 – Failure to comply with rules etc

2.2.12. We previously suggested 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, but note this has not been included. Will such circumstances be taken into account in evaluating the action to take which the Tribunal *'considers just'*? We would prefer the rules to be explicit.

[1] http://www.litrg.org.uk/reports/submissions.cfm?id=504

2.2.13. 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.

Rule 8 – Striking out a party's case

2.2.14. We are concerned that the wording of 8(1) refers to a case being 'automatically' struck out where the non-compliant party has been warned that this will be the consequence of failure to act.

2.2.15. Whilst this may be the right course of action in a number of cases, this rule gives no flexibility to the Tribunal to be lenient; for example to make an allowance for the party in the event of exceptional circumstances or where they have a reasonable excuse for failure to comply with the direction. We therefore recommend that this wording be changed to allow more flexibility.

2.2.16. The striking-out provisions (Rule 8) are new to tax appeals, and as drafted would not be even-handed where the appellant is an unrepresented individual and the respondent is HMRC. If the appellant fails to comply with a direction, etc, the proceedings are struck out; if the respondent fails to do so, it is merely barred from taking any further part in the proceedings and the Tribunal 'need not consider any response or submissions made by that respondent' (Rule 8(8), (9)). In practice, it is not uncommon for HMRC to ignore directions with impunity. We recommend that where the respondent fails to comply with directions of the Tax Chamber, it should not only be barred from taking part in the proceedings, but the Tribunal should be able to make a decision on the appeal in favour of the appellant.

2.2.17. Regarding 8(2), 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.

2.2.18. We are pleased that our previous suggestion to give an appellant the opportunity to make representations in relation to the proposed striking out has now been incorporated at 8(4).

2.2.19. We note that the First-Tier Tribunal rules have now been aligned with the Upper Tribunal in terms of imposing a 28-day time limit for an appellant to apply for reinstatement (Rule 8(7)). As a general point on time limits, direct taxes have traditionally used 30 days as a standard – would it not be clearer for the Tax Tribunals to follow this?

Rule 10 – Costs

2.2.20. We note that Rule 10(1)(b) has replaced the reference to a party acting unreasonably in 'bringing' proceedings with 'in connection with' proceedings. We assume this would now be interpreted as protecting an unrepresented appellant who, say, brought a hopeless case in the absence of being able to engage the services of an adviser in bringing the proceedings (so long as they act reasonably in the course of the proceedings themselves).

2.2.21. For complex cases, Rule 10(1)(c) still implies that the appellant has to take positive action to exclude themselves from the costs 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. We reiterate that 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. Just because a party is unrepresented, or on a low income, it does not follow that issues raised by their tax appeal may not be 'complex'.

2.2.22. Again, we welcome Rule 10(2)(b) which 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.

2.2.23. We are concerned that restricting the recovery of 'wasted costs' to costs incurred 'since the proceedings were started in the Tribunal' will not adequately compensate appellants where proceedings are abandoned by the respondent, or where the respondent's case proves to be frivolous or badly handled. In such cases, the preparatory costs may be greater than anything spent on the proceedings themselves.

Rule 11 – Representatives

2.2.24. We welcome the modifications to Rule 11(5) which now allow more flexibility for unrepresented appellants to bring along support, for example a McKenzie Friend.

Rule 13 – Sending and delivery of documents

2.2.25. We welcome the introduction of Rule 13(4) which now allows request of a hard copy in the event of an electronic communication being unacceptable to the recipient. It will particularly assist a low-income appellant who might otherwise incur the cost of printing out long and bulky submissions from the respondent.

Rule 14 – Use of documents and information

2.2.26. We are not convinced that the rules on publication and disclosure are adequate. It appears that Rule 14 does not cover publication of the judgement itself and neither does Rule 35. In terms of publishing judgements, convergence of the (published) VAT Tribunal and (private) General Commissioners rules is a difficult issue, but we think the rules need to cover it. This could be achieved by saying that either party can request that the decision is to be kept private to the parties, but giving the Tribunal overriding discretion if publication of the judgement is in the public interest (in which case the publication must be anonymised).

Rule 15 – Disclosure, evidence and submissions

2.2.27. We note that the term 'full disclosure process' now appears to have been described under Rule 15(2). Exercise of this rule should have regard to situations where HMRC have already exercised inspection powers and taken copies of documents etc (eg see new powers in Schedule 36 FA 2008), to avoid repeated requests being made of the appellant, thereby placing an unnecessary burden on them.

2.2.28. We can envisage problems with the proposed power to issue directions requesting expert evidence (Rule 15(1)(c)). What will happen where a party cannot afford to appoint an expert?

2.2.29. Rule 15(3)(b) deals with exclusion of evidence in certain circumstances. We repeat our earlier recommendation that some further wording should be included 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.

Part 3 – Proceedings before the Tribunal – Starting appeal proceedings

2.2.30. The rules do not mention the possibility of applying to postpone payment of tax, which can be done at the same time as making the appeal.

2.2.31. There is a major drafting flaw in that the appellant needs first to understand what track their appeal has been allocated to, otherwise they will not know if they need to state grounds of appeal or which practice directions to comply with. It seems to us there ought to be two stages – the appellant makes a simple brief appeal, then their case is allocated and MoJ tells them what else they need to supply. The two stages seem to have been combined in these rules.

2.2.32. We previously commented that the rules appear to require the appellant to provide a great deal of information with the notice of appeal. In the revised draft, there does not seem to have been significant relaxation in those requirements and we reiterate the following points from our last submission: Many unrepresented appellants are likely to find preparation of their case 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.

2.2.33. There also seems to be an imbalance in time limits, for example in Paper track cases, the respondent has 42 days to state their case (Rule 23), but the appellant only has 30 days to reply (Rule 24). 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**. 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.

Rule 21 – Allocation of cases to tracks

2.2.34. We are pleased to note that the previous prescribed list of cases has been removed, as this would have been unduly restrictive and time-consuming to keep up-to-date.

2.2.35. We do question, however, whether four tracks are necessary and whether three might suffice - Paper (for simple cases), Standard and Complex. With the caveat that those allocated to the Paper track should have the option to apply for a hearing (as provided for in Rule 25), this proposal would allow for the Paper and Complex cases to be dealt with appropriately and leave 'everything else' to the standard process.

2.2.36. We would like to know exactly criteria will be used to judge whether a case is 'complex'. In particular, cases brought by low-income unrepresented appellants can involve important or complex issues of law, but not necessarily large sums (although they may be large to the appellant). It is clearly in the interests of low-income, unrepresented appellants that proceedings are kept as simple as possible so we would be interested to know what will constitute the descriptive categories in Rule 21(4), and how much discretion will the Tribunal have in their allocation.

Chapter 2 – The Paper track

2.2.37. As we argued in our response to the Council on Tribunals' consultative paper The use and value of oral hearings in the administrative justice system1, paper hearings are particularly suitable for tax appeals where the point at issue is usually one of law based on agreed facts. They are often preferable to oral hearings for unrepresented appellants who may value the opportunity to prepare in their own time, perhaps with the assistance of a pro bono adviser, and might be intimidated at the prospect of an oral examination at which there would be no free representation.

2.2.38. The particular advantages to the unrepresented appellant indicate that paper hearings should be available at the option of the appellant where the facts are agreed. This should not constrain the right of the appellant to choose an oral hearing, or the Tribunal to suggest to the appellant that his or her interests would be better served by an oral hearing.

2.2.39. Ultimately, though, the appellant should have the choice, and we are therefore not content that Rule 23(3) should allow the respondent, HMRC, to request an oral hearing, without a countervailing measure in Rule 24 that would give the appellant an overriding right to object. We do not consider this would be unfair to the respondent, given the inequality of arms between HMRC and the unrepresented appellant, and HMRC's ready access to high quality representation at oral hearings.

2.2.40. As we argued in our response to the Council on Tribunals' 2005 consultation, good case management is crucial to the process of a paper hearing, to keep up the momentum of the proceedings, to ensure fair play between the parties, and to ensure that justice is not prejudiced by the absence of an oral hearing.

Chapter 3 – The Basic, Standard and Complex cases

2.2.41. Rule 28(1) allowing transfer to the Upper Tribunal is appropriate but does not allow for any right of appeal over the transfer nor provision for the parties to receive an explanation as to the reasons for the decision. Perhaps the former is not thought generally appropriate as it is for the Tribunal to decide whether it has the relevant expertise or jurisdiction to deal with a case, but we feel the latter is important, so that the parties understand the position. We therefore suggest that provision be made for an explanation to be sent to the parties, together with details of what this means in terms of the handling of their case and so forth (vital for the unrepresented appellant).

2.2.42. That said, the facility to transfer a case to the Upper Tribunal could be useful in non-complex cases as well as complex ones. We are thinking particularly of cases where the First-tier Tribunal would not have jurisdiction, but the Upper Tribunal might – for example, a matter suitable for judicial review proceedings.

Rule 31 - Time and place of hearings

2.2.43. As previously suggested, 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.

[1] September 2005: see http://www.litrg.org.uk/reports/submissions/cfm?id=298

Rule 35 – Notice of decisions and reasons

2.2.44. There should be a time limit within which the Tribunal must issue a final determination. 'As soon as reasonably practicable' (Rule 35(2)) is not adequate.

Rule 38 - Setting aside a decision which disposes of proceedings

2.2.45. We repeat our earlier recommendation that 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.

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

Rule 39 – Application for permission to appeal

2.2.47. Again, we query the use of 28 days in Rule 39(2) – the tax world tends to operate with 30 days as a standard appeal deadline and a disparity could cause confusion.

Rules 40 & 41 – Onward appeal and 'review'

2.2.48. Section 11 of the TCE Act imposes a new restriction on the right of a tax appellant to appeal against a first instance Tribunal decision: the requirement for permission to appeal. Hitherto the right of the taxpayer to appeal to the High Court against a decision of the General or Special Commissioners has been unfettered. Therefore it is paramount that the process of obtaining permission and appealing should be as expeditious as possible, and that there should be no unnecessary obstacles.

2.2.49. For that reason we are uneasy about requiring the First-tier Tribunal to consider whether to review its own decision before it deals with the application for permission to appeal. If the First-tier Tribunal were able to correct any obvious or accidental errors of law, that would save time and costs all round; but if on review the First-tier Tribunal were to re-decide the matter, giving rise to yet another application for permission to appeal against that later decision (by virtue of TCEA section 9(11)), which the First-tier Tribunal would then have to review again, the appeal process would become an unending spiral.

2.2.50. The procedure for review should be as 'light' as possible, otherwise there is a risk that the First-tier Tribunal will simply be rehearing the case. The rules should lay down guidelines as to what the Tribunal should consider before granting the right of appeal – eg, is it a complex technical issue? As a minimum, the word 'must' in the first line of Rule 40 needs to be changed to 'may' so as to allow more flexibility. In contrast, the wording of Rule 44 in the draft Upper Tribunal rules is much better.

2.2.51. It is important that the First-tier Tribunal should notify the parties both before reviewing its decision, and afterwards even if it decides to take no action, so that the parties know where they stand (Rule 41(2) refers).

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 reiterate our earlier query concerning 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 simply to 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 take the 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 (see for example Rule 25(2)). Ambiguity should be avoided so perhaps it would be preferable to express all time limits in terms of days.

Rule 8 – Striking out a party's case

2.3.4. Although this rule is now more closely aligned with that of the First Tier, there appears to be no equivalent of First Tier Rule 8(5) which states the effect of striking out a case. Is this not also relevant in the Upper Tribunal? Similar comments apply below in the context of Rule 17 (withdrawals).

Rule 10 – Orders for costs

2.3.5. The rules here seem to be even more restrictive than the First Tier. In the Upper Tribunal, we would prefer to see a full costs regime, with the provision for a party to apply to the Tribunal that it should be a 'no costs' hearing.

Rule 15 – Evidence and submissions

2.3.6. There is no equivalent here to Rule 15(2) for the First Tier whereby the Tribunal can require a list of documents etc. We suggest that such a power would be even more necessary at the Upper level.

Rule 17 - Withdrawal

2.3.7. As noted above, there seems to be a gap here in that there is no equivalent of Rule 17(2) of the First Tier rules, which state the effect of a withdrawal.

Rule 21 – Application to the Upper Tribunal for permission to appeal

2.3.8. Does Rule 21(4)(a) adequately cater for circumstances where the First Tier Tribunal has power to give its decisions orally?

Part 5 – Hearings

2.3.9. We reiterate our earlier comments that we understand 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.

Rule 37 – Hearings in a party's absence

2.3.10. Rule 37 now refers to the Tribunal being *'satisfied that the party was duly notified of the hearing or that reasonable steps have been taken to notify the party of the hearing*'. However, we note that the former Rule 38(a)(ii) which said *'is not aware of any good reason for the failure to attend'* has been removed. Does this mean that the party could not notify the Tribunal of an 11th-hour emergency preventing them from attending, and request a deferral? We would prefer to see the former draft Rule 38(a)(ii) reinstated.

Ex parte hearings

2.3.11. 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
12 November 2008