

HMRC consultation document

**VAT: amendments to legislation – assistance with electronic filing of VAT returns
Response from the Low Incomes Tax Reform Group ('LITRG')**

1. Executive summary

- 1.1 The decision in *LH Bishop Electrical Co Ltd and others v HMRC Commissioners* [2013] UKFTT 522 (TC) ('*LH Bishop*') was that the VAT regulations breached the human rights of the three joint appellants by not providing exemptions from the obligation to file online for those who were prevented from doing so by disability, age, or remoteness. By not appealing, HMRC has indicated that it is prepared to be bound by that decision.
- 1.2 The adjustments to the telephone filing service on which HMRC are now consulting will not cure the breach. Even if the VAT regulations are amended to permit telephone filing, and the existence of the service is widely publicised, there will still be some taxpayers for whom neither online filing nor telephone filing is suitable or feasible.
- 1.3 Since telephone filing is not itself a form of electronic filing but a concessionary alternative (per the Tribunal's decision), there is no reason why paper cannot be continued and offered to those few whose human rights are breached by the regulations in their present form. Paper returns can easily be scanned on to HMRC's back-end systems at significantly less cost to the Exchequer than operating the telephone filing service.
- 1.4 Failure to remedy the breach of human rights identified in *LH Bishop* will result in more litigation, incurring more costs for the Exchequer and damage to the reputation of HMRC. This can be avoided by allowing paper filing for the very small minority who may need to use it.
- 1.5 The breach will not be remedied by amending the regulations as proposed in para 4.3 of the consultation document. That proposed amendment provides no statutory exemption from online filing for those whose Convention rights have been infringed by the online filing requirement, and no remedy where HMRC uses its discretion in a manner that is not compliant with those rights, or fails altogether to use its discretion. The suggestion that taxpayers first try to use public libraries, or computers belonging to friends or family, or the services of an agent, before being offered an alternative to online filing would itself

be a breach of the taxpayer's human rights in certain circumstances, as set out in the judgment in *LH Bishop*.

- 1.6 In order to be human rights-compliant, the regulations should provide exemptions from online filing for those who are computer illiterate because of their age, or who have a disability which makes using a computer accurately very difficult or painful, or those who live too remotely for a reliable internet connection. Any such amendment of the regulations should also recognise that the facts of *LH Bishop* covered only some difficulties and there may be others that affect people who are neither disabled, old nor geographically remote, but whose human rights are nevertheless breached by being made to file online.

Who we are

- 2.1 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. Everything we do is aimed at improving the tax and benefits experience of low income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 LITRG works extensively with HM Revenue & Customs and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.
- 2.3 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.

Introductory remarks

- 3.1 We welcome the opportunity to respond to this important consultation. We are pleased to note that HMRC have decided not to appeal the decision in *LH Bishop* which would indicate that it is prepared to be bound by the decision of that Tribunal. The decision, in summary, was that the VAT online filing regulations were an interference with the joint Appellants' rights under the European Convention on Human Rights Article 1 Protocol 1 (protection of property) ('A1P1') and Article 8 (right to respect for private and family life) ('A8') combined with Article 14 (prohibition of discrimination) ('A14') because of their disproportionate application to persons:
- who are computer illiterate because of their age, or
 - who have a disability which makes using a computer accurately very difficult or painful, or

- who live too remotely for a reliable internet connection¹.

- 3.2 The consultation document seems to assume that by making adjustments to the telephone filing service to meet some of the judge's criticisms of it will be sufficient to remedy the breach of human rights in the VAT regulations. But it will not.
- 3.3 First, telephone filing was declared unlawful by the Tribunal because it is a concession that is not supported by the regulations, which allow only two methods of filing – online or on paper². Secondly, it has been kept secret so that only a few of those whom it was intended to benefit will have found out about it. Amending the regulations so as to allow for telephone filing might deal with the first point, and publicising it widely will deal with the second – although the consultation document says nothing about how it is proposed to publicise it. However, neither will be enough to remedy the breach of Convention rights identified by the Tribunal. In particular, the telephone is obviously not an appropriate means for people with a speech or hearing impairment, or with certain learning disabilities, and yet the proposals in para 4 of the consultation document seem to rely exclusively on telephone filing as the only alternative to online filing. This will undoubtedly prejudice the small number of VAT-registered business owners for whom that method is unsuitable and who are also unable to file online.

Need for a paper filing alternative

- 3.4 Given that, as the Tribunal found³, telephone filing is not itself a form of electronic filing but a concessionary alternative, there is no reason why paper cannot be continued and offered to those few whose human rights are breached by the regulations in their present form.
- 3.5 The Tribunal found, relying on HMRC's evidence, that a paper return can be transferred to HMRC's back-end system at comparatively little cost⁴, and that in contrast to telephone filing, HMRC already has the power to offer paper filing under the regulations as they stand. The judge also found that 'telephone filing costs HMRC (in HMRC officer time) more than paper filing and it is only viable because so few people are offered it'⁵.
- 3.6 Paper filing of VAT returns is already in use for members of religious minorities and insolvent businesses and extending it to the very few businesses whose human rights are breached by the regulations in their current form will not involve significant additional cost to the Exchequer, and will certainly cost less than operating the proposed telephone filing facility for the additional applicants.
- 3.8 The fact that the consultation document does not ask about paper filing, only about telephone filing, strongly suggests that the point of the Tribunal's judgment has been

¹ Para 922 of the judgment

² Ibid, para 499

³ Ibid, para 511

⁴ Ibid, para 374

⁵ Ibid, para 512, 513. See also para 373/4 where the judge describes how a paper return is scanned directly on to HMRC's backend system. 'Human intervention is required to place the VAT return on the scanner and more intervention is required (such as putting the information into readable form) if the scanner cannot read the VAT return.' By contrast, according to Annex A of the consultation document, a telephone call during which a taxpayer's VAT return is processed (see also paras 429 to 433 of the judgment) can take up to 15 minutes of HMRC officer time.

missed. But unless the breach is properly remedied, there will continue to be applications to the Tribunal – not (following *Le Bistingo*) in the form of appeals against the online filing regulations which the FTT no longer has jurisdiction to consider⁶, but in the form of reasonable excuse appeals against penalties for non-compliance. While *LH Bishop* is not binding, it is persuasive, and is likely to persuade most tribunals hearing such appeals. Individuals may also seek to challenge one or more HMRC decisions by way of judicial review or under equalities legislation. Further legal disputes such as those can only result in ongoing cost to the Exchequer, and ongoing damage to the reputation of HMRC, which can be avoided by allowing paper filing for the very small minority that may need to use it.

3.9 Moreover, the number of those affected are already few in number, and are likely further to decrease as new technology is developed. In this respect, the response from Action on Disability and Work UK refers to the use of mobile phones and other mobile devices, and suggests HMRC develop an app for taxpayers to send VAT returns in areas of the country where signals are good. We would endorse that recommendation. To the extent that *LH Bishop* decided that age discrimination is in point, this factor will also become less relevant over time, see the Tribunal's judgment at ¶¶ 713, 794 and 922.

3.10 We turn now to the specific questions posed in the consultation document.

Question 1: If the VAT Regulations 1995 are amended as described in 4.3 above, will this be sufficient to provide a means for all VAT registered businesses (except the very small number that are exempt) to file VAT returns online?

4.1 Certainly not.

4.2 The criticism of the VAT regulations made by the judge in *LH Bishop* was that they were an interference with the joint Appellants' rights under the Convention (A1P1 and A8 combined with A14) which was not justified⁷. The reason she gave was the disproportionate application of the regulations to persons who were computer illiterate because of their age, or who have a disability which makes using a computer accurately very difficult or painful, or those who live too remotely for a reliable internet connection. In seeking to amend the regulations, HMRC should be considering how they can be made compliant with the Convention so far as those three groups of persons are concerned, not how they can provide a means for all VAT registered businesses to file VAT returns online unless they are already exempt by reason of religious affiliation or insolvency. They should also recognise that the facts of *LH Bishop* covered only some difficulties and there may be others that affect people who are neither disabled, old nor geographically remote, but whose human rights are nevertheless breached by being made to file online – see the discussion of 'other status' at ¶ 696 of the Tribunal decision in *LH Bishop*.

⁶ Ibid, para 919

⁷ Ibid, para 922

- 4.3 The proposal set out in para 4.3 and Annex B of the consultation document does not remedy that breach. It does no more than provide HMRC with a discretion to allow employers to use alternative filing methods where HMRC are satisfied that it is not reasonably practicable for them to file online. It provides no statutory exemption from online filing for those whose Convention rights have been infringed by the online filing requirement, and no remedy where HMRC uses its discretion in a manner that is not compliant with those rights, or fails altogether to use its discretion. The guidance reproduced in Annex B is itself probably unlawful in at least three respects:
- 1) It requires employers – even those with disabilities that prevent them from using computers, or who cannot access an internet connection, or who are unable to use an online channel because of their age – to ‘follow [HMRC’s] advice’ in trying to access an online digital channel *as a precondition* to being allowed to use an alternative;
 - 2) It requires employers falling within those categories to demonstrate not only why they are unable to use an online channel, but why they cannot use a third party to submit online returns on their behalf, even though to compel a taxpayer by law to use a third party has been variously held to be a breach of A8 and A1P1⁸;
 - 3) It makes it clear that the alternative options will be withdrawn from April 2017.
- 4.4 In order to be compliant with the Convention, the regulations should provide exemptions from online filing for those who are computer illiterate because of their age, or who have a disability which makes using a computer accurately very difficult or painful, or those who live too remotely for a reliable internet connection. It seems to us bizarre and disproportionate to allow an exemption to a small number of people who *choose not* to use computers because of their religious views, but no exemption for those who *cannot* use a computer because of a disability, or their age, or who cannot access an internet connection because of where they live.
- 4.5 As a side issue, many business people with disabilities are likely to employ a personal assistant, or carer, to help them with their day to day tasks. A taxpayer in this position is exempt, as a care and support employer, from filing their PAYE returns online and is permitted to use paper filing for PAYE. Yet they benefit from no such exemption from online filing of their VAT returns and this is likely to strike them at best as odd, inconsistent or muddled thinking on the part of the legislature.
- 4.6 Finally, in asking whether all VAT registered businesses will be able to file on line if certain amendments are made to the online filing regulations, this question seems to presuppose that telephone filing (which is mentioned in the consultation document as a permitted form of filing in certain circumstances) is a form of electronic filing. The judgment in *LH Bishop* makes it clear that it is not. Paragraph 475 states:

⁸ Ibid paras 795 and 802

‘In conclusion, telephone filing is not assistance with online filing. It is filing by a different method which has been permitted by concession.’

- 4.7 In order for telephone filing to be a form of online filing, the HMRC officer taking the telephone call and inputting the figures dictated by the taxpayer would have to be acting as the taxpayer’s agent at the relevant time, a view which the judge variously described as ‘bizarre’, ‘quite extraordinary’ and ‘obviously wrong’. As HMRC did not appeal this judgment, we must surmise that they accept the judge’s ruling. At ¶1499 the judge also decided that telephone filing was illegal because it is not allowed by the Regulations. She said:

‘Regulation 25(4) states that a taxpayer who does not make an online return must make a paper return. Therefore, it seems to me that while HMRC have general care and management powers, and these extend to power to, by concession, exempt a person from the obligation to file online, it does not extend to allowing HMRC to offer a filing system that is neither online nor paper.’

Question 2: Is there any additional guidance we ought to provide for businesses having difficulty filing VAT returns online?

- 4.8 Whatever other guidance is provided to businesses, it is essential that every taxpayer who comes within any of the three categories identified in *LH Bishop* – ie computer illiterate because of age, or disabled in such a way that using a computer accurately is very difficult or painful for them, or living too remotely for a reliable internet connection – is made aware of their right to use an alternative channel to file their VAT return. Every business should be made aware of the available options and what they need to do to avail themselves of them. The same advice should be given for people who not only cannot file online but also cannot file using the telephone service.

Question 3: Are there any circumstances, other than those detailed above, where we ought to consider allowing businesses to use the Filing by Telephone service?

- 4.9 The appellants in *LH Bishop* and others whose appeals were stayed behind that case appealed to the Tribunal on particular grounds, and the Tribunal decided the matter with reference to those grounds – computer illiteracy due to age, disability, and geographical remoteness. But nothing in the judgment suggests that there are no other grounds on which a breach of a taxpayer’s Convention rights can be sustained. For example, a taxpayer who is too poor to be able to afford to purchase hardware, software and a monthly contract for broadband or a dial-up link to the internet might be a case where alternative forms of filing should be permitted. The categories should not be regarded as closed off by the decision in *LH Bishop*. Again, we refer you to the judge’s comments at ¶1696 of *LH Bishop*.
- 4.10 We have explained in our introductory remarks why we believe that simply lifting the veil of secrecy surrounding telephone filing, and making a few adjustments to the service to make it more accessible, will not cure the breach of Convention rights brought to light in *LH Bishop*.

Question 4: What changes would we need to make to the Filing by Telephone service to meet the objectives of accessibility and convenience?

4.11 To make the filing by telephone service more accessible and convenient, it would have to be:

- *Properly publicised.* One of the main reasons why the telephone filing concession was ruled unlawful in *LH Bishop* was that it was kept secret, so that those who were intended to benefit from it never found out about it (unless it was offered to them to settle an appeal). The reason HMRC gave for lack of publicity was a fear that if more taxpayers knew about it, more would apply for it, some of whom would be rejected. But if the online filing method is easy to use and efficient, any taxpayer who can use it will naturally choose to do so. We do not believe the floodgates argument is valid in this case. In any event, given that the secrecy was a reason why the current telephone filing was found to be illegal, proper publication and access is essential.
- *More flexible than currently.* The clear evidence of all three joint appellants in *LH Bishop* – evidence which the judge accepted despite being challenged by HMRC – was that telephone filing would be very inconvenient for them⁹. The judge also made the general observation that telephone filing was not a very convenient option for submitting a time-sensitive document, the late submission of which will incur penalties¹⁰. We do not believe that the businesses run by the three joint appellants are untypical of small businesses generally. In its current form, telephone filing depends upon fixing a date three months in advance when the taxpayer will be available to take a 15 minute call from HMRC and file his/her VAT return. The evidence HMRC gave at the *LH Bishop* hearing was that if the telephone filing team could not make contact with the taxpayer at or around the pre-arranged time, they would write to the taxpayer to re-arrange – no suggestion was made that the appointment could be re-arranged by telephone, although in Annex A of the consultation document the taxpayer is advised to ring the VAT helpdesk to re-arrange the appointment. In our view, there are very few small businesses that can guarantee to be available to take a telephone call from HMRC at a specific time three months hence, and if HMRC wishes to make the telephone filing service more accessible it should provide a dedicated line for the taxpayer to ring when convenient to him/her. Also, as most small businesses do their tax returns outside their opening hours, HMRC should recognise and accommodate that by providing an out-of-hours telephone filing service to operate in the evenings and at weekends. Even so, certain businesses will still find the telephone filing option inconvenient, and they should be able to choose alternative means of filing such as the tried and tested paper method.

4.12 As discussed, it is vital to keep an alternative to online and telephone filing to accommodate those for whom neither is possible – paper is the obvious solution. It is cheap, straightforward and accessible.

4.13 When we met HMRC officials during the consultation period, we were asked if we could provide some evidence of how taxpayers who were unable to go online would prefer to file instead – whether by telephone or paper – and, if they preferred paper to telephone, the

⁹ Ibid, para 444

¹⁰ Ibid, para 443

reasons for their choice. We undertook a small amount of qualitative research, the outcome of which is described in the Appendix to this Response.

Question 5: Are there any other HRA or Equality Act issues that we need to take into account in the design of the VAT return filing process?

- 4.14 We refer to our introductory remarks. Telephone filing will not answer to the needs of those who find both filing online and using the telephone impossible or excessively difficult – for example, those with hearing or speech impediments or with learning difficulties – and an alternative needs to be put in place. The obvious route, as discussed, is to continue the paper channel.
- 4.15 We can envisage situations in which the only help available may be by a family member or friend who also suffers a disability making it excessively difficult or impossible to file online.

Question 6: Do you have any general comments or questions about the issues raised in this consultation document?

- 4.16 We reject the view that online access can be obtained using the means referring to in para 2.5 in which HMRC comment:
- ‘For example, if the business does not own a computer, we advise that they can access one by:
- using public libraries;
 - using computers owned by friends or family; or
 - using the services of an agent.’
- 4.17 Insistence on each of those methods potentially breaches the Convention rights of those in a similar position to the joint appellants in *LH Bishop* for the reasons we allude to in our answer to question 1, and are set out in full in paras 790 to 803 of the *LH Bishop* judgment.
- 4.18 In addition:
- We note that it significantly increases the time taken to file a return if the first option is used (most libraries are around half an hour or more on average away from people’s homes or businesses). The number of libraries is dwindling and we have been told that mobile libraries used in remote areas do not offer computer access.
 - The second may be insecure. It leaves as problematic what happens where there is a falling out or the friend or neighbour is ill or otherwise unavailable.
 - The third is likely to cost at least £100-200 a return even for a basic return.
- 4.19 The impact assessment shows that HMRC do not expect to incur significant costs to operate the telephone filing system. For the reasons stated above, we do not think that it will be more expensive to continue to offer paper returns to those who need assistance; indeed, as we have remarked, the judge in *LH Bishop* found (relying on HMRC evidence) that paper filing was actually cheaper than telephone filing.

Conclusion

- 5.1 We set out in this response why we believe that the amendments to legislation proposed in the consultation document will not cure the breach of Convention rights identified in *LH Bishop*, and we have said how we believe the regulations should be amended in order to cure the breach. We have also set out what we believe to be the pitfalls in reliance on telephone filing to the exclusion of all other alternatives to online filing, and why the much cheaper alternative of paper filing should be retained for the small minority that may still need to use it.
- 5.2 As always, we remain willing to engage with HMRC to find a solution that will be compliant with the Convention.

LITRG

14 February 2014

APPENDIX

When we met officials to discuss the consultation, we were asked if we could find out from the appellants whether a telephone filing service would suit their requirements, what improvements they would recommend, and whether – even if an improved telephone service were on offer – they would still prefer to file on paper; if so, why.

We therefore wrote to those appellants whom we had supported through the proceedings, and put to them the following four questions:

1. If the telephone filing service described in the consultation document were improved, would you consider using it?
2. If yes, what improvements to the service would make it sufficiently convenient for you to use (for example by offering a dedicated telephone number for your use when convenient to you, and staffing the service at evenings and weekends)?
3. If not, can you briefly describe the reasons why not (for example, a disability that inhibits your use of the telephone)?
4. If a paper alternative were available would you use that in preference to the improved telephone arrangements, and if so, why?

Overwhelmingly, the respondents said that the current telephone filing service, whereby a time is agreed three months hence for the HMRC to telephone the taxpayer and deal with filing the VAT return, was unworkable for them. A sole proprietor of a small business cannot guarantee what he or she will be doing at a particular date and time three months in the future. Customers need to be served when they arrive; the proprietor cannot stop part way through serving and shut the premises in order to take a call.

None of the respondents were prepared to abandon paper filing to use the telephone filing service in its current form. Some were prepared to consider telephone filing as an alternative to paper if it were substantially improved, but even then expressed a preference for paper filing. For them to consider using the telephone filing service, it would have to be available when they did their paperwork – generally at evenings or weekends – and there would have to be a facility for the taxpayer to ring the telephone filing team on a dedicated line at no or very low cost. There was no appetite for pressing buttons or hanging on the phone for lengthy periods. Evening and weekend availability would mean accommodating the long and sometimes unsocial working hours of many appellants running their businesses by themselves (for example, one respondent works from 7am to 9pm, seven days a week).

Two respondents answered the specific questions we posed.

- One said in answer to questions 1 and 2 that they would ‘consider using a telephone filing service if there were a dedicated telephone line, an 0800 number and not a premium rate number, a staffing service as suggested, and an easy and simple way to understand’. In answer to question 4: ‘if the paper alternative were still available I would prefer to use it over the telephone filing service. Why fix it if it isn’t broke?’
- Another said in answer to question 1: ‘yes, with serious reservations’; question 2: ‘a dedicated direct telephone number for me to phone, which will be answered promptly

without various options; at a time convenient to me, at evenings and weekends when I do paperwork and *not* by appointment'. He explained that as he had to wait for all his suppliers' invoices to arrive before he could calculate his liabilities he had only two weeks to notify HMRC and make payment. He also had difficulty hearing but has to remove his hearing aids before using the phone to avoid the shrieking feedback. He cannot use a textphone device for the same reasons as he cannot use a computer. He would also require the telephone option to be permanent.

In response to question 4 he writes: 'I have had four years of stress and anxiety to gain approval to continue paper filing and the Tribunal made a decision in my favour. I respectfully ask whoever reviews HMRC consultations to consider how they would be affected by being aged 74, disabled with rheumatoid arthritis, loss of sight in one eye and its problems, and deafness. Obviously paper filing would be preferable.'

One respondent spoke of the risk of telephone as well as internet connections being down for days at a time during adverse weather conditions, particularly in remote communities. 'I will be 65 years old, if I survive to October, my preferred choice by a country mile would be to continue with paper VAT returns'.

Another respondent said that one possible method which had not been discussed so far, and which would be convenient for many small businesses who made extensive use of this kind of technology, was filing by fax. That respondent expressed a preference for paper filing over telephone because of the difficulty in keeping appointments three months hence owing to the nature of his business and his disabilities.

A third respondent mentioned the practical difficulty with telephone filing if the sole proprietor has to be absent – for example on holiday – at the critical time.

Some of the older appellants had taken time to 'master' the VAT return and were now comfortable with that. To have to learn a new method of filing would be an unwelcome extra burden for them, for no benefit that they could perceive.