

## **Ministry of Justice: Court and Tribunal fees – consultation on further fees proposals**

### **Response from the Low Incomes Tax Reform Group**

#### **1 Executive summary**

- 1.1 We are responding to this consultation from the perspective of the low-income unrepresented appellant before the First-tier Tribunal (Tax Chamber).
- 1.2 The FTT (Tax Chamber) has been a costs-free environment since its formation, as were the General Commissioners of Income Tax before it, in order to be accessible to all taxpayers whatever their means. The introduction of a charging system for access to the Tribunal would cut across that principle and will impede access to justice for those who are unable to afford the fees.
- 1.3 The FTT (Tax Chamber) is very different from other appellate bodies in which fees are proposed in that the original claim – in terms of tax or penalties charged – emanates from HM Revenue & Customs (HMRC), not from the appellant. The role of the appellant in these cases is more one of defender – defending himself or herself against the demands of the State. The appellant's reasons will appear to him or her to be – and may quite often be – wholly justified.
- 1.4 The amounts involved in many appeals are too small to justify the fees proposed (for example, a fee of £50 is totally disproportionate if the subject of the dispute is a £100 penalty, and more so if the appellant incurs an additional £200 fee for a hearing). In general, a fee structure is likely to have a disproportionately large impact on appellants who are individuals of slender means, or very small businesses. Even £50 can be a high sum for an appellant on a low income (eg for a person working for 30 hours a week at the national minimum wage it represents more than a quarter of a weekly wage).
- 1.5 We note the proposed use of the HMCTS fee remission scheme in the FTT (Tax Chamber), although we question how economical it will be (a) for the appellant to complete and (b) for

the Tribunal staff to process a 30-page form with a double means test where the amounts of stake are as small as we have illustrated above (eg where remission is sought from a £50 fee for contesting a £100 penalty).

- 1.6 Provision for reimbursing a fee might work in some cases, but if the appellant cannot find the £50 fee in the first place, it becomes immaterial whether or not it is reimbursed as access to justice may have been denied from the outset. Deferral would bring with it not only extra administration but also the uncertainty as to whether the fee will eventually become payable or not.
- 1.7 In our view, if fees are to be introduced at all, cases allocated to the paper or basic tracks should automatically be exempt from fees, and cases that are allocated to a standard hearing should similarly be exempt if the circumstances of the case, including the amount at stake, or the means of the appellant, indicate that to be the proper course.

## **2 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 HMRC 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 We welcome the opportunity to respond to this consultation. Our interest in doing so is primarily to advance the perspective of the unrepresented appellant on a low income in the First-tier Tribunal (Tax Chamber), and our answers deal only with the tax tribunals. We are pleased to note that no fees are proposed for the Social Entitlement Chamber where appeals against tax credit decisions are heard.
- 2.4 We now turn to the specific questions raised in the consultation document at para 133 on the tax tribunals.

## **3 Question 16: Do you agree with the proposed fee structures we are proposing in the First-tier Tribunal (Tax Chamber) and the Upper Tribunal (Tax and Chancery)?**

- 3.1 We do not agree with the fee structure proposed for the reasons we explain below.
- 3.2 We do not disagree with the general principle of asking users of a tribunal to contribute towards its cost in some cases. However, the cost-free environment of the First-tier Tribunal (FTT) is well worth maintaining as it provides access to justice in an area where the original claim emanates not from the appellant but from the Crown in the form of an assessment or

determination, the respondent (HMRC) have infinitely more resources at their disposal, legal aid is almost always unavailable and the appellants' economic wellbeing is frequently at stake.

- 3.3 The tax tribunal differs from others in that the so-called 'appellant' is generally the party against whom HMRC seek to use their enforcement powers. In tax matters, the initiative generally comes from HMRC (who demand payment of an assessed amount, or a penalty, say) and the citizen's role, if not passive acceptance, is that of defender. Yet under these proposals it is the citizen, the defender, who is being asked to pay a fee for the right to defend what they may see as (and what may indeed turn out to be) an unjust imposition, whereas in most other tribunals and courts it is the instigator of a dispute (the plaintiff, or claimant) rather than the defender who is obliged to pay access fees.
- 3.4 As the Minister's foreword to the consultation document so rightly points out, it is essential to 'promote equality of all before the law' and to 'protect the weak and vulnerable'. The introduction (para 8) also emphasises the principle that access to justice must be safeguarded:
- "The Lord Chancellor has a duty when setting court fees to have regard to the principle that access to the courts must not be denied."
- 3.5 These principles, particularly the protection of the weak and vulnerable, are well observed in (by way of example) the proposal not to impose fees in the Social Entitlement Chamber or the Mental Health Tribunal, and elsewhere in the consultation document where fee exemptions and reductions are proposed. The FTT (Tax Chamber) occasionally deals with large amounts of tax for litigants with access to considerable resources to engage in disputes with HMRC (eg in avoidance cases), but mainly it is a forum for unrepresented taxpayers to challenge comparatively small amounts – typically of automatically imposed penalties – for which they believe they have a valid defence such as reasonable excuse.
- 3.6 To that extent, in relation to certain cases and categories of cases, the FTT (Tax Chamber) is not dissimilar to, and its users not unlike those who use the services of, the Social Entitlement Chamber. A scan of penalty cases heard in the First-tier Tribunal will show that many appellants are small or micro-businesses, or individuals on low or modest incomes. There is likely to be an overlap between the two tribunals in that individuals in receipt of means-tested benefits may also come before the tax tribunal to defend, for example, the imposition of an automatic penalty.
- 3.7 Users with limited means who wish to challenge, say, the imposition of a £100 penalty will very probably be discouraged from appealing if in order to do so they are obliged to pay a fee equal to 50% of amount at stake (and a further 200% if there is to be a hearing) – it will simply be uneconomical to proceed, whatever the justice of the taxpayer's case. And for someone working full-time at the national minimum wage, £50 can represent over a quarter of a week's wages – and somebody on that level of income simply does not have that amount of disposable income once living expenses such as food, fuel and housing costs have been paid out.
- 3.8 The need for an efficient and fair appellate system, even for the comparatively small sums involved in some automated HMRC penalties, becomes particularly pressing given the numbers of HMRC decisions that are overturned on review or appeal. Quantitative research

published in August 2014<sup>1</sup> showed that 48% of those questioned had their decision overturned on review, ranging from 35% of PAYE decisions to 44% of self-assessment decisions and 57% of VAT decisions, most of them concerning penalties. That is to say, nearly one-half of HMRC decisions have been successfully challenged. While the statutory review process obviates the need to appeal to the tribunal in many of those cases, those figures do illustrate HMRC's worrying propensity to decide matters wrongly at first instance, and the consequent need for an appellate system which can be accessed easily and free of cost. It would be unfortunate indeed if the introduction of fees into the FTT (Tax Chamber) were to result in a reduction of the numbers of taxpayers seeking redress who might otherwise have been successful.

- 3.9 There may be an argument that internal review procedures ought to be capable of weeding out most penalty cases. Certainly, HMRC's internal review procedure works well in respect of many such cases (as the statistics quoted in 3.8 show). But there is still an appreciable number which proceed to the Tribunal, and in a proportion of those the taxpayer wins. So the internal review process does not work every time. Nor could it, in cases where instructions issued by the Department to the reviewers are themselves wrong in law.<sup>2</sup>
- 3.10 The history of the FTT (Tax Chamber) should also be borne in mind. The FTT (Tax Chamber) evolved from the General Commissioners of Income Tax who would hear tax disputes locally and informally and hardly ever in a court-room setting, while more complex appeals went to the Special Commissioners. Because of their local focus, the General Commissioners' decisions may have lacked consistency over the country as a whole, but their accessibility, the ease with which unrepresented litigants could appear before them and the absence of any costs regime were seen as distinct advantages. When the time came to replace the General Commissioners with something more formal, it was felt to be of paramount importance that the accessibility of the former appellate regime should be preserved as far as possible. Therefore, in the consultations leading up to its formation, in which the Ministry of Justice was involved, all agreed that in the FTT (Tax Chamber) no award of costs would be made for or against the appellant, win or lose, except in exceptional circumstances. If costs awards were likely to be a barrier to justice for the individuals and small businesses likely to use the Tribunal, the same must be true of the imposition of court fees, albeit on a smaller scale.

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<sup>1</sup> Research Report: Statutory Review Process – quantitative research to understand customers' experience and perception of the Statutory Review Process (August 2014) – [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/350831/report333.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/350831/report333.pdf).

<sup>2</sup> See for instance HMRC's guidance on the *Steptoe* case (<http://www.hmrc.gov.uk/manuals/vcpmanual/VCP10534.htm>) where HMRC continue to cite the dissenting judgment of Scott LJ in the Court of Appeal.

**4 Question 17: Are there any types of applications or cases which you feel should be exempt from the fees?**

- 4.1 While we would very much prefer there to be no fee to open proceedings in the tax tribunal for the reasons we give above, if fees are to be introduced, we believe it is vital that the ‘weak and vulnerable’, to quote the Minister, are protected by appropriate exemptions.
- 4.2 We note that the standard HMCTS fee remission scheme will apply, which means that those without the means to pay court fees can at least apply for remission. But the application process is long and burdensome, involving as it does the completion of a 30-page form with a two-stage means test of both capital and income. One has to consider whether it is a good use of scarce resources to put appellants through such an exercise, and to require tribunal staff to process it at an added cost to the service, given some of the amounts at stake.
- 4.3 The intended power for the Tribunal to order that fees be reimbursed requires that the fee has to be found in the first place, and it is that requirement that is most likely to bar access to justice from the outset. That apart, as a matter of fairness, if HMRC allow a case to be pursued to the FTT (Tax Chamber) which they then lose, the Tribunal should be empowered to order HMRC to bear the fees related to the proceedings rather than the appellant.
- 4.4 Deferred fees entail not only extra administration but also uncertainty over whether a fee will eventually become payable, and that uncertainty may itself act as much as a barrier to justice as the requirement to pay a fee in the first place.
- 4.5 A more economical way of protecting the ‘weak and vulnerable’ appellant might be to provide that particular types of application should be exempt from fees. Penalty appeals brought by most individuals and small businesses will often be allocated to the paper or basic tracks, so it would make sense to exempt those. In addition, given that some such cases will be allocated to the standard track, exemption ought to be extended to the standard track where it would be in the interests of justice to do so, taking into account the nature of the case (including the amount at stake) and the circumstances of the appellant, including their income or means.
- 4.6 Some of these cases will involve larger sums of money than the ordinary penalty appeals – but it is entirely possible for amounts owing to HMRC to grow simply because a vulnerable taxpayer has no idea how to react to HMRC’s demands or how to challenge them. Such cases may include non-filing or non-payment penalty appeals where amounts have become large, or special relief claims.<sup>3</sup> Such cases could either proceed via the HMCTS remission scheme (if the vulnerable appellant could be assisted to complete the lengthy and difficult form), or

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<sup>3</sup> See *John Clark* TC04509 (<http://www.financeandtaxtribunals.gov.uk/Aspx/view.aspx?id=8487>) for an illustration of this type of case, which both shows how HMRC can relentlessly pursue taxpayers through the Tribunal system with little or no justification, and also underlines the need for an accessible and inexpensive appeal process in the interests of justice and fairness.

there could be a general discretion for the judge to remit fees in part or in full, combined with directions as to the circumstances in which the judge should use his/her discretion.

- 4.7 There are also other cases where to impose fees would be invidious – for example, a range of cases which turn on an important matter of fairness or principle or in which a professional advocate has offered his or her services pro bono for that very reason.<sup>4</sup> It would be absurd for the court or tribunal to put in place pro bono representation for a deserving but indigent appellant, only for the tribunal to re-impose the barrier to justice by charging fees for access.

LITRG

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<sup>4</sup> Such as *LH Bishop Electrical Company Ltd & Ors v HMRC Commissioners* [2013] UKFTT 522 (tax).