

**The Tribunals (Scotland) Act 2014: Consultation on 2 sets of Draft Regulations which make provision for: a time limit within which to seek permission to appeal a decision of the Scottish Tribunals and Rules of Procedure for the Upper Tribunal; and offences in the Scottish Tribunals. Response by the Chartered Institute of Taxation and the Low Incomes Tax Reform Group**

## **1 Introduction**

- 1.1 The Chartered Institute of Taxation (CIOT) and its Low Incomes Tax Reform Group (LITRG) are pleased to submit comments on the above consultation document in respect of draft regulations issued by the Scottish Government in September 2015.
- 1.2 Our response draws on the knowledge and experience of both our members in practice and the in-house technical team.
- 1.3 We make some initial general points and then consider the questions posed in the consultation. We have therefore not included any form of executive summary to our response.

## **2 General comments and other comments on the draft regulations**

- 2.1 We note that the Revenue Scotland and Tax Powers Act 2014 (RSTPA 2014) established the Scottish Tax Tribunals. These are currently governed by their own specific regulations and rules of procedure. It is our understanding that the Scottish Tax Tribunals will become part of the Scottish Tribunals in Spring 2017. Our comments on these draft regulations and rules of procedure are made in the light of these anticipated future developments, to ensure that the regulations and rules of procedure are appropriate for tax cases in due course.
- 2.2 We note from the outset that the draft regulations and rules of procedure under consultation in many respects replicate the existing Scottish Tax Tribunals regulations and rules of

procedure.<sup>1</sup> Overall, we welcome the approach that has been taken. We only make comments in this response where we have suggestions to make.

- 2.3 As a general point, we think that effective case management is key, both in ensuring that special needs are catered for and that cases are heard efficiently and by the most appropriate panel. It should be noted that appeals can be biased against those unable to afford professional representation.<sup>2</sup> It is important therefore that case management does not exacerbate this.
- 2.4 Expenses can be a barrier to accessing justice. Appellants of low or modest means will struggle to meet their own costs. The possibility of an adverse expenses award against them is a further disincentive to pursuit of their case. In the interests of justice, we favour an expenses-free environment at the First-tier Tribunal and an optional expenses regime at the Upper Tribunal. We therefore welcome the provision in rule 13 of the draft Rules of Procedure for the Upper Tribunal. We think, however, that the ‘no expenses’ regime should be capable of being overridden for unreasonable behaviour and that it must be made clear to potential appellants that the rule can also be applied to Revenue Scotland (not just the appellant).

### **3 Questions on draft regulations prescribing a time limit for seeking permission to appeal and Upper Tribunal rules of procedure**

*Q1 - 4 Is the proposed time limit of 30 days appropriate for a party to submit an application for permission to appeal a decision of the First-tier Tribunal or Upper Tribunal? Do you have any comments on the draft rules of procedure? In particular, are there any additional rules of procedure that you would wish to see prescribed? In particular, do you consider that any of the proposed rules of procedure are not relevant to the Upper Tribunal?*

#### *Question 1*

- 3.1 We think a 30 day time limit is acceptable. We note however that the proposal is for the time limit to commence from the date on which the decision was sent to the appellant or the date on which the statement of reasons was issued. We question how the appellant will know what date this was: at a minimum it needs to be stated clearly on the correspondence. In addition, it seems unbalanced that the time period runs from the date of sending or issue to the date when the application is received from the appellant. It would be more equitable if the 30 day period used the same basis for each party: date of receipt for both, or date of sending for both.
- 3.2 We recognise the need for the Tribunal to specify time limits for the delivery of documents, as part of its effective case management. While the majority of parties may use e-mail, for those that use the postal service, problems could arise in the event of a postal strike, for example. We note that the Interpretation Act 1978, section 7 applies in Scotland, under which 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

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<sup>1</sup> <http://www.legislation.gov.uk/ssi/2015/184/contents/made> and <http://www.legislation.gov.uk/ssi/2015/132/contents/made>

<sup>2</sup> We note that there are a number of organisations which individuals may approach for free legal advice and representation, including the Faculty of Advocates and the Law Society of Scotland. It would be helpful if the Scottish Tribunals information (both digital and hard copy) were to provide clear signposting to these facilities.

course of post'. This places a sufficient burden on anyone seeking to rely on it, as a person generally has to show that they did post the item at the time they say they did. The additional burden imposed by the imbalance in the draft regulations is therefore unnecessary.

### *Question 2*

- 3.3 We think that in framing the Upper Tribunal rules of procedure there are some important principles to bear in mind. It is important that the Tribunal is actually, and is perceived to be, independent from Revenue Scotland; the Tribunal system must be accessible to all; appellants must be fully advised of their appeal rights and be provided with adequate and neutral guidance on Tribunal procedures. Our comments are made with these principles in mind.
- 3.4 Within Part 1 Interpretation of the rules of procedure, we wonder whether the meaning of 'appellant' should be expanded within sub-section (a) to read 'a person who makes an appeal or application, or applies for permission to appeal to the Upper Tribunal'. Likewise, within sub-section (a) of the meaning of 'respondent', the meaning could be expanded to read 'in an appeal or application for permission to appeal against a decision of the First-tier Tribunal ...'
- 3.5 Within Part 3 Procedure for Cases in the Upper Tribunal of the rules of procedure, we note that rules 4 (2) and 5 (2) require a response or reply to be received no later than or within 30 days after the date on which the Upper Tribunal sent a copy to the respondent. The comments we make above (paragraphs 3.1 and 3.2) in relation to the time limits specified in the Time Limits regulations apply in this instance too.
- 3.6 Rule 8 concerns the Tribunal's various powers, including the power to require a party to provide submissions or give evidence. We note that this includes the ability to request evidence either orally or written. It would be helpful to have clarification of what power the Scottish Tribunal has to require someone from the rest of the UK to appear before it and give evidence.
- 3.7 In rule 11 (3), we wonder whether there should be an additional sub-section, reading '*in proceedings which have been transferred from the First-tier Tribunal, the Upper Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding*'.
- 3.8 Rule 22 deals with hearing venues. The provision leaves the time and place up to the President to determine. We trust that sufficient flexibility will be allowed to the parties to make alternative arrangements if those proposed are inconvenient, provided that the process is not delayed unfairly as a result. We recommend that there be provision for the appellant to specify at the outset where they would like their case to be heard; we hope that as far as possible those living in more remote locations will not be disadvantaged in terms of possible venues. In addition, we question whether 14 days is sufficient as a minimum period of notice (rule 26), given that parties will have to make travel arrangements to appear at a hearing. We hope that the case management process will keep parties informed as to the likely date and location of the hearing, so that its confirmation will not be unexpected.
- 3.9 Rule 28 in respect of hearings in a party's absence almost replicates the equivalent rule for the Tax Tribunal established by the Revenue Scotland and Tax Powers Act 2014. We recommend the addition of a condition reading, '*is not aware of any good reason for the failure to attend*'. We think it is important to allow for the party to notify the Tribunal of an 11<sup>th</sup>-hour emergency preventing them from attending.

### Question 3

- 3.10 The rules as drafted only appear to envisage hearings with appellants and respondents: they do not appear to cater for *ex parte* hearings. We think consideration needs to be given as to whether additional rules are required for *ex parte* hearings.
- 3.11 In addition, provision could be made, in tax cases where the issue is one that affects a wider class of taxpayers, for the Upper Tribunal to invite the tax professional bodies to submit representations on behalf of the Scottish taxpayer community in general. In the absence of the taxpayer being represented, it would, we suggest, be useful for Scottish taxpayers in general to have the option to have some input.

## 4 Questions on draft regulations creating offences in relation to proceedings before the Scottish Tribunals

*Q1 - 4 Do you have any comments on the draft regulations creating offences in relation to proceedings before the Scottish Tribunals? Are there any additional offences in relation to proceedings that you would like to see added? Would you like to see any of the proposed offences omitted? Do you have any views on the penalties proposed for committing these offences?*

- 4.1 We think that the offences seem to be a mix in terms of degree of severity. The first (a) and second (b) are undoubtedly serious and deserving of the potential punishment proposed. We think however that the third (c), failure to attend or give evidence is more nuanced. Non-attendance is arguably less serious in any case, and may indeed have a reasonable explanation. We accept that the Tribunals need to have the backing that a penalty for non-attendance brings, but we think that the potential penalties are too severe in this instance. For example, failure to attend due to illness or transport problems should not result in a jail term. In this respect, we welcome the inclusion of paragraph (2), providing for a reasonable excuse defence.
- 4.2 Since the regulations specifically refer to the failure to attend or give evidence ‘when required to do so in accordance with Scottish Tribunal Rules’,<sup>3</sup> we would expect the offence for failure to attend or give evidence to apply only in circumstances where the Tribunal has cited someone or required the production of a particular piece of evidence, under for example rule 8 or 19 of The Upper Tribunal for Scotland Rules of Procedure 2016 (or the equivalent rules of The First-tier Tribunal for Scotland Rules of Procedure). If this is indeed the case, we think that it would be helpful to provide clarification in The Scottish Tribunals (Offences) Regulations 2016, such that it is clear that if an appellant fails to attend their own hearing, but has not been specifically required to attend in accordance with rule 19, for example, the only penalty they will face is that the hearing will proceed in their absence, meaning that they miss out on the opportunity to present their case from their own perspective. Such clarification could take the form of a reference to the specific rules (both First-tier and Upper) to which the offences regulations apply, rather than just referring to the rules generally. This would make it clear that an offence could only arise where a party was in no doubt that the tribunal was exercising a power requiring attendance. In addition, we think that a party/witness (in either tribunal) should receive specific notice that failure to comply with a requirement (to attend or give evidence) could constitute an offence.

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<sup>3</sup> Regulation 2, paragraph 1(c) of draft The Scottish Tribunals (Offences) Regulations 2016.

## 5 The Chartered Institute of Taxation

- 5.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the United Kingdom concerned solely with taxation. The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.

The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries. The CIOT's comments and recommendations on tax issues are made in line with our charitable objectives: we are politically neutral in our work.

The CIOT's 17,500 members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

The Chartered Institute of Taxation  
14 December 2015