

**Tax Appeals Modernisation Project**  
**Stakeholder Group Meeting Minutes**

**26th September 2007,**  
**81 Chancery Lane**

**Reference: SG09**

**Prepared by: Bryan Pay**

**Present:**

Sir Stephen Oliver (SO)	(President Finance & Tax Tribunals)
Malcolm Gammie (MG)	(Research Director, Tax Law Review Committee)
David Halsey (DH)	(HMRC)
Robin Tough (RT)	(HMRC)
David Hinstridge (DH)	(HMRC)
Dr Nuala Brice	(VAT & Duties Tribunals)
Lord Newton (TN)	(Council on Tribunals)
Penny Hamilton (PH)	(Chartered Institute of Taxation)
Ian Menzies-Conacher (I M-C)	(Confederation of British Industry)
Ron Downhill (RD)	(Law Society)
Jane Moore (JM)	(Low Incomes Tax Reform Group)
Gordon Coutts QC (GC)	(Scottish Interests)
Roger White (RW)	(Section 706 Tribunal)
Henry Russell (HR)	(General Commissioners)
Tony Priest (TP)	(Clerks to the General Commissioners)
Robert Maas (RM)	(Institute of Chartered Accountants)
David Goy QC (DG)	(Revenue Bar Association)
Peter Knight (PK)	(MoJ Legal)
Mike Watson (MW)	(Tribunals Service, MoJ)
Bryan Pay (BP)	(Tribunals Service, MoJ)
Karen Marsh (KM)	(Tribunals Service, MoJ)

**Apologies:**

John Avery Jones	(Special Commissioners)
Claire Radcliffe	(Senior President's Office)
Martin John	(Tribunals Service)
Helen Latham	(Her Majesty's Revenue and Customs)

**1. Introductions and Minutes**

- 1.1 Stephen Oliver (SO) welcomed the attendees to the meeting. The Minutes from the meeting in March with one correction, that it was the Low Incomes Tax Reform Group.

**2. Ministry of Justice Update: TAM Project and TCE Act Implementation**

- 2.1 Mike Watson (MW) provided the update. He introduced the new Project Team members BP and KM and made the following points:
- The Autumn consultation would soon go to MoJ Minister for a full 12 week consultation to be launched in November; Stakeholders had received a copy of the tax appeals chapter.
  - There was a close working relationship with HMRC for their work on handling of cases prior to the Tribunal. HMRC would provide their update on this.
  - The Start of Jurisdiction subgroup had met and the Rules subgroup had done some good preparatory work for the development of a unified set of rules for the new tax jurisdiction next year.
  - Initial work had also been done to gauge the rough order of magnitude and types of new appointments required for the new tax jurisdiction. Contact was being made that week with the Judicial Appointments Commission to programme in competitions, and MW would update the Stakeholder Group at the next meeting on proposals.
  - SO was arranging a judicial meeting on cross-border issues in Scotland, and one was planned for Northern Ireland. The TAM project team proposed to mirror this approach with officials in those two devolved administrations.
- 2.2 Overall he thought there was good progress given there was still 18 months to implementation.
- 2.3 In the discussion that followed Stakeholders made the following points. RW considered the chapter a good basis to go forward.
- 2.4 JM noted that the draft did not include any questions being consulted upon. MW said that there would be specific questions around costs and he would appreciate the Group's input into what other matters should be flagged.
- 2.5 SO saw the area where the document was softest on detail was around Upper Tribunal. He saw key areas as working through the criteria for seeking leave to go to the Upper Tribunal and what cases would start there in the first instance.
- 2.6 ICM said that para 20 needed to emphasise the importance of ensuring appropriate categorisation of cases. NB and SO noted this was a good point to consider in light of new, unified rules for the new tax appeals tribunal. The VAT & Duties Tribunal seemed to accommodate different cases through three tracks according to their increased complexity. SO added that a missing link was how rules would be developed for the Upper Tribunal.
- 2.7 DG emphasised the importance of getting the right tribunal to hear the right case. He saw this issue as being just as important as that of costs. Para 21 need to flag the significance of this issue.
- 2.8 PH expressed some concerns about the high level nature of much of the document, and emphasised the need for meaningful questions. MW noted the TCE Act was broad and enabling legislation, and that MoJ had made a commitment to consult separately on tax, in this document around the overall reform of the Tribunal structure.
- 2.9 TN asked about the choreography between the HMRC and MoJ consultations. Ideally the two consultations should have been to the same timetable, as in many ways the MoJ consultation on tax appeals was actually also a consultation on HMRC's part of the process. MW emphasised the close working together of the two project teams and consistency of principles.
- 2.10 DH noted that HMRC were not consulting on costs, which were a matter for MoJ. However, which cases should be heard in the Upper Tier and which cases were

subject to costs would still have strong links back to HMRC. They did have specific questions about aspects of the new system that would impact on them.

- 2.11 JM sought clarification as to how the HMRC internal review would fit with any ADR process, which was provided for in the TCE Act and which she expected the new tribunals system to make some provision for.
- 2.12 MG asked to what extent tax might be seen as quite a distinct and separate element of reform, and its overall fit with Tribunal reform. There would be a tax chamber within the overall structure, but the jurisdiction had real differences with other aspects of the system (e.g. a costs regime for tax would not be appropriate for one for Social Security).
- 2.13 ICM also thought that the HMRC consultation and MoJ consultation were two parts of the same whole. This also needs to be made clear throughout the consultation. JM argued that the HMRC internal review must not be confused with Alternative Dispute Resolution, which was an aspect of Tribunal Service Reform.
- 2.14 SO picked up on DG's point about the right judges to hear the right cases. There would need to be a judicial recruitment decision soon, to ensure the right expertise was on board to deal with the right types of cases. This was a serious area of concern which needed to be addressed and he had raised the issue with the President Designate.

### **3. HMRC Update**

- 3.1 DH gave an update on HMRC's October consultation on Start of Jurisdiction for tax appeals. Exact publication date still unknown, but communications plan in development and planning to consult via a series of meetings.
- 3.2 He outlined that the principle that customers should have maximum opportunity to resolve the matter with HMRC directly, and at the same time the expectation that they should have the opportunity to press the button to have their day at the tribunal. The core of the proposals were the Impartial Internal Review, based on the options of being statutory, non-statutory and statutory optional, with a view to developing as much consistency as was desirable across different types of tax. There would also be a section on transition. This was the bit that hit on day one, and there was the intention this be an outward going process.
- 3.3 MG noted that the document was silent on the sort of processes suggested for the internal review. If people did not understand the constraints of certain procedures, there was a risk they could not focus on the issues.
- 3.4 IMC commented that most people would dismiss this as "just an internal review", and there will need to be work to convince that it was impartial. TN noted there was conflict between "impartial" and "internal", and use of the term "thorough" might be preferable.
- 3.5 SO argued that a good review process should take over some of the work that currently goes to the General Commissioners, and so affect recruitment decisions. It was essential to know with absolute certainty when a case becomes an appeal, and that exact point of maturity was not yet clear from the Condoc.
- 3.6 HR asked how the oversight of the Tribunal would come through the HMRC proposals. It was essential that HMRC not be seen as owning the entire process. DH referred to the Tribunal Service being entirely in charge of "listing" of appeals in the new system. RM said that he was concerned at terminology, which would need to clearly differentiate when a case became an appeal.
- 3.7 NB noted the situation in the VAT & Duties Tribunal and that the Rules Sub-committee would want to ensure that once the review process had been concluded, the Rules ensured that onward from this the Tribunal would look after the entire appeal.

3.8 Comments were made around HMRC practices in relation to closure notices and self-assessment. DH noted the outcome of the Powers Review, and the proposals to scrap the entire enquiries process.

3.9 MW concluded by noting that that HMRC have been involved with and consulted on the work in the Rules subgroup, and that the consultation process should help flesh out these issues.

#### **4. Costs regime for tax appeals: responses to MoJ**

4.1 MG introduced the discussion on costs. He commented that it was in the interests of justice that costs not act as a deterrent to Tribunal users. There were, at the same time, some very large tribunals users such as banking corporations who would appeal regardless and costs were not an issue for them.

4.2 SO outlined his view that there were a middle-ground of medium sized appeals where appellants could be deterred unless costs were available. He gave these examples - appeals by charities, the appeal by the husband and wife in Arctic Systems and disputes over zero rating of appliances for the disabled. For the Tribunal to have the power to award costs in such a case, however, would need an assurance that HMRC would not itself seek costs. From the Tribunal's point of view, costs should ensure adequate representation.

4.3 RD outlined the Law Society's views that costs should absolutely not discourage appellants, except in relation to unreasonable behaviour. He noted the current practice in relation to VAT & Duties, and paragraph 44 of the Analysis that outlined the 60/40 split of cases whereby HMRC won more cases than it lost. It would not be in the interests of the taxpayer for no HMRC self-denying ordinance except in costly and complex cases. An advance notice of whether a case should be subject to costs would reassure appellants, concerned that they might be at risk.

4.4 DG also outlined the diversity of views in the Revenue Bar Association, which was mixed as to whether absence of costs provided an incentive or disincentive to the appellant. He thought that the current General Commissioner Tribunal was satisfactory; no costs except in difficult and complex cases. One criteria for determining whether costs might be an absolute amount. There would need to be transparency around transparency for appellants at the beginning of the case. This criteria for costs would also need to be consistent for cases going in the first instance to the Upper Tribunal.

4.5 IMC favoured the default option of there being no costs except for purely vexatious cases, though appellants might have an "opt in" if they were particularly aggrieved. He saw this default no costs option as applying to even relatively large companies. Any opt in would need to be covered by clear and published criteria.

4.6 SO noted that the system currently works well in the VAT Tribunal, and that the current system could transfer across direct tax. This would require a modification of the current Sheldon Parliamentary statement. PH agreed, and commented that on the experience of VAT & Duties cases the costs to the public purse would be small. There was a discussion of including a modified Sheldon statement in the statement of case.

4.7 DH stated that HMRC came from the point of view that any costs regime should be even-handed, and that there would be one uniform criteria for award of costs across the new Tribunal. They would prefer there were no award of costs at all. He said that there should be no assumption that the Sheldon statement would transfer across into the new system as it currently applies to VAT & Duties cases.

4.8 MG then summarised the debate. He noted that key question of whether there were a favourable bias towards the appellant along the lines of current practice in the VAT &

Duties Tribunal. He noted an even-handed approach where costs were available could provide a real deterrent.

- 4.9 TN highlighted his increasing concern that the more the group moved away from the default position of no costs, the more the potential impact on access to justice. If HMRC's cost recovery powers were not limited in some way, by seeking to use costs to encourage appellants to take a meritorious case, you actually be achieving the opposite of what you intended. What was needed was a clear statement from HMRC as to whether Sheldon were to continue. RD concurred that unless the self-denying ordinance continued in some form then the award of costs should be very narrow.
- 4.10 PH made the point that she thought there needed to be a broader and more genuine consultation process on this issue. She raised whether there should be a separate consultation in the public domain, as she thought the Autumn Document needed to reach a wider audience. She was unhappy that the assumption seemed to be that the Stakeholder Group represented all tribunal users, and that the summary of their views was not necessarily a true reflection of opinions.
- 4.11 MG commented that what this group decides on costs is crucial in advance of the consultation. The Autumn Document was mostly harmless, but that this issue was vital.
- 4.12 IMC noted that neither the Ministry's Autumn Document nor the HMRC's consultation addressed the issue of the Sheldon statement, which was obviously crucial. It seemed to have fallen between two stools.
- 4.13 MW raised two options for a mechanism for consulting more widely with taxpayers.
- One was to incorporate more into the autumn document to reflect the options and where the debate had got to by this stage.
  - The other option was to ask MoJ Ministers to consult on this specific issue in a separate and smaller consultation (i.e. via a smaller ConDoc) related to tax reform modernisation specifically.
- 4.14 There was not an explicit decision in favour of either option, though the general agreement among stakeholders was that this was a significant area where views needed to be sought from taxpayers broader than those represented on the current stakeholder group, and from those actually using the system.
- 4.15 RM summarised the issue that if there were no Sheldon statement, then the group would want a very narrow costs power, if there was a Sheldon, then they would want a broader costs power. DG commented that the current Sheldon statement was highly unsatisfactory, and his preference was for some replication of this in tribunal rules or another statutory basis. There was broad support for a statutory "Son of Sheldon".
- 4.16 MG asked for interest in joining a stakeholder Sub group on costs, as proposed in the analysis of submissions, which would further consider the cases and criteria for which costs might be appropriate. RM, PH, JM, RD, DH, SO and MG indicated their interest.

## **5. AOB**

- 5.1 There was no other business. The next meeting of the Stakeholder Group is 11 December 2007 from 2pm at Fox Court.

## Summary of Action Points

<b>AP No.</b>	<b>Action Point</b>	<b>Owner</b>
<b>1</b>	<b>To arrange a meeting of the Costs subgroup prior to next meeting of the Stakeholder Group 11 December 2007</b>	TAM Project
<b>2</b>	<b>Presentation to the next meeting of the Stakeholder Group on rough order of magnitude and types of judiciary for the new tax jurisdiction</b>	TAM Project
<b>3</b>	<b>Administrative meeting to be arranged with officials in Scotland and NI, mirroring the judicial meetings being arranged via SO.</b>	TAM Project