Tribunals Service

Tax Appeals Modernisation Project

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Tax Appeals Modernisation Project

Stakeholder Group Meeting Minutes v1.0

2nd April 2008
Fox Court, 14 Gray's Inn Road

Reference: SG12

Prepared by: Gemma Young, Bryan Pay and Lily Wolday

Present:	Malcolm Gammie (MG) - Acting Chair	(Research Director, Tax Law Review Committee)
	David Halsey (DHa)	(HMRC)
	David Hinstridge (DHi)	(HMRC)
	Penny Hamilton (PH)	(Chartered Institute of Taxation)
	Ron Downhill (RDo)	(Law Society)
	Gordon Coutts QC (GC)	(Scottish Interests)
	Henry Russell (HR)	(General Commissioners)
	Robert Maas (RM)	(Institute of Chartered Accountants)
	Mike Watson (MW)	(Tribunals Service, MoJ)
	Bryan Pay (BP)	(Tribunals Service, MoJ)
	Karen Marsh (KM)	(Tribunals Service, MoJ)
	John Avery Jones (JAJ)	(Special Commissioners)
	Ian Menzies-Conacher (IMC)	(Confederation of British Industry)
	Tony Priest (TP)	(Clerks to the General Commissioners)
	Robin Williamson (RW)	(Low Incomes Tax Reform Group)
	Gemma Young (GY)	(Tribunals Service, MoJ)
	Lily Wolday	(Tribunals Services, MoJ)
Apologies:	David Goy QC & Nicola Shaw	(Revenue Bar Association)
	Sir Stephen Oliver	(President Finance & Tax Tribunals)
	Rowena Dimond (RDi)	(Tribunals Services, MoJ)
	Dr Nuala Brice (NB)	(VAT & Duties Tribunals)
	Jane Moore (JM)	(Low Incomes Tax Reform Group)
	Lord Newton (TN)	(Council on Tribunals)
	Peter Knight	(MoJ Legal)
	Roger White	(Section 706/04 Tribunal)

Introductions and Minutes

1. Malcolm Gammie welcomed the attendees and there were introductions. The minutes of the last Stakeholder Group meeting were agreed without amendment.

Project Update

2. MW gave a brief project update, noting that many work streams were addressed by today's agenda items. He discussed appointments, assignments, and business processes, stressing the need to firm up outstanding policy and process issues.

3. He said that Tribunals service had told JAC that tax appeals appointments were a priority, and JAC were treating them as such, with competitions likely to be late May/early June. An assignment policy had been agreed with Sir Stephen Oliver, and letters seeking expressions of interest would go out soon. On business processes, the Tribunals Service was working closely with HMRC, and had already had one workshop to discuss the key points of interface between HMRC and the Tribunals Service.

4. IMC asked whether there was any update on numbers of appointees for the new system. BP noted the numbers for Non-Legal Members had increased since the group was last briefed, because of the need for flexibility to cope with an expected increase in workload in the Tribunal's first year, and JAC's concerns around the feasibility of using a reserve list.

5. In response to questions from TP, BP confirmed the retirement age for new appointments as being 70; the expectation was that the Service should expect at least three years service from any appointee. MW also said that the experience of current General Commissioners was indispensable for the new system, and the advertisement would reflect the importance of tax appeals experience.

AP: the TAM Project to provide an update note to the Group around numbers and types of recruits for the new Tax Chamber

***Transforming Tribunals* Response to Consultation Analysis**

6. MW introduced this item and thanked those around the table who had responded to the consultation, and GY distributed a short addendum of responses which had been received late by the TAM team. These did not change the analysis of major consultation responses previously distributed to the Stakeholder Group. He said there was much helpful comment around a number of questions to be taken forward as part of business design. The responses provided helpful reassurance of the direction in which the project is heading. The responses to costs questions did not appear to raise any new issues beyond those already identified and discussed by the Stakeholder Group.

7. PH commented in the second paragraph under Q.27 that her analysis of the submissions was that only one respondent actually expressed support for a default "no costs" position. DHa, however, expressed the opposite view that

most respondents supported this position. RW said that their support for "no costs" was heavily caveated around there being early dispute resolution or a pro bono scheme of assistance for the unrepresented in the new system.

8. MW noted that the summary reveals diverging views, and was prepared for stakeholder information only. A formal response would be published as a chapter in the *Transforming Tribunals* response. 19th May was the target date for this response.

Update on costs

9. MG introduced this item, and MW explained further. A costs sub-group meeting had been tentatively arranged for 24 April, and the intention was to bring a proposal to that group. The time was now pressing on this issue, as more delay would impact on the development of the Rules. There was discussion of the next meeting of the main Stakeholder Group, and noted that as its next meeting was not until June any proposal agreed by the Stakeholder Group would need to be distributed ex-committee. MG confirmed that this would occur.

10. TP made the comment that, having initially opposed costs in relation to unreasonable behaviour, he had now come around to the idea but that he thought the bar needed to be set pretty high (e.g. "wholly" unreasonable behaviour). JaJ commented on a case he heard, where at least £1 million must have been spent by the parties; the Tribunal would never get away with "no costs" for such cases. MG noted this linked with the issue of what cases might go to the Upper Tribunal at first instance. The outline of the Upper Tribunal rules were still not clear.

Report from Rules Sub-Group

11. MW gave a brief update in NB's absence. He said that the Rules subgroup had reached broad agreement and would meet again in late May, when MoJ legal would have prepared draft rules incorporating comment already provided by subgroup members. He confirmed that these would chamber specific rules, though based on a generic model so that there would likely be considerable commonality across the First-tier Chambers.

12. RM asked whether these early drafts of rules might be distributed more widely to the Stakeholder Group. MW agreed to make these available when they had been prepared. He also advised the Group that in developing the rules an eye needed to be kept on the Tribunal Procedures Committee (T.P.C.). This would make the rules in the new system, and would be considering rules for the two chambers being established in October as its first task.

Upper Tribunal

13. MG introduced this subject and the helpful short paper prepared by SO, setting out criteria for first instance referrals to the Upper Tribunal. He explained his understanding that the Upper Tribunal would in fact consider very few first-instance appeals, and there was the facility for Upper Tribunal judiciary to drop down to the First Tier to hear cases should the circumstances require it.

14. PH questioned why, if most issues would be sorted out in the First-Tier, there was a need for all cases to go to the Upper Tribunal on appeal. This seemed to

be adding in an unnecessary level of appeal for many cases, and she thought the policy aim was to reduce unnecessary levels of appeal. She was also discomforted that the First-Tier and the Upper Tribunal judiciary hearing the particular case may have the same level of expertise, or be similarly constituted panels. This raised the question of whether the Upper Tribunal was merely adding another legal layer.

15. DHa stated that HMRC supported the proposal that cases would only go on initial first instance referral to the Upper Tribunal with the consent of both of the parties and the President, with costs in such cases governed by the usual Upper Tribunal rules. He also provided the following comment on SO's criteria for cases:

    - On item 1, matters raising substantial and complex issues, being issues that depend mainly on questions of law and where fact-finding will be of subsidiary importance to the outcome of the dispute, HMRC are content.

    - On item 2, lead and class appeals, group litigation arrangements and matters similar to those on which the First Tier have produced conflicting decisions, HMRC would welcome clarification that these cases, like those in item 1, would also be ones where fact-finding would be of subsidiary importance. In particular the present wording might give the impression that a larger tranche of cases might start in the Upper Tribunal than may be envisaged, with regards to substantial and complex cases.

    - On item 3, inheritance tax disputes to which the Inheritance Tax Act 1984, section 222(3) applies, while not objecting to what is proposed, HMRC would advise that at present very few of these cases go straight to the High Court so perhaps this should be reconsidered.

    - On item 4, Judicial Review matters that are not within the existing jurisdiction of VAT and Duties Tribunal, HMRC are not sure this item should be in this list, having assumed that any JR case which was previously with the High Court would go to the Upper Tribunal, rather than this being subject to the agreement of the parties etc.

    - On item 5, Scottish cases where the facts are agreed and which, under a special procedure of the Scottish Supreme Court, can be referred direct to the Inner House of the Court of Session, HMRC's Scottish lawyers would appreciate further clarification. Is this intended to refer to matters governed by rule 41.26 of the rules of the Court of Session (which relates to appeals under section 221 and 222(3) IHTA or regulation 6 and 8(3) of the Stamp Duty Reserve Tax Regulations 1986)? If so it is not clear why a special rule is needed.

AP: **GC to respond to HMRC with clarification as to what the special rule is, so that they could refer back to their lawyers.**

16. RDo was concerned at the proposal that consent of both parties be required to go directly to the Upper Tribunal. He considered that the taxpayer's consent should be required but not that of HMRC. This was based on his concern that HMRC might try to prolong litigation by keeping cases in the first-tier, and

taxpayer consent should always be required for a case to come within the costs regime of the Upper Tribunal.

17. RDo also expressed concern that cases which would obviously be appealed to a higher court would start in the First Tier, rather than the Upper Tribunal. The option to go directly to a superior court of record is available under the current system, but would be restricted in the new system (with permission and on a point of law).

18. IMC wondered if there were many cases which did not turn on the facts but on a 'simple point of law'. MG and JAJ confirmed that many cases do turn on law as opposed to fact, in their experience. JAJ cited the *Carvill* case, as one where issues of fact and law were quite evenly balanced, and it might be heard in either Upper Tribunal or First-Tier.

19. RM commented that at times it seems as though HMRC deliberately build up the costs of appealing in order to deter the taxpayer from accessing their rights. DHa did not accept this, and said that he preferred a symmetrical approach to consent to going directly to the Upper Tribunal. A discussion followed of inheritance tax cases, whereby cases may "leapfrog" to the High Court by agreement of both parties.

20. MG stressed it was important the Group focus on what cases it thought should begin in the Upper Tribunal separate from the issue of costs. The costs policy could be factored in at a later stage.

21. IMC wondered if the current GCIT/SCIT system, whereby the taxpayer can elect to be heard by the Specials was a model for the new system. MW clarified the thinking that most Special Commissioners cases would be heard in the First-Tier of the new system, and Special Commissioners cases should not be equated with Upper Tribunal cases in the new system. The GCIT/SCIT election would not be a feature of the new system

22. MW further noted that the Upper Tribunal is equivalent to the High Court and so it would not always be appropriate to start cases at that level. There was a policy intention that these appeal rights be dealt with as far as possible within the Tribunals system (as opposed to the Courts system). He would check the statute in relation to whether cases dealt with properly in the First-Tier might appeal directly to the Court of Appeal. He did note, however, that higher courts do take a dim view of leapfrogging and that permission would be required. In the discussion, it was noted that higher courts often prefer the lower courts to perform a fact-sifting role.

23. There was a discussion around Judicial Reviews. JAJ posited that the First Tier and the Upper Tribunal might need to sit simultaneously, such as where a case is an ordinary VAT appeal, but where there is a judicial review point.

24. MG concluded by thanking the Stakeholder Group for a good opening discussion on the Upper Tribunal. MW said they would take the issues raised to the next meeting of the costs sub-group, which Sir Stephen Oliver would join.

AP: TAM Project Team to check TCE Act to see what provisions (if any) there are for cases "leapfrogging" the Upper Tribunal from First-Tier to Court of Appeal.

Start of Jurisdiction

25. DHa and DHi briefed the Stakeholder Group on their process map and the key points of interface with HMRC. They noted the ongoing work on information exchange and other requirements with MoJ. DHi noted this was likely to be the last version of the overall map, and they would now be working on process maps for each of the individual tracks envisaged (simple, standard etc).

26. RM raised a concern around step 6, which set out a requirement for taxpayers to notify HMRC at the same time as the Tribunal. He saw this as burdensome and unnecessary as the Tribunal would notify HMRC in any event. DHi acknowledged this concern, and said that this step needed further consideration and should be considered "optional". There was an issue HMRC was working through in relation to ensuring the taxpayer notified them they wanted tax postponed at the time of their appeal. They referred to this as "dual service", and were in discussion with MoJ, in light of how rules for other tribunals accommodated such an approach.

27. PH pointed out that use of the word "appeal" by HMRC was unhelpful, given the role of the Tribunal Service, and that "objection" was better terminology to use with the taxpayer. She also highlight the DWP guidance for appellants as being very clear and helpful and could be used as a model for the new tax appeals system.

28. MG suggested the group consider the chart at their leisure and come back to HMRC if there were any further concerns.

Paper Hearings

29. MG introduced the item on Paper Hearings and asked DHa to present the paper that had been tabled. DHa outlined the discussion at the Rules sub-group, that a default Paper Track found favour, but that they wished for agreement from the main Stakeholder Group. DHa drew attention to table of compliance penalty appeals, all in direct tax, all reasonable excuse cases, which would be part of the default paper track.

30. DHa made the point that HMRC and MoJ might consider extending the proposed list of cases they thought appropriate for a default paper track at a later stage. This might include some compliance penalties cases which would be new types of cases coming out of the Powers Review. Any extension to the list would only be after consultation with stakeholders.

31. JaJ queried the process as it was set out in the minutes of the Rules sub-group, i.e. concerning an exchange of documents. He thought there was a missing stage whereby the taxpayer would respond to an HMRC written decision. He further noted that he had never upheld a reasonable excuse appeal when an appellant had not turned up. DHa assured him that a Paper Hearing would occur after optional internal review and an HMRC decision.

32. DHa made clear there would always be the option of choosing an oral hearing, and the Tribunal could always require it in any event. There was a discussion as to whether HMRC should have an equal power to opt for an oral hearing with the appellant. RDo was concerned that HMRC not, in effect, practice a veto and force an oral hearing, possibly for vexatious reasons.

33. DHi noted that with the move towards centralisation there would be less likelihood of the “rogue inspector” scenario. It was further noted it might emerge that a case did have precedence value and HMRC might wish an oral hearing; and appellant would not be compelled to attend. MG also made the point that the Revenue might wish to opt for an oral hearing because they might suspect the taxpayer of lying. The Tribunal might not be able to determine this from the papers.

34. RM asked whether the proposed default paper hearings track precluded the taxpayer and HMRC both agreeing a paper hearing for other cases. Stakeholders had seen this in the past as a potential convenience for taxpayers. BP confirmed that the Rules subgroup (in para 11 of the subgroup minutes) did envisage hearings on the papers for a broader range of cases, however these would not be subject to a default paper hearings track and different procedures would apply.

35. MG now summarised the discussion. He said that unless there was strong opposition, the views of the group was that there should be a default paper track, and the details and rules around this process should now be developed. The Rules sub-group would develop procedural rules for a default Paper Track based on the proposals as set out in the paper**.**

Transition

36. MG introduced this topic, which relates to management of existing cases in the system, and how they transition to the new. The MoJ paper sets out cases in different stages of the hearing and listing process, which they have begun to work on transitional arrangements for. HMRC set out a proposal for how they manage existing live “appeals” within their internal processes.

37. In the discussion that followed the following points were made:

- HMRC expected the “impasse” provision to ensure no sudden spike of work for the tribunal in its first year of operation though the point was made there was no certainty around how taxpayers might behave differently in the new system.
- There would be an offer of internal review for these existing cases, should they wish to appeal to the Tribunal. This was a departure from the consultation proposals, but HMRC thought stakeholders would understand and indeed welcome this.
- DHi would be consulting with professional bodies through their existing consultative committee and business liaison setup on transition arrangements as required.
- MoJ was beginning to work with the Clerks around how best to handle appeals at various stages within the Tribunal system at the point of transition.

A.O.B

38. MG asked if DHa wished to give the group an update on their “Tax Appeals against decisions made by HMRC” consultation. DHa referred to their recently published response document, and that the Finance Bill contained the vires to enable the changes to be implemented. The intention is to publish an initial draft of the joint HMRC/MoJ Order in mid May.

39. There was no other business and the Stakeholder Group are due to meet again on 5th June 2008, 11am – 1pm at Fox Court.

Summary of Action Points

AP No.	Action Point	Owner
1	**An update note to the Group around numbers and types of recruits for the new Tax Chamber**	TAM Project
2	**Clarification as to what the special rule is in relation to Scottish Appeals direct to the Court of Session.**	Gordon Coutts
3	**Check TCE Act to see what provisions (if any) there are for cases "leapfrogging" the Upper Tribunal from First-Tier to Court of Appeal.**	TAM Project
4	**Ensure discussion of Upper Tribunal issues at the next costs subgroup, including attendance by SO.**	TAM Project