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Tax Appeals Modernisation Project		

Tax Appeals Modernisation Project

Stakeholder Group Meeting Minutes

13th February 2008

Fox Court, 14 Gray's Inn Road

Reference: SG11

Prepared by: Jane Betchley and Bryan Pay

Present:

Sir Stephen Oliver (SO)	(President Finance & Tax Tribunals)
Malcolm Gammie (MG)	(Research Director, Tax Law Review Committee)
David Halsey (DHa)	(HMRC)
David Hinstridge (DHi)	(HMRC)
Lord Newton (TN)	(Council on Tribunals)
Penny Hamilton (PH)	(Chartered Institute of Taxation)
Ron Downhill (RDo)	(Law Society)
Jane Moore (JM)	(Low Incomes Tax Reform Group)
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)
Jane Betchley	(Tribunals Service, MoJ)
Rowena Dimond (RDi)	(Tribunals Service, MoJ)
John Avery Jones (JAJ)	(Special Commissioners)
Ian Menzies-Conacher (IMC)	(Confederation of British Industry)
Dr Nuala Brice (NB)	(VAT & Duties Tribunals)
Tony Priest (TP)	(Clerks to the General Commissioners)
Nicola Shaw (NS)	(Revenue Bar Association)

Apologies:

David Goy QC	(Revenue Bar Association)
Roger White	(Section 706 Tribunal)
Peter Knight	(MoJ Legal)

Introductions and Minutes

1. Sir Stephen Oliver (SO) welcomed the attendees and there were introductions. The minutes of the last Stakeholder Group meeting were agreed.

Project Update

2. Rowena Dimond (RDi) introduced herself as the Ministry of Justice's Senior Responsible Officer for the project. She gave a brief project update, noting that a dedicated Tax Appeals Modernisation website had been set up, and reminding Stakeholders that the Transforming Tribunals consultation period ends Friday 22nd February.
3. She acknowledged the progress made on a number of issues, particularly in relation to Start of Jurisdiction and judicial requirements for the new system. HMRC's Powers Review would likely impact on judicial requirements, and MoJ was working closely with HMRC on this. Costs remained an outstanding and difficult issue for the new system.
4. RD also emphasised work going on behind the scenes on an end-to-end business design and process. This was crucial, "joined up" work with HMRC, which stakeholders might not necessarily be aware was going on. .
5. The question was asked how programmed legislative changes to appeal rights (such as in relation to inheritance tax) and transitional issues would be dealt with. MW outlined the order-making powers under the TCE Act, which was an affirmative process, and provided for amendments to primary legislation as part of the transfer process.
6. There were outstanding questions, both legislative and practical, around how appeals in the system at the point of transfer should be managed. MoJ's Legal team will be looking at the tax legislation in close detail, and the TAM Project Team and HMRC have already begun to work on this concern.

Report back of Costs Sub-group

7. Malcolm Gammie (MG) provided an update, based on the distributed note of the sub-group meeting. He pointed out the framework that most of the sub-group had agreed, albeit with caveats and a number of reservations from HMRC. The framework was developed on the assumption that there would be no "Sheldon" practice.
8. The key points were a power in relation to "unreasonable", including "vexatious" or "frivolous", behaviour. The Chamber would generally operate as a default "no costs" environment; there would be an opt-in elective scheme for taxpayers. There was potential for HMRC's Rees practice to address some issues of costs deterring appellants from taking "public interest" cases.
9. MW acknowledged the commitment of the sub-group in meeting for nearly four hours and expressed MoJ's gratitude for the considerable input stakeholders had provided on this issue and to Malcolm Gammie in particular. He said he welcomed the full SG's views on the note before them. However he needed to flag that an appropriate costs regime was emphasised in MoJ's Transforming

Tribunals consultation as an important issue on which feedback was sought and that consultation would be ongoing until February 22. MoJ could not therefore offer a definitive view prior to the end of the consultation exercise.

10. HMRC acknowledged the productivity of the sub-group meeting, particularly its work on how an Upper Tribunal costs regime might work in relation to first instance referrals. That is, the need for agreement from parties and from the Tribunal for the case to enter an Upper Tribunal regime where costs would normally follow the event.
11. HMRC said that they continued to have fundamental concerns around an “elective” approach, which might encourage taxpayers to pick winners and did not think a system founded on such an approach would be acceptable to Treasury Ministers. The critical step, if there were to be some cases to which costs might apply, was drawing a clear line around a small range of cases in the First-Tier, the costs position for which could then be considered. This was necessary for certainty for users and for Treasury Ministers. In the discussion that followed, these points were made:
 - 11.1. The remit of the Stakeholder Group was to make proposals to government in relation to reform of tax appeals. The majority view of the sub-group was that a costs-regime in the First-tier needed to operate on the basis of self-selection.
 - 11.2. The Tribunals Procedure Committee is empowered to make rules for the new Tax Chamber which would cover a costs regime. However, it is not feasible for any proposed regime not to be supported by Ministers, both Treasury and MoJ.¹
 - 11.3. There was a suggestion that cases that were equivalent in weight to High Court litigation might automatically qualify for costs. There was debate around the monetary value at which such a case would qualify (£30,000 was mentioned as an upper limit, but many did not agree). The point was made, by GC, that the Tribunal could agree on an application that the appeal was important complex or potentially lengthy, so making it subject to costs. This could be argued and decided at any preliminary hearing”.
 - 11.4. The point was made that the Tribunal might agree this was an important case, and therefore potentially subject to costs, and this could be made at a preliminary hearing.
 - 11.5. The point was made that if HMRC were concerned around picking winners, they should not take losers. Drawing comparisons across the Tribunal system where award of costs was unusual was not necessarily helpful, as “inequality of arms” between the appellant and HMRC argued for a different approach within tax.

¹ TCE Act 2007 Schedule 5, 28(3). Rules made by the Committee must be signed by a majority of the members of the Committee and submitted to the Lord Chancellor, who may allow or disallow Rules so made.

- 11.6. There were potentially undesirable behavioural consequences in terms of taxpayers taking cases further up the system, should costs only be available in the Upper Tribunal. Some of the large, fact-based cases which were intended to be considered in the First-tier were also ones where legal representation was significant and where costs are appropriate.
12. MG summarised that even if the group had been able to categorise cases as “complex and substantial”, the appellant would have been able to apply for costs, so a de-facto taxpayer “opt in” would have operated in any case. He thought, therefore, that HMRC’s objection was more around the potential open-endedness of the regime.
13. He thought there was some merit in the work that SO had done in trying to categorise cases that would always fall outside of a costs regime (save for “unreasonable” behaviour). There might be potential to take enough cases out of the potential costs pool for HMRC to be confident about an elective scheme operating in the residue. He thought that the sub-group’s proposal could be tweaked in this way. In the discussion that followed this point was made:
- 13.1. There was potential within judicial discretion to “ring fence” cases. It was noted that General Commissioners already make determinations as to whether a case is substantial or complex. The senior president might issue a protocol. Either party might be free to make an application, but the Tribunal would determine whether a case qualifies as substantial, complex, or addresses important issues of justice.
14. MW suggested that the Group wait until responses from the MoJ Transforming Tribunals consultation had been received, and then make a decision as to whether the sub-group should meet again to discuss further. This was agreed.

Report back on Start of Jurisdiction (SoJ) Sub-group

15. JAJ introduced this item and asked DHi from HMRC to provide the update, outlining the proposals that he will take to HMRC’s own Tribunals Reform Project Board on 14th Feb.
16. DHi said that in light of the forceful argument made at the recent Start of Jurisdiction sub-group meeting, HMRC would drop their initial proposal that HMRC transmit the appeal to the Tribunal. Their proposal was that the taxpayer transmitted the appeal to the Tribunal. This raised issues around applications for postponement of tax.
17. HMRC would want the taxpayer to notify them of the course of action they were intending to take at each stage of the process (e.g. seek internal review or appeal). This was partly to inform their decision on maintaining the postponement status of a taxpayer’s appeal.
18. The taxpayer would be provided with the documentation to send the appeal to the Tribunal, and asked separately to send an application for postponement of tax to HMRC (if that was what they wanted). There would need to be systems in place for the Tribunals Service to re-route such applications when they were made to the Tribunal.
19. Where there was no communication from the taxpayer, a time-limit of 30 days would be recommended, before HMRC would notify their administration team of

action to cease postponement. HMRC will install a fail-safe mechanism to reinstate the postponement, should an appeal and application come to light after this period.

20. Over time, it was hoped to provide for electronic transmission of appeals, but this would not be achievable for the April 2009 deadline. Documentation created now however, could be angled towards easy integration into an electronic transmission system in the future.
21. The Stakeholder Group welcomed these proposals. RDo drew attention to the fact that it is currently very simple for the unrepresented taxpayer to appeal, and hoped that rights would not be lost through over-bureaucratisation. SO raised the proposal of a populated appeal form. It was noted that such details needed to be worked through in the coming months, along with other practicalities of the new system.
22. DHa confirmed that it was intended that the vires for changes would be contained in the 2008 Finance Bill.

Update on Judicial Requirements

23. MW presented in hard copy a paper that the TAM Project Team had put together on judicial requirements for the new system based on the “steady state” of General Commissioner work. This had not been circulated as a formal paper, as changes to the Construction Industry Scheme and the HMRC Powers Review’ looked set to increase the new Tribunal’s workload towards the end of 2009/10. The order of magnitude and how this should be factored in were still being worked through.
24. MW drew attention to the regional breakdown of General Commissioner work, and the draft job descriptions for fee-paid Non-Legal and Legal Members of the new Tribunal. These had received judicial input. He noted that around half of requirements would be met by appointments through the Judicial Appointments Commission, and that most non-legal requirements would be met in this way. It was hoped that through this process existing General Commissioner and Clerk expertise would transfer into the new system.
25. RM asked if the time average estimates were a bit low, given his experience of lengthy Personal Income Tax Assessment cases, and the difficulties this involved in terms of listing. MW noted the bulk of the judicial needs would be met through fee-paid members, which provided flexibility if time estimates were a bit low. HR said that he thought the averages seemed reasonable approximations and provided a good yardstick. He noted that these time averages were based on a relatively comprehensive recent data gathering exercise with Clerks.
26. MG asked whether decision-making time had been included in the averages. MW confirmed that non-hearing related judicial time had been included, following comment from stakeholders at the last meeting. SO commented that the Rules sub-group would be considering the issue of what written determinations might be required following a case (whether short-form or long-form). PH suggested a short summary be written for all cases, though some cases would naturally require a more detailed explanation.

17. TN raised a concern that the last bullet in the non-statutory criteria for Non-legal members seemed to suggest equality of status between HMRC administration and the Tribunal. This was rephrased as “having an understanding of tax appeals”.
18. MW said MoJ would be happy to distribute the Job descriptions electronically for comment. Whilst MoJ still did not have a firm timetable from JAC, they were in contact with them and JAC was aware of the order of magnitude required and the implementation timetable. BP said the Non-legal competition would be the larger of the ones proposed, and a reserve list would probably be utilised for positions becoming available for a period after the initial recruitment.

Update on Rules

19. MW provided a brief update. He explained that a set of “generic” or core rules had been sent out to senior judiciary for their comment. On the basis of this comment, Tribunal rules would be developed on a Tax Chamber basis. This empowered the sub-group to meet to develop Tax Chamber specific Rules requirements, which would then be taken forward by the Tribunals Procedures Committee.
20. The Rules sub-group would meet on 20th February, and report back to the Stakeholder Group at its next meeting in April. The sub-group would also consider Paper Hearings.
21. NB had received a copy of the generic rules and responded with other members of the Full-time Tax Judiciary. She saw the work of the sub-group has two-fold, being the question of what jurisdiction specific rules might be required, as well as what changes should be made to the Generic Rules to be appropriate to Tax.
22. In the discussion that followed, JM argued that a user-friendly “how to appeal” guide, written in plain English, would be important to help the unrepresented taxpayer understand and conduct their own appeal.

A.O.B

23. There was no other business. The Stakeholder Group are due to meet again on 2nd April 2008, 11am – 1pm at Fox Court.

Summary of Action Points

AP No.	Action Point	Owner
1	Stakeholders to respond, if they wished, to the Transforming Tribunals consultation, closing date of 22 nd February 2008.	All
2	To consider reconvening the costs sub-group, following the results of the consultation, in relation to the questions asked concerning costs.	Malcolm Gammie & TAM Project
3	To distribute electronically to the sub-group the Paper on Judicial appointments, including draft Job Descriptions, after amendment as suggested by TN.	TAM Project
4	To provide for the next stakeholder group meeting an update paper on workload, case categorisation, and	TAM Project

	Judicial Requirements in the new tax appeals system.	
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