Tribunals Service

JUDICIAL OFFICE AND
BUSINESS DEVELOPMENT DIRECTORATE

Tax Appeals Modernisation Project

Paper 1 – Update on Costs

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Update on Costs

The Stakeholder Group will recall that we spent a good deal of time at the last meeting considering the issue of an appropriate costs regime for the new system.

In the course of discussion it became clear that the future of the "Sheldon" principle was a fundamental issue for stakeholders. It was also agreed that a Sub Group be established under the chairmanship of Malcolm Gammie to take the issue forward.

HMRC and MoJ officials had a series of discussions and the views of the respective ministers were sought. This culminated in a revision to MoJ's "Transforming Tribunals" document (published 28 November) which explained that the Government took the view that Sheldon would not apply on the introduction of the new tax appeals system. The relevant extract is at Annex A.

The Project team circulated a note to the Sub Group noting the position and setting out some proposals for a costs regime in the light of that. Members of the Sub Group felt however that further clarification was required on Sheldon and they subsequently met with HMRC to discuss this.

Members of the sub group requested that the clarification provided by HMRC should be made available to the full Group and thereafter published more widely. HMRC agreed to consider this request. HMRC have now prepared the note attached at Annex B. After the meeting, HMRC's note will be published on the MoJ "Tax Appeals Reform" website.

Following the discussion with HMRC Malcolm Gammie and Robert Maas have provided their views on MoJ's paper. MoJ propose however that with the clarification provided by HMRC, the Sub Group may now wish to meet and discuss. A meeting in January would allow proposals to be brought back to the full SG meeting in February.

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Annex A - Transforming Tribunals: Tax Appeals: Consultation on Costs

A note from HMRC

Following publication of the "Transforming Tribunals" document on 28 November, discussion with some members of the Ministry of Justice Senior Stakeholder Group, has revealed some uncertainty about the meaning and implications of the statement (paragraph 297) that on the move to the new tribunal, the "Sheldon" practice will cease to apply. The Ministry of Justice have invited us to clarify the position.

Under the costs regime for the VAT and Duties tribunal and the Sheldon practice, HMRC pays costs when it loses but does not normally seek costs when it wins. These arrangements date back 30 years to the time when VAT was a new tax and the uncertainty that inevitably generated for taxpayers and government alike. On the direct tax side, which generates the overwhelming majority of tax appeals, costs have never been generally available. Going forward, direct and indirect tax appeals will be heard by the same tribunal, and it seems appropriate to look for a consistent approach across the taxes.

In line with the proposals for tribunals more widely, the consultation document proposes (paragraph 298) that "no costs" would be the default position, but invites views on whether there is a case to make limited provision for costs where one of the parties behaves unreasonably or the issues involved are substantial or complex. These proposals are put forward on the basis that either side would be liable to pay the other's costs if they lost.

The statement about Sheldon clears the ground for discussion of the costs issues in the context of the consultation. The document envisages discontinuing the practice as it currently applies to indirect taxes on the move to the new tribunal system. And it does not put forward any proposals to apply any similar blanket arrangements across all taxes and duties under any new arrangements about costs designed for that system.

It is, of course, open to those responding to the document to comment on any aspect of what is envisaged, if they wish, in the normal way. We are aware for instance that some respondents may want to suggest limited categories of appeal which they feel merit special consideration. In doing so they would need to take account of the "Rees practice" (see below) which addresses cases of hardship and wider interest, and which it is envisaged would continue. In making any case for exceptional treatment it would be important to address and take account of the behavioural effects (both positive and negative) and balance the interests of the individual with those of the taxpaying population as a whole who would ultimately pick up the bill.

It has become clear to us that the "Rees practice" is not as widely known as we supposed. This practice is described in a Ministerial statement which sets out the circumstances in which the revenue departments (now HMRC) will exercise discretion about seeking costs in appeals, in particular where there is hardship for the taxpayer and a wider interest in the outcome. A copy of the statement is attached.

There is no intention to discontinue the "Rees practice", which we envisage would apply wherever costs are available in the new tribunals.

HMRC
6 December 2007

The Rees practice

The policy on coming to arrangements about costs (in the context of High Court cases) was set out by Mr Peter Rees on 12 March 1980:

"The general rule in the appeal courts is that losing party risk having to pay the other side's costs, and I do not think it would be right to treat tax cases differently as a matter of course. However, both revenue departments exercise their discretion on matters of costs and are willing in appropriate circumstances, and in particular where it is they who are appealing against an adverse decision, to consider waiving their claims to costs or making other arrangements. Influential factors include the risk of financial hardship to the other party and whether the case is one of significant interest to taxpayers as a whole, turning on a point of law in need of clarification. If the revenue authorities are to come to an arrangement of this nature, they would expect to do so in advance of the hearing and following an approach by the taxpayer involved."