Taking a Tax Appeal

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This article concerns the legal, procedural and practical aspects of appealing to the Special Commissioners against an assessment to corporation tax (similar principles apply to income tax and capital gains tax). The note covers preparation of the appeal, the tribunal hearing, the importance of factual evidence and witnesses, the roles of the taxpayer, barrister and tax adviser and the position in relation to costs. It goes on to discuss the options available to a party who is unsuccessful at first instance, before finishing with a brief overview of the main changes that the Tribunals, Courts and Enforcement Act 2007 ("TCEA 2007") will make to the tax appeals process. It does not specifically address appeals to the VAT Tribunal or General Commissioners.

1. When and How to List an Appeal

The listing of an appeal represents the first stage in the formal process of tax litigation. It generally occurs, however, at a late stage in a dispute with HMRC; and disputes invariably arise as a result of enquiries into and amendments to self-assessment returns or as a result of assessments to tax which are not self-assessments[*]: see generally s.31 Taxes Management Act 1970 ("TMA 1970").

In terms of timing, therefore, an appeal should be listed when a dispute has reached a stage when no further progress can be made in the resolution of the dispute so that HMRC makes an amendment to a self-assessment return

[*] The tax legislation grants rights of appeal in other situations. These are not specifically addressed in this article.

which the taxpayer is unwilling to accept, or when HMRC is unwilling to revise an assessment (other than a self-assessment) which it has made.

Most tax appeals have to be made in writing within 30 days of the issue of the assessment or notice of the amendment to self-assessment: s.31A TMA 1970. A notice of appeal must specify the grounds of appeal.

The legislation provides for a taxpayer to make an application for admission of a late appeal: s.49 TMA 1970. An application of this kind must be made to an Inspector (or the Board of HMRC) who should allow it if he is satisfied that there is a reasonable excuse for the late appeal and that the application is made without unreasonable delay after the expiration of the normal time limit.

If the Inspector (or the Board) is not satisfied on an application made under s.49 TMA 1970, he should refer the application to the Commissioners. The Commissioners' decision on an application under s.49 TMA 1970 is final.

HMRC's approach to applications for late appeals is described in the Manuals at AH0251.

Once a decision is made by the taxpayer to appeal, HMRC will frequently offer to apply to the Special Commissioners[*] for the appeal to be listed. This manner of proceeding presents few difficulties in practice. If HMRC lists an appeal, it will do so on a Form 209. Form 209 is designed to supply the Commissioners with the details of the taxpayer and the dispute, as well as a description of the question for determination. HMRC will seek to agree the question for determination with the taxpayer before sending Form 209 to the Commissioners.

[*] Tax appeals may, in some cases, be heard by the General Commissioners. Only appeals to Special Commissioners are, however, addressed in this article.

On occasion, however, HMRC will delay in listing an appeal and it is perfectly open to the taxpayer to apply to the Special Commissioners for the Appeal to be listed.

A taxpayer may list an appeal by letter to the Special Commissioners. The letter should contain the following information.[**]

(1) Full name of the appellant.

(2) Appellant's address for correspondence

(3) Details of representation (accountant/solicitor/Counsel).

(4) Name, address and reference number of HMRC officer dealing with the case.

(5) The matter under appeal (a photocopy of the correspondence identifying the item(s) appealed against).

(6) A copy of the notice of appeal.

(7) Evidence of formal election of the appeal to the Special Commissioners.

(8) A brief statement of the point(s) at issue.

(9) An estimate of the time needed for the hearing.

[**] See "Guidance on the referral of an Appeal for Hearing by the Special Commissioners", a guidance note prepared by the Special Commissioners.

(10) An indication whether directions have been agreed between the parties, or if standard directions are to apply.

(11) Confirmation that the above information has been served on the other side.

2. Stages in an Appeal

The first stage of a tax appeal is the hearing before the Special Commissioners.* The conduct of appeals before the Special Commissioners is governed by the Special Commissioners (Jurisdiction and Procedure) Regulations 1994, SI 1994/1811 ("the Regulations").

Appeals lie from the Special Commissioners to the High Court, from the High Court to the Court of Appeal and from the Court of Appeal to the House of Lords. The avenues open to the party which is unsuccessful at first instance are covered more fully below.

Referrals to the European Court of Justice may be made at any stage during the course of an appeal. A referral can, therefore, delay the progression of an appeal and prevent it from directly following the usual stages.

An appeal may be settled by agreement at any stage in the process if terms can be agreed between the parties. If an appeal is settled by agreement or withdrawn before it is heard by the Special Commissioners, the Clerk to the Special Commissioners must be informed immediately and written confirmation must follow to the Special Commissioners. At later stages (before the High Court, Court of Appeal and House of Lords) the appeal must be withdrawn in the manner provided by the RSC.

* There are a limited number of statutory provisions which contain unique appeals procedures e.g. ss.703 et seq Income and Corporation Taxes Act 1988. The general position is addressed in this article.

3. What Happens at Each Stage

Special Commissioners

In tax cases, the hearing before the Special Commissioners is usually the most extensive hearing during the course of an appeal and usually requires the most extensive preparation. Appeals before the Special Commissioners are relatively informal, though nowadays, case management before the Special Commissioners is governed by Directions made pursuant to powers given by the Regulations.

The matter of Directions is explained in a Practice Statement ("the Practice Statement") issued by the Presiding Special Commissioner, Sir Stephen Oliver, in September 2006.[*] The directions essentially govern the preparation for a hearing in the period before the hearing.

The Practice Statement notes that straightforward cases can be covered by simple directions and that the parties will usually agree these without any input from the Special Commissioners. The more complex the case, however, the more specific the directions may need to be and the parties may not be able to agree directions between themselves in all cases. If agreement cannot be reached, there may have to be a preliminary directions hearing.

Basic Directions

There are four basic directions ("the Basic Directions") which apply automatically in all cases (simple or complex).

[*] The Practice Statement is reproduced at www.financeandtaxtreatments.gov.uk/practice_directions/ps_special_comms.htm

The first basic direction essentially deals with the listing of the appeal. The second basic direction deals with agreeing the issue for determination. The third basic direction deals with agreeing management directions and the fourth basic direction deals with agreeing dates for a hearing.

Management Directions

The management directions deal with exchange of documents and information, agreement of a draft statement of agreed facts, the identity of proposed witnesses of fact and outlines of evidence of witnesses, preparation of agreed bundles, exchange of witness statements and exchange of skeleton arguments and authorities.

The standard management directions (reproduced in the Practice Statement) will apply if bespoke management directions are not or cannot be agreed.

If standard management directions are utilised but some bespoke directions are, nevertheless, required, these can be the subject of agreement between the parties. Alternatively, either party can apply to the Tribunal before the hearing for additional specific directions.

The aim of the directions is that, by the time of the hearing, the parties should have agreed the issues, facts (as far as possible) and produced agreed bundles of documents and (ideally) authorities, identified witnesses and exchanged skeleton arguments.

From a practical perspective, attention to detail in the preparatory stages is essential; time spent in preparation is invariably repaid.

In practical terms, it is extremely helpful in determining whether or not to appeal a decision of the Special Commissioners and in preparing documents and arguments for appeal, to have a full note of the hearing. In substantial cases -- where there is likely to be at least two or three days of witness evidence, professional transcripts of evidence often prove invaluable. In such cases, HMRC will normally agree to share the costs of the provision of transcripts (which can run to £800 per day). Where the parties agree between themselves to obtain transcripts, the Special Commissioner's consent (which will invariably be granted) should be sought prior to the hearing: the Special Commissioners themselves find transcripts of the evidence most helpful in reaching and preparing their decision.

It is possible to make an application for the hearing before the Commissioners to be conducted in private and the identity of a person not to be publicised in the decision (Regulation 15). The Special Commissioners may grant permission (and will usually do so) for a private hearing and anonymised decision if it is necessary for the protection of the private life of the party making the request or, more broadly speaking, in the interests of justice. An example of the former might be where a firm of accountants have been accused of negligent conduct in respect of their partnership returns that they prepared in-house. Where appropriate, the identity of witnesses can also be withheld in the decision; fear of persecution may, for example, justify this course of action. It is not, however, enough that an ordinary taxpayer would prefer his tax affairs not to be publicised.

Taxpayers should bear in mind, however, that it is almost impossible to secure either a private hearing in or an anonymised decision from the higher courts.

At the hearing before the Special Commissioners itself, the normal procedure is for the taxpayer's representative to open the case by presenting the

agreed facts, the documents, the taxpayer's arguments on the law and the taxpayer's witness evidence. HMRC will have an opportunity to cross-examine the taxpayer's witnesses as they give evidence.

HMRC will then present its arguments on the law and any further evidence that it wishes to adduce. (It is not common for HMRC itself to produce evidence.) If HMRC does produce any witness evidence, the taxpayer's representative will have the opportunity to cross-examine the witnesses.

The taxpayer's representative will then close by replying to HMRC's arguments.

It is increasingly common for HMRC to seek to open the case. This is often so that HMRC has the opportunity to have the first word (in opening) and the last word (in reply). In general, the taxpayer should resist any attempts of this kind by HMRC. In almost all appeals the burden of proof is on the taxpayer and he is entitled to (and, tactically, invariably should) open the case and reply.

In most cases the Special Commissioners will reserve their decision. A written decision ("the Decision") will usually be produced within about 6 weeks.

The taxpayer and HMRC then have to decide whether to give effect to the Decision or whether it can and should be appealed to the High Court.

High Court

The procedure for appealing from a Decision of the Special Commissioners to the High Court is set out below in greater detail, but can be summarised as follows.

The time limit in which an appeal must be made from the Decision of the Special Commissioners is tight. An appeal to the High Court must be made within 56 days from the date of notice of the Decision – so the decision whether or not to appeal must be made promptly.

The appeal is made by an Appellant's Notice of Appeal. This is now a relatively detailed form which must be completed and lodged in the High Court together with accompanying documents. The Appellant's Notice must include grounds of appeal and be accompanied by a copy of the Decision and the bundle of documents in support of the appeal.

Wherever possible, the Appellant should enclose his skeleton argument for use in the High Court with the Appellant's Notice. If not, it must be filed within 14 days thereafter.

An appeal cannot, accordingly, be made with a view to preserving a position and dealing with the details of the appeal at a later stage.

The respondent to the Appeal must complete a Respondent's Notice within 14 days of service on him of the Appellant's Notice unless he simply wishes to have the decision of the Special Commissioners upheld in full, in which case, no Respondent's Notice need be served.

On the other hand, the respondent has considerably longer for serving his Skeleton: it does not need to be served until 7 days before the date of the hearing at the latest.

As regards whether a Decision can be appealed against, an appeal can be made only where the appellant is dissatisfied with the Decision of the Special commissioners as being erroneous on a point of law and this is covered in greater detail below.

In respect of the order of the parties' submissions, the procedure before the High Court broadly follows that before the Special Commissioners. Witnesses before the Special Commissioners will not give direct evidence again before the High Court, but witness evidence as recorded in the Decision or transcripts of evidence may of course be referred to by the parties.

An appeal to the Court of Appeal (from a hearing in the High Court which is itself an appeal) can be made only with permission of the Court of Appeal.

Permission will be granted if the Court of Appeal considers that the case raises an important point of principle or practice, or there is some other compelling reason for the Court of Appeal to hear the case.

In limited circumstances, a decision of the Special Commissioners may be appealed direct to the Court of Appeal rather than the High Court: s.56A(2) TMA 1970 and this is explained in more detail below.

4. The Role of Factual Evidence and Witnesses

Commissioners are the fact-finding tribunal in tax cases. It is, therefore, essential to ensure that the optimum set of facts is established before the Special Commissioners and recorded in their decision ("the Decision").

The Commissioners will apply the law to the facts before them and it is important that they have a complete factual picture for this purpose. The Commissioners can be asked to draw inferences from facts which are found by them (or agreed) between the parties, but cannot otherwise assume the existence of facts which are not proved before them.

Regulation 17 of the Regulations contains the rules regarding evidence at Commissioners' hearings.

Regulation 17(6) provides that the Commissioner may require evidence of any fact which appears to them to be relevant to the subject matter of the proceedings. Relevance is the key criterion for the admissibility of evidence. The Regulation goes on to provide that the Commissioners may receive relevant evidence notwithstanding that it may be inadmissible in proceedings before a court of law in the UK, but (except where a claim to privilege would be upheld) they must admit evidence which would be admissible in such proceedings.

The Commissioners may, therefore, hear a wide range of evidence. In assessing the truth and weight to be attached to any particular evidence the Commissioners may take account of its nature and source and the manner in which it is given: Regulation 17(4). A taxpayer's representative should be prepared to make submissions to the Commissioners as to the relative weight of different kinds of evidence. For example, it might be submitted that direct evidence should be given more weight than hearsay evidence.

Factual evidence before the Commissioner usually takes three forms:

1. Agreed Facts

2. Oral evidence

3. Documentary evidence

It is unusual for evidence to take the form of real evidence such as objects. Occasionally, however, real evidence may be produced: an example might be in an issue concerning capital allowances when physical objects may be exhibited at the hearing.

Agreed Facts

An important part of the process of preparation for a Commissioners' hearing is the agreement (to the fullest extent possible) of facts.

The standard directions require the parties to agree facts so far as possible.

In many cases a statement of agreed facts can take or substantially take the form of a chronology.

In some cases, all of the facts can be agreed and the parties will make submissions only on the correct law to be applied to the facts and inferences properly drawn from those facts.

Increasingly, however, HMRC is reluctant to agree all of the facts in a case and will require the taxpayer to prove at least some of the facts upon

which he seeks to rely. To the extent that facts can be agreed, they should carry significant weight.

Oral Evidence

Oral evidence is introduced by calling a witness to give evidence. Oral evidence is usually given voluntarily, but Regulation 5 of the Regulations provides for the issue by the Commissioners (at the request of a party) of a witness summons.

A witness giving oral evidence may be required to give evidence on oath or affirmation.

Nowadays, evidence in chief is given by witnesses in the form of a written witness statement. The Practice Statement requires the written statement to contain the full names, address and occupation of the witness and to exhibit all necessary documents. The witness statement must conclude with the words "I believe that the facts stated in this witness statement are true" and must be signed and dated by the witness.

A witness statement must be comprehensive and contain all of the evidence which the taxpayer (as the party assumed to be calling the witness) wishes the witness to give. This is particularly important because the Practice Statement provides that a written statement shall stand as the evidence in chief of the witness subject to such further questions as the Tribunal shall allow.

A witness who gives a statement will invariably face cross-examination by HMRC and the Regulations expressly provides for the formal attendance at a hearing of a witness who has given a statement: Regulation 17(5). The taxpayer's representatives will have an opportunity to re-examine a witness following cross-examination.

That said, where the facts are not contentious, HMRC might occasionally not seek to challenge witness evidence. If this is the case, their confirmation should be sought in advance of the hearing and the tribunal notified in writing. It may then be possible to dispense with a particular witness's attendance without prejudice to either party's case, which can often be useful and save costs where the witness would otherwise have had to travel to the hearing from abroad.

Oral evidence may also be given by experts at hearings before the Special Commissioners. This is known as expert evidence and tends to be opinion evidence rather than evidence of fact. Regulation 12 of the Regulations governs the production of expert evidence at hearings before the Special Commissioners.

Regulation 12 requires the parties to a hearing to agree to exchange proofs of their expert evidence by an agreed date (typically about 3 weeks) before the hearing. If the parties cannot agree matters concerning expert evidence, the Commissioners can make directions for disclosure and the timing of disclosure.

The parties should, where possible, agree to use a single expert or encourage their experts to meet to narrow down the issues between them.

In tax cases, the most common form of expert evidence is accountancy evidence as to the correct treatment of various items in commercial accounts. Expert evidence in relation to the laws of a foreign jurisdiction is also not uncommon.

Documentary Evidence

The Practice Statement requires the taxpayer and HMRC to provide to one another lists of documents on which they intend to rely at the hearing and to provide copies of documents on the list that have not already been provided to one another.

The parties should then seek to agree a bundle of documents and paginate it accordingly. If agreement cannot be reached on a bundle, separate paginated bundles should be provided. This might happen where HMRC try to include documents that have no apparent relevance to the case at hand. However, it should be borne in mind, that in cases involving voluminous bundles, it is often better simply to include all the documents (if HMRC refuse to remove seemingly irrelevant documents), rather than disagree over a handful of documents which will then be handed up separately, so drawing attention to them when they would otherwise go unnoticed. The same goes for documents that might otherwise attract privilege if their contents are not damaging to the client.

The Regulations (at Regulation 6) provide that if a party agrees a document for the purposes of any proceedings before the Commissioners, he shall be deemed, subject to the terms of that agreement, to admit for the purposes of the proceedings that the document was written and signed or executed by the person by whom, and on the date on which, it purports to have been signed and if it purports to be a copy of another document, that it is a true copy of that document.

Regulation 6 does not, however, in the absence of express agreement, deem a party admitting a document to admit the contents of that document.

In practical terms, it is extremely helpful to have a clear and well-presented set of agreed documents at a hearing. The use of separate bundles can lead to confusion and inconvenience in referring to documents while presenting a case.

It is important that the parties and witnesses are fully familiar with the documentary evidence as they may have to address it when giving evidence, in particular, during cross-examination.

Documentary evidence is usually accorded considerable weight by the Commissioners (particularly if agreed between the parties). It can reduce the need for witness evidence and its value at a hearing can be very material.

To the extent that documents are not agreed between the parties, one or other party may wish to prove the document: i.e. to satisfy the Commissioners that it is genuine and is what it purports to be. A document is ordinarily proved by calling its author or another person who can verify its authenticity as a witness.

Though it is not essential to prove a document, a party may wish to formally prove a document so that he can persuade the Commissioners to attach more weight to it than they might be inclined to attach to a document which is neither agreed nor proved.

5. The role of the Tax Barrister, Tax Adviser and Taxpayer

The Tax Barrister

The barrister's role is, fundamentally, to represent the taxpayer at the hearing before the Special Commissioners.

In most cases, however, the barrister will have advised the taxpayer for a considerable period of time before the hearing. He or she might even have advised on the matter which has become the issue before the Commissioners.

The barrister will, accordingly, advise on the merits of the appeal, and will frequently advise upon the evidence required and preparations for the appeal.

Most barristers will, in fact, expand their role as much as is reasonably necessary to ensure that the appeal runs smoothly. Barristers are nowadays frequently instructed by accountants instead of (rather than as well as) solicitors and, in the context of a hearing before the Commissioner, a barrister may need to take on a broader than usual role in preparation for the appeal.

The Tax Adviser

The tax adviser's role is to assist the barrister in preparation for the hearing and to liaise with the taxpayer and all persons involved in the appeal.

The tax adviser will generally also be the person in direct contact with HMRC's Solicitor's Office and/or Appeals Unit.

The tax adviser's role is extremely important; he will usually know the taxpayer and his affairs better than others involved in the case and he should seek to ensure that all relevant information and material flows through to the barrister in a convenient and accessible form.

On a more basic level, the tax adviser can assist in the preparation of bundles and more generally with the administrative aspects of the appeal.

Seemingly minor details such as arranging a meeting room at or near to the Special Commissioners over lunchtimes can be of real practical value.

The Taxpayer

The taxpayer's key role will be to support the professional advisers in the appeal. He may also have a significant role as a witness in the case.

In addition, the taxpayer will ultimately take decisions on matters such as whether the case should be settled and, if so, at what figure, and whether the matter should be appealed.

The roles identified for the characters above can change, evolve or overlap. In all cases, however, perhaps the key point is that conducting a case in the best possible way involves a tremendous amount of teamwork; and it is vital that all of the persons concerned operate effectively as a strong and united team.

6. The Unsuccessful Party at First Instance

A number of avenues may be open to the unsuccessful party following a decision of the Commissioners at first instance. They can be summarised as follows:

1. A review of the original tribunal's decision in certain circumstances;

2. An appeal to the High Court on a point of law;

3. A "leapfrog appeal" to the Court of Appeal;

4. Judicial review of the conduct of the tribunal at first instance; or

5. Defending subsequent enforcement proceedings by raising a public law defence.

A Review of the Original Decision

The Special Commissioners' discretion to review, in certain circumstances, an original Decision which they have given is described in the Regulations (at Regulation 19). The Commissioners can review either a final determination or a decision in principle or both either on application of one of the parties or of their own motion.

To review a determination or decision, the Commissioners must be satisfied that:

(a) The decision or determination was wrongly made as a result of an administrative error by the Clerk or any member of the staff of the Commissioners or a party;

(b) A party failed to appear or be represented at the hearing and had a good and sufficient reason for that failure; or

(c) Accounts or other information relevant to the case had been sent to the Clerk or to the Revenue before the hearing but had not been received by the tribunal until after the hearing.

Advisers should be warned that the ill health of the appellant will not necessarily constitute a good and sufficient reason for his failure to appear or to

be represented at a hearing (see, for example, *Forbes v Revenue & Customs (No 2)*, released on 16 May 2007 and *Phillips v Burrows (Inspector of Taxes)* [2000] STC (SCD) 112). The ill health of the taxpayer is not a good and sufficient reason for the failure of his adviser to attend on his behalf.

An application to reopen an appeal must be made not later than 14 days of the issue of the notice of the Decision or determination. The application must be made in writing, stating the grounds in full (Regulation 19(2)). If the tribunal decides to undertake a review of its own motion, it must serve notice of that decision on the parties not later than 14 days of the date of the issue of the Decision or determination (Regulation 19(3)). All parties have the right to be heard in relation to any application or proposal for review.

The outcome of a review is that the Commissioners may vary or set aside the original Decision or determination. A new Decision or determination must be substituted as the Commissioners see fit. Alternatively, the Commissioners must make an order for a rehearing. The rules relating to original Decisions or determinations of a tribunal apply to new Decisions or determinations in the same way.

The Special Commissioners can correct clerical mistakes or errors from an accidental slip or omission in a Decision by way of a signed certificate (Regulation 25(3)).

Where a review has been undertaken, the time limit for appealing to the High Court should run from the date of a Decision varying an original decision or a final determination or substituting for it a new Decision or determination. Where, on the other hand, there has been no variation or substitution, the time limit for appeal will continue to run from the date of the original Decision or determination. The Commissioners' decision as to whether or not to undertake a review cannot itself be appealed to the High Court.

If there is any doubt as to whether a Decision released by the Commissioners is in truth a variation or substitution, the safest course of action is to appeal within the time limit in respect of the original Decision (see *Commissioners for HM Revenue & Customs v Church of Scientology Religious Education College Inc.* [2007] EWHC 1329 (Ch) in relation to a refusal to extend time in relation to an appeal from the VAT tribunal. Note that HMRC has appealed to the Court of Appeal but judgment has not yet been released).

An appeal from the Special Commissioners to the High Court

An unsuccessful party has an automatic right of appeal against the Commissioners' decision to the High Court on an error of law (TMA 1970, s.56A); permission to appeal is therefore not required.

(i) The Role of the Court

Whereas the Special Commissioners are the tribunal of first instance and will generally be the final authority on questions of fact, the High Court serves an appellate function. Its role is limited to determining questions of law. The court cannot overturn a Decision of the Special Commissioners simply because it would have come to a different conclusion on the facts. Accordingly, factual errors are rarely appealable, save where a finding of fact is wholly unreasonable or has no reasonable evidential basis. A good example would be appeals concerning an individual's residence, ordinary residence or domicile: historically, there have been very few successful appeals from Decisions at first instance.

Errors in law made by the Commissioners will be disregarded on appeal if the errors do not directly affect the outcome (*Clarke v British Telecom Pension Scheme Trustees* [2000] STC 222). Furthermore, a Decision will not be set

aside simply because the Commissioners did not take into account or deliberate on a particular issue.

(ii) Appealable Decisions – errors or law or appealable errors of fact

The following are examples of questions of fact:

- Questions of degree;
- Business and accountancy questions;
- Questions as to witness evidence in general as well as questions relating to credibility;
- Matters of expert opinion; and
- Questions arising in respect of the interpretation of laws of a foreign jurisdiction, which will normally fall into the above category as these issues will be the subject of expert opinion (apart from matters of EU law).

The familiar principles which the court will follow when reviewing an apparently factual determination of the Commissioners were set out by Lord Radcliffe in *Edwards v Bairstow and Harrison* (1955) 36 TC 207 HL. In summary:

- There is a distinction between primary facts and inferences drawn from facts.

- There has been an error in point of law "where the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal".

- This will be so either where there is no evidence to support a particular determination or the evidence is inconsistent with and contradictory to the determination.

Factual findings are of crucial importance where the inferences from those facts lead directly to the imposition or otherwise of a charge to tax (for example, individual residence and employment status, findings of fraudulent or negligent conduct).

(iii) Procedure for appealing a decision of the Special Commissioners

The old case-stated procedure is no longer used in relation to appeals from the Special Commissioners. In appeals other than against penalties, the unsuccessful party normally has 56 days from the date the decision was released in which to lodge an Appellant's Notice with the High Court (CPR Part 52 PD para 23.5(1)(c)). The appeal must be made to the Chancery Division; permission is not required. Where the Special Commissioners have been asked to certify the case as suitable for appeal direct to the Court of Appeal and have refused, the time limit for appealing is reduced to 28 days from the date of refusal.

Under CPR Part 52 PD para 5.2, an application for an extension of time can be made. The Appellant's Notice should state the reasons for the delay and the steps taken to progress the appeal.

Appeals to the High Court are made on Form N161. Grounds of appeal are to be appended to the Appellant's Notice which must also be accompanied by a bundle of documents, including the Decision, usually the appellant's skeleton argument, additional evidence being relied upon and any other documents the appellant reasonably considers necessary for the court. The bundle should be agreed in advance with the respondents.

If the appellant's skeleton argument is not served with the Appellant's Notice, then it must follow within the next 14 days.

Typically, all documents and written evidence before the Special Commissioners will be included in the appeal bundle in addition to a transcript of evidence (if taken) before the Special Commissioners.

Copies of authorities relied upon in the appellant's skeleton argument are not included in the materials provided with the Appellant's Notice at this stage. A joint bundle of authorities is produced at a later stage, once the respondents have served their skeleton. Once the Appellant's Notice has been lodged, permission is required for any amendments to be made. A copy must be served on all respondents and on the Special Commissioners.

The *Chancery Guide* is an invaluable aid to the preparation of appeals to the High Court and above.

"Leapfrog Appeals"

(i) <u>From a decision of the Special Commissioners direct to the Court of Appeal</u>

Under TMA 1970, s.56A(2), an appeal from the special Commissioners may be made direct to the Court of Appeal if:

(a) all the parties to the appeal consent;

(b) the Special Commissioners certify that the decision involves a point of law relating wholly or mainly to the construction of an enactment which was fully argued before them and fully considered by them; and

(c) the leave of the Court of Appeal has been obtained.

Where the Special Commissioners do give the necessary certification, the parties then have 28 days within which to make a joint application for permission to the Court of Appeal. Where permission is subsequently granted, the appellant has 14 days from the date of notification to serve the Appellant's Notice on the clerk to the Special Commissioners and the other parties.

Where the Special Commissioners refuse to give the necessary certification or the Court of Appeal refuses permission, the appellant has only 28 days from the date of refusal within which to appeal to the High Court.

(ii) From a decision of the High Court direct to the House of Lords

There is an exceptional power for appeals to be taken directly from the High Court to the House of Lords pursuant to ss.12-15 of the Administration of Justice Act 1969. There are a number of conditions: the High Court judge must certify that the appeal is a suitable one for the leapfrog procedure (on the basis that it raises a point of general public importance based on statutory

interpretation or on which there is already binding Court of Appeal authority) and permission from the Appeal Committee of the House of Lords must be obtained.

Judicial Review of the conduct of the tribunal at first instance

The legality of a Decision of either HMRC or the Special Commissioners can be challenged by judicial review, in much the same way that any other decision of a public body can be so challenged and is, accordingly, only outlined here.

Judicial review exists where there is no other right of appeal or where other rights of appeal have been exhausted. The review will generally be concerned with the conduct of a particular body, rather than the substantive merits of the case.

An application is made to the Administrative Division of the High Court for one of or more of the following discretionary orders: a quashing order (quashing the decision of the public body), a mandatory order (compelling a public body to act in a particular manner) or a prohibiting order (prohibiting a particular course of action). In addition, declarations, injunctions and awards of damages can also be ordered as equitable remedies.

The procedure for bringing a claim for judicial review against either HMRC or the Special Commissioners follows the general procedure set out in CPR Part 54. It is always prudent to warn the proposed defendant in advance of the lodging of the application for permission; failure to do may be reflected in the subsequent award of costs.

Where a Decision of the Special Commissioners is the subject of the review, HMRC must always be joined as an interested party. Taxpayers can

also be joined as interested parties where they are directly affected by the claim (for example, where a third party might be obliged to indemnify the applicant under an existing tax deed).

Under CPR Rule 54.4, the court's permission to proceed is first required. An application for permission is made in the claim form which must be filed not later than 3 months after the grounds to make the claim first arose (CPR Rule 54.5). Permission is normally decided without a hearing. However, if permission is refused on the papers, a reconsideration can be requested at an oral hearing. Once permission has been granted, the application can proceed to trial.

In relation to tax cases, judicial review is normally sought where either HMRC or the Commissioners have acted *ultra vires*, there has been a failure to comply with the rules of natural justice or unfairness or unreasonableness to the extent that no authority properly directing itself on the relevant law and acting reasonably could have reached the decision that is the subject of the complaint (the well-known *Wednesbury* principle as established in the case of *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680).

Examples of cases where judicial review would be the appropriate course of action are:

- Where HMRC has failed to apply the terms of its own publicised Statement of Practice or extra-statutory concession (for example, an application to judicially review HMRC's alleged departure from Statement of Practice IR 20 in relation to individual residence and ordinary residence is currently before the High Court pursuant to the decision of the Special Commissioners in *Gaines-Cooper v Revenue and Customs Commissioners* [2007] STC (SCD) 23);

- Where there has been a breach of natural justice following a tribunal's refusal to adjourn a hearing (for example, *R v Sevenoaks Comrs and IRC, ex p Thorne* [1989] STC 560 where the taxpayer was ill and *R v Hastings and Bexhill General Comrs and IRC ex p Goodacre* [1994] STC 799 where the taxpayer was overseas).

Advisers should note that, although an attractive option in principle, it is relatively rare for a taxpayer to succeed in judicial review proceedings in practice (especially in proceedings brought against the Special Commissioners) owing to the high standard of unreasonableness that must be established by the applicant. In addition, the unsuccessful party can often be left facing a substantial costs bill and public funding is not available.

Mounting a public law defence to enforcement proceedings

Where assessments to tax, penalties, surcharges or interest have been upheld by the Special Commissioners, but subsequently remain unpaid and the Special Commissioners' Decision not appealed to the High Court, there are a number of avenues open to HMRC to enforce payment of tax.

A collector of taxes may distrain upon the taxpayer's goods and chattels – no court order being required unless an entry warrant is sought from the magistrates' court. Tax not exceeding £2,000 is recoverable summarily as a civil debt in the magistrates' court. Alternatively, tax due and payable may be sued for as a debt due to the Crown by enforcement proceedings in either the County Court or the High Court.

Where enforcement proceedings are brought, the general rule is that taxpayers are precluded from challenging the validity of assessments to tax by virtue of TMA 1970, s.70, which provides that, where HMRC produce appropriate certificates to the effect that sums of tax are due, then that shall be

sufficient evidence that the sum claimed is due to the Crown. Penalties, surcharges and interest are similarly recoverable (s.69) and there are a long line of authorities establishing that the County Court has no appellate jurisdiction in respect of determinations of the Special Commissioners (for example, *IRC v Pearlberg* [1953] 1 All ER 388, *CIR v Soul* 51 TC 86 and *Ahluwalia v McCullough*, CA [2004] STC 1295).

However, in an exceptional case, it is open to the taxpayer to raise a public law defence (such as abuse of power, procedural impropriety, *Wednesbury* unreasonableness or unfairness – namely, one of the grounds of judicial review) to challenge proceedings to recover tax (*IRC v Aken* [1990] 1 WLR 1374) and it is not an abuse of process to mount such a defence in private law proceedings (*Pawlowski (Collector of Taxes) v Dunnington* [1999] STC 550). On the rare occasions when such grounds are found to exist against either the Commissioners or HMRC, assessments have not been enforced.

7. Costs

The rules relating to the award of costs vary depending on whether the matter was brought before the Special Commissioners or before the appeal courts.

When the current tribunal system is reformed, the costs structure will be unified.

Costs at First Instance

Pursuant to the Regulations, the Special Commissioners have the discretion to award costs of (or incidental to) the hearing of any proceedings against any party that the tribunal considers has acted *wholly unreasonably* in connection with the hearing (Regulation 21(1)).

Costs can be awarded against HMRC as well as against a taxpayer. The party against whom an order for costs is to be made has the right to make representations against the making of the order (Regulation 21(2)). The order for costs may be in respect of the whole or part of the costs incurred and, if not otherwise agreed, shall be determined by the County Court according to its rules.

The discretion to award costs under Reg 21(1) is very restrictive in two respects – it is certainly not the case that costs follow the event. First, the party concerned must have acted *wholly unreasonably* (a very high standard) and secondly, this must have been *in connection with the hearing* (not at some earlier stage). Accordingly, HMRC cannot be penalised in respect of delays during the course of their enquiries, whether wholly unreasonable or not.

In exercising their discretion, the Special Commissioners must consider the actions of the party in question in light of the overall result of the substantive hearing. Accordingly, a costs order may be refused in the event that each party enjoys partial success in respect of various elements of the hearing, notwithstanding that one party might have acted wholly unreasonably in the process.

Once the Special Commissioners have exercised their discretion, it is rare that it will be over-turned on appeal.

Examples of wholly unreasonable behaviour in connection with a hearing are:

- Acting in bad faith;

- The raising of discovery assessments by an Inspector under TMA 1970, s.29(1) without first checking to ascertain whether he in fact had the power to make the assessments; and

- A persistent failure to comply with directions.

However, the following have been found not amount to wholly unreasonable behaviour:

- The pursuit of an appeal by HMRC on a technical point of law where there was no authority and HMRC had little faith in a successful outcome;

- An inspector's failure to attend the original hearing or notify the taxpayer of intended absence;

- A taxpayer's "war of attrition" against the Revenue, lasting some years, in connection with an appeal against the Revenue's refusal to accept his capital allowances claim.

The Regulations give no indication as to the basis on which costs are to be awarded. Costs are normally awarded on a standard basis (which will not fully reimburse the recipient), but can be awarded on an indemnity basis where the conduct of the person against whom the award has been made has been such that it merits a more punitive award.

The restrictive power of the Special Commissioners to award costs stems from the perception that tribunal proceedings are, by their nature, relatively straightforward and can normally be conducted without the need for legal

representation. Accordingly, many tribunals have a limited jurisdiction to award costs.

In reality, however, proceedings before the Special Commissioners do not normally fit in with this perception and can involve complex issues of both fact and law. It has been suggested, during the course of the consultations in relation to the Tribunals Courts and Enforcement Act 2007, that the proposed unified system of costs should apply to tax cases in a similar manner as they currently apply before the VAT tribunal (where the tribunal's discretion is far less restricted so that costs normally follow the event, but the normal practice of HMRC is not to apply for their costs save in exceptional circumstances, such as cases involving dishonesty, evasion of VAT or misuse of the tribunal procedure by the taxpayer).

Costs in respect of appeals to the Higher Courts, including judicial review

Costs in respect of an appeal to the High Court and beyond are awarded as the court sees fit, as with any other civil appeal. An order for costs will be made either at the end of the hearing or when judgment is handed down and normally follow the event.

Costs are similarly awarded in the Court of Appeal and House of Lords. The rules relating to costs are predominantly contained in CPR parts 43-48 and related practice directions.

In practice, costs will normally be determined by summary assessment, although a detailed assessment of costs is also possible.

In certain types of cases, HMRC will not ask for its costs on appeal, even if successful. Such instances include:

- Where the taxpayer appears in person, especially as respondent to an appeal by HMRC from an erroneous decision of the Commissioners;

- Where the appeal is considered by HMRC to be a "test case"; or

- Where the matter is one of statutory determination or is of particular public importance and the tax at stake is relatively low.

However, taxpayers and their advisors should not be misled into believing that, simply because the tax at stake is small, this will be reflected in the level of costs awarded by the court to HMRC if it is the successful party.

Although the principle of proportionality might affect the grade of HMRC Solicitor instructed in a particular matter (and indeed, HMRC's choice of counsel), it does not mean that HMRC's preparation should be unduly restricted.

It is not out of the question, in rare cases, for an award of costs to be greater than the tax at stake (depending, of course, on the complexity of issues to be determined and the conduct of the taxpayer in relation to the appeal).

If, in relation to a particular appeal, a potential award of costs is a concern, advisers should seek to agree how costs should be borne by the parties in advance with HMRC. If no agreement is forthcoming, it may, in certain circumstances, be possible to apply to the court prospectively for a "costs cap order" at an early stage in the proceedings.

Where a taxpayer does not instruct a solicitor to conduct appeal proceedings, it should be noted that only certain preparation costs will be recoverable.

Advisers should be particularly mindful of this where, at first instance, a taxpayer has instructed either a firm of Chartered Accountants or Chartered Tax Advisors, who instructed counsel directly under the Bar's Licensed Access Scheme.

A firm of solicitors will have to be instructed (possibly in addition to accountants) on appeal if technical legal assistance is required by counsel and if costs relating to those legal services are to be recovered (see *Agassi v Robinson* [2005] EWCA Civ 1507).

Interest is payable on any costs awarded to or against the Crown in the High Court, unless the court orders otherwise (Crown Proceedings Act 1947, s.24(2)).

8. **Proposed Changes under the Tribunals, Courts and Enforcement Act 2007**

The Tribunals Courts and Enforcement Act 2007 ("TCEA 2007") received royal assent on 19 July 2007. The TCEA 2007 is essentially the enabling legislation for the entire reform of the current system of tribunals and appeals, including tax appeals. In due course, detailed rules will be contained in Statutory Instruments, which are to be published for consultation shortly.

The TCEA is divided into seven parts. The principal reforms relating to tax appeals and enforcements are contained in:

- Part 1: Tribunals and Inquiries – this creates a new statutory framework for tribunals, bringing tribunal judiciary together under a Senior President;

- Part 2: Judicial Appointments – this revises the minimum eligibility requirements for appointment to judicial office, enabling eligibility to be extended by order; and

- Parts 3-6: Civil Debt and Recovery – These revise the law relating to enforcement by seizure and sale of goods, including power of entry into premises. Claims in the civil courts will be enforced more effectively; administration orders and enforcement restriction orders are to be reformed; measures will be introduced to assist debtors to manage their indebtedness.

In outline, the proposed changes to the current tax appeal system are:

- The current systems of tribunals will be unified into a single tribunal comprising a first tier and an upper tier. All tax appeals will go to the one tribunal which will replace the General Commissioners, the Special Commissioners and the VAT Tribunal.

- ***The first tier*** will be organised into "chambers"; there will be a specific chamber for hearing tax appeals:

    - In most cases, it will be the tribunal of first instance.

    - It is thought that the first tier will consist (in the case of tax) largely of local centres before a local judiciary, much like the present meetings before the General Commissioners.

- There will most likely be larger centres in London, Manchester and Edinburgh that will deal with matters of greater complexity.

- Some of the present Special Commissioners and VAT Tribunals members may well preside over such matters.

- As well as a right of appeal from the first tier to the upper tier, the first tier will also have the power to review its decisions.

- ***The upper tier*** will be a single tribunal organised into groups of judges, each group having responsibility for a particular jurisdiction:

  - Judges that currently preside over High Court appeals will comprise the upper tier, potentially alongside some of the current Special Commissioners and VAT Tribunal members.

  - Appeals raising a point of law or wide importance or particular complexity may, in certain cases, start in the upper tribunal.

  - However, it is unlikely that particularly fact-heavy appeals will be suitable for first hearing in the upper tribunal.

  - The purpose of the upper tier is effectively to replace the current right of appeal to the High Court. Appeals from the first tier will go to the upper tier and then, with leave, straight to the Court of Appeal and so on.

- The upper tier will also take on a large part of the High Court's current jurisdiction in judicial review matters.

- Rather than lodging a notice of appeal with HMRC, taxpayers will post appeals directly to an appeals processing centre.

- There will also be reforms to the current rules relating to (amongst others) the publication of appeal cases, costs and fees and rights of audience.

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