

BRITISH TAX REVIEW

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LEGAL TAXONOMY

FROM SWEET & MAXWELL

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Transformation of the tax tribunal

THE new rules governing the reform and operation of the tax tribunal are set out in the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) and the secondary legislation issued thereunder. The changes introduced by TCEA 2007 are in response to the 2001 Report of The Review of Tribunals by Sir Andrew Leggatt¹ which was commissioned by Lord Irvine of Lairg, the then Lord Chancellor, and the 2004 White Paper entitled “Transforming Public Services: Complaints, Redress and Tribunals”.² The secondary legislation was introduced following the public consultation undertaken by HMRC in October 2007.³

The reform of the tax tribunal is part of a wider reform of tribunals and has resulted in a two-tier tribunal system comprising the First-tier Tribunal and Upper Tribunal,⁴ and which so far as possible is governed by a single uniform set of rules. The Lord Chancellor has appointed Carnwath L.J as the Senior President of the Tribunals⁵ who presides over both the First-tier Tribunal and the Upper Tribunal.⁶ The tribunal is divided into chambers.⁷ There is a Tax Chamber of the First-tier Tribunal⁸ and a Finance and Tax Chamber of the Upper Tribunal.⁹ Each of the chambers has a president who presides over that chamber.¹⁰ Warren J. is the first President of the Finance and Tax Chamber of the Upper Tribunal. Sir Stephen Oliver Q.C., the former Presiding Special Commissioner, has become Acting President of the Tax Chamber of the First-tier Tribunal, and (non-statutory) Vice-President of the Finance and Tax Chamber.

Many of the tribunals in England and Wales which the Act sought to reform were administrative tribunals where one party to the hearing was a branch of the state. One of the main objectives of the reform was to establish a tribunal system which was independent of the sponsoring department of the administration.

In this article the writers will consider some of the novel procedural rules as they apply to the tax tribunal and the structure which has been put in place to secure independence.

¹ Report of the Review of Tribunals by Sir Andrew Leggatt: Tribunals for Users—One System, One Service (August 16, 2001) (2001 Leggatt Report). Available at: www.tribunals-review.org.uk/leggatthm/leg-00.htm (accessed May 5, 2009).

² White Paper *Transforming Public Services: Complaints, Redress and Tribunals* (July 2004) Cm 6243. Available at: www.dca.gov.uk/pubs/adminjust/transformfull.pdf (accessed May 5, 2009).

³ HMRC, *HM Revenue and Customs and the Taxpayer: Tax Appeals against decisions made by HMRC*, Consultation Document (October 2007). Available for download from: http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_afpb=true&_pageLabel=pageLibrary_ConsultationDocuments&propertyType=document&columns=1&id=HMCE_PROD1_027968 (accessed May 5, 2009).

⁴ TCEA 2007, ss.3(1), (2).

⁵ TCEA 2007, s.2(1).

⁶ TCEA 2007, s.3(4).

⁷ TCEA 2007, s.7(1).

⁸ First-tier Tribunal and Upper Tribunal (Chambers) Order (SI 2008 No.2684), as amended by the First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order, SI 2009 No.196, Art.2(3).

⁹ SI 2008 No.2684, Art.6(b).

¹⁰ TCEA 2007, s.7(2).

Jurisdiction and precedent

With effect from April 1, 2009 the General and Special Commissioners, the VAT and Duties Tribunal and the Section 706 Tribunal were abolished and the jurisdiction of each of those tribunals was expressly transferred to the new tribunal.¹¹

Further there was an express transfer of the jurisdiction from the High Court to the Upper Tribunal where a case before the tribunal involves an application for judicial review of an act or omission of HMRC.¹²

The Upper Tribunal is a superior court of record¹³ which enables it to make determinations of fact and law and failure to comply with an order of the Tribunal may amount to contempt and a custodial sentence can be imposed. This is the role normally adopted by the High Court. The jurisdiction of the High Court to review its decisions is naturally consequentially excluded.¹⁴ As discussed more fully below an appeal from the Upper Tribunal is expressly to the Court of Appeal¹⁵ and not to the High Court as was the case for an appeal from the Special Commissioners.¹⁶ The Upper Tribunal has effectively assumed the jurisdiction of the High Court.

The Upper Tribunal may undertake a review of its own decisions and this is discussed in more detail below.¹⁷ The Upper Tribunal also has jurisdiction to hear appeals from the First-tier Tribunal.¹⁸

The First-tier Tribunal has jurisdiction to hear appeals in respect of decisions where there was previously a right of appeal to the Commissioners¹⁹ and can make determinations of fact and law. It is not a court of record or superior court of record. It has jurisdiction to review its own decisions on questions of law but not of fact.²⁰

There is no express provision stating the precedential value of a decision of either the First-tier Tribunal or the Upper Tribunal. As the Upper Tribunal is a superior court of record and has effectively assumed the jurisdiction of the High Court the expectation is that its decisions should have the same precedential value as a High Court decision and a judge of the Upper Tribunal should follow existing High Court decisions as a matter of judicial comity unless the judge considers the decision to be incorrect.²¹

The First-tier Tribunal is free to make decisions on the law and facts on their merits without reference to any prior decision made by that tribunal. This general rule reflects the difficulty of generating a consistent view of the law where the decision-making tribunals are geographically disparate. This accords with the 2001 Leggatt Report.

¹¹ Transfer of Tribunal Functions and Revenue and Customs Appeals Order (SI 2009 No.56), Arts 3 and 4.

¹² TCEA 2007, s.19(1).

¹³ TCEA 2007, s.3(5).

¹⁴ *Hansard*, HL Vol.629, col.1438 (December 13, 2001).

¹⁵ TCEA 2007, s.13(1) and Appeals from the Upper Tribunal to the Court of Appeal Order 2008, SI 2008 No.2834, Art.2.

¹⁶ TMA 1970, s.56A(1).

¹⁷ TCEA 2007, s.10(1).

¹⁸ TCEA 2007, s.11(2).

¹⁹ SI 2008 No.2684, Art.5A (as inserted by the First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order, SI 2009 No.196, Art.5).

²⁰ Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules (SI 2009 No.273), r.41(1)(b).

²¹ Lord Mackay of Clashfern (Ed.), *Halsbury's Laws of England*, 4th ed. (LexisNexis Butterworths, London, 2007), Vol.37, para.1244.

Composition of the panel and track allocation

The membership of both the First-tier Tribunal and the Upper Tribunal will consist of legally qualified judges²² and of members with specialist expertise in the relevant area.²³

Judges and members from the previous tribunals, apart from the General Commissioners, have been transferred into the new system.²⁴ Full-time Special Commissioners have become judges in the Upper Tribunal and Deputy Special Commissioners have become judges in the First-tier Tribunal and deputy judges in the Upper Tribunal.²⁵

The composition of the panel of judges hearing any case is dependent on the nature of the case being heard. Cases are allocated to one of four tracks: default paper cases, basic cases, standard cases and complex cases.²⁶ Default paper cases are cases which are not allocated to one of the other three tracks and, as the name suggests, are decided on the papers without a hearing.²⁷ However, if either party requests a hearing one must be held.²⁸ Likely cases to fall within this category are imposition of penalties for late filing.

Default paper cases may be dealt with by a single judge or member.²⁹

Basic cases involve a hearing with minimal exchange of documents prior to the hearing.³⁰ Appeals against penalties on the ground of reasonable excuse are likely to be basic cases.

Basic cases will be heard by a panel of three consisting of judges or members as directed by the Chamber President.³¹ It is expected that where preliminary issues are being determined the presiding member of the panel will be a judge.

Standard and complex cases are those which are subject to more detailed case management and are disposed of at a hearing.³² Complex cases are those which the tribunal considers will involve a lengthy hearing, receiving large volumes of oral evidence, complex or important principles or issues, or large sums of money.³³

The rules governing the composition of the panel are the same in standard and complex cases. Where the panel is disposing of the case or hearing preliminary issues it must comprise at least one judge who may sit with two others, who may be judges or members as directed by the Chamber President.³⁴ Where the hearing is for directions or striking

²² TCEA 2007, Sched.2, para.1(2).

²³ TCEA 2007, Sched.2, para.2(2).

²⁴ Tribunals Service, "New Tax Tribunals launched", News Release 02/09 April 1, 2009 available at: www.tribunals.gov.uk/Tribunals/Documents/Releases/PN_0209_NewTaxAppealsSystemLaunched_final.pdf (accessed May 8, 2009).

²⁵ SI 2009 No.56, Art.5.

²⁶ SI 2009 No.273, r.23(2).

²⁷ See fn.26.

²⁸ SI 2009 No.273, r.26(7).

²⁹ Carnwath L.J., Practice Statement, "Composition of tribunals in relation to matters that fall to be decided by the Tax Chamber of the First-tier Tribunal and the Finance and Tax Chamber of the Upper Tribunal on or after 1 April 2009", (March 10, 2009) (Tribunal Composition Practice Statement), para.3. The statement is available at: www.tribunals.gov.uk/Tribunals/Documents/Rules/Practicestatementontaxcomposition.pdf (accessed May 8, 2009).

³⁰ See fn.26.

³¹ Tribunal Composition Practice Statement, para.4.

³² See fn.26.

³³ SI 2009 No.273, r.23(4).

³⁴ Tribunal Composition Practice Statement, para.7.

out a single judge must preside.³⁵ If the panel comprises two judges the presiding judge is selected by the Chamber President.³⁶

Complex cases may, with the consent of the parties, be referred to the President of the Tax Chamber of the First-tier Tribunal with a request that the case be considered by the Upper Tribunal. The agreement of the President of the Tax and Finance Chamber of the Upper Tribunal is also required.³⁷

Where a complex case is transferred to the Upper Tribunal the rules relating to the composition of the panel are the same as those governing complex cases in the First-tier Tribunal.³⁸

Clerical errors, procedural irregularities and review of own decisions

Each of the Upper and the First-tier Tribunal has power to correct clerical errors.³⁹

Each of the Upper and First-tier Tribunal has power to set aside a decision previously made if it transpires that there has been a procedural irregularity and the tribunal considers that it is in the interests of justice to do so. The irregularities include documents either not being sent or being sent late or one party's representative not being present at a hearing.⁴⁰

As mentioned above, the First-tier Tribunal may only review a decision where it is satisfied that there has been a mistake of law.⁴¹ The Upper Tribunal may also undertake a review of a decision if it is satisfied it has overlooked a legislative provision or binding authority or there is new binding precedent between the date of its decision and the receipt of the application for appeal.⁴²

There seems to be conflict between the manner of expression of the power to review conferred by sections 9(2) and 10(2) TCEA 2007 which indicate that the tribunals may initiate a review of their own decisions either upon exercise of their own initiative or upon an application for leave to appeal by a party, save where the tribunal procedural rules restrict exercise of the power to review to the tribunal's own initiative. However both sets of tribunal procedural rules⁴³ restrict the exercise of the power to review to receipt of an application for permission to appeal.⁴⁴ Where a review is undertaken the tribunal may re-decide the matter to avoid the need for an appeal. Only a single review is permitted of a decision in any case.

Before the First-tier Tribunal takes any steps to undertake a review all parties must be given an opportunity to make representations.⁴⁵ In contrast the Upper Tribunal need not give such an opportunity but must inform all parties that, where no such opportunity has been afforded, that party has a right to apply for the action previously taken to be set aside

³⁵ Tribunal Composition Practice Statement, para.9.

³⁶ Tribunal Composition Practice Statement, para.8.

³⁷ SI 2009 No.273, r.28.

³⁸ Tribunal Composition Practice Statement, paras 11, 12, and 13.

³⁹ SI 2009 No.273, r.37 and SI 2008 No.2698, r.42.

⁴⁰ SI 2009 No.273, r.38 and SI 2008 No.2698, r.43.

⁴¹ TCEA 2007, s.9 (1) and SI 2009 No.273, rr.40(1) and 41(1)(b).

⁴² TCEA 2007, s.10 (1) and SI 2008 No.2698 r.45(1).

⁴³ SI 2009 No.273 and SI 2008 No.2698.

⁴⁴ SI 2009 No.273, r.41(1) and SI 2008 No.2698, r.46(1).

⁴⁵ SI 2009 No.273, r.41(3).

and for the decision to be reviewed again.⁴⁶ The outcome of the review must be notified to the parties in writing.⁴⁷

It should be noted that section 124 Finance Act 2008 gave the Treasury power by statutory instrument to make provision for review by HMRC of a decision made by it. Provisions have been inserted after section 49 Taxes Management Act 1970 by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.⁴⁸ HMRC have undertaken that, where possible, reviews will be carried out by a person who is outside the line management of the officer in charge of the case. The appellant may request, and HMRC may offer, a review of “the matter in question” which is defined as the matter to which an appeal relates.⁴⁹ This internal review is intended to assist in reducing the number of cases which progress to the tribunal.

Appeals

It was a feature of the procedural rules of the Special Commissioners that appeal to the High Court was of right. No application for leave was required.⁵⁰

Appeals may be made from the First-tier Tribunal to the Upper Tribunal from an appealable decision. The following decisions are not appealable—a decision not to review the tribunal’s own decision, a decision to take no action following a review, a decision to set aside an earlier tribunal decision, a decision of the First-tier Tribunal that has already been set aside, and other decisions of the character specified in the Appeals (Excluded Decisions) Order 2009 (the Excluded Decisions Order) by an order to be made by the Lord Chancellor.⁵¹ An application for permission to appeal must be made in writing within 56 days of the latest of the date of receipt of the fully reasoned decision, the review of the decision or the decision to set aside.⁵² If the First-tier Tribunal refuses permission to appeal an application may be made to the Upper Tribunal.⁵³

An appeal against a decision of the Upper Tribunal lies to the Court of Appeal and an application for permission to do so must be made in the first instance to the Upper Tribunal.⁵⁴ The usual time frame for applying for permission to appeal is one month from the date of the relevant decision.⁵⁵

If the Upper Tribunal refuses to give permission to appeal it must inform the parties in writing of the reasons for refusal.⁵⁶ An applicant may then apply to the Court of Appeal for permission to appeal.⁵⁷

⁴⁶ Tribunal Procedure (Upper Tribunal) Rules SI 2008 No.2698, r.46(3).

⁴⁷ SI 2009 No.273, r.41(2) and SI 2008 No.2698, r.46(2).

⁴⁸ SI 2009 No. 56, Sched.1, para.30.

⁴⁹ Taxes Management Act 1970 (TMA 1970), s.49I(1)(a).

⁵⁰ TMA 1970, s.56A(1).

⁵¹ TCEA 2007, s.11(5) and the Appeals (Excluded Decisions) Order (SI 2009 No.275).

⁵² SI 2009 No.273, r.39(2). The relevant notice must be given so as to be received within the stipulated time.

⁵³ TCEA 2007, s.11(4)(b).

⁵⁴ TCEA 2007, s.13(1) and (2) and SI 2008 No.2698, r.44(1).

⁵⁵ SI 2008 No.2698, r.44(4). The relevant notice must be given so as to be received within the stipulated time.

⁵⁶ SI 2008 No.2698, r.45(3).

⁵⁷ TCEA 2007, s.13(4)(b) and SI 2008 No.2698, r.45(4)(b).

Permission to appeal to the Court of Appeal will, as before, be granted only where the proposed appeal would raise some important point of principle or practice or there is some other compelling reason.⁵⁸

Appeals from the First-tier Tribunal to the Upper Tribunal and from the Upper Tribunal to the Court of Appeal are on points of law only,⁵⁹ as was the case with appeals from the Special Commissioners to the High Court,⁶⁰ with decisions based on facts being capable of challenge only if the decision falls outside the bounds of reasonable judgement.⁶¹ If an error of law has been made, the First-tier Tribunal and Upper Tribunal, in re-making the decision, may make such findings of fact as they consider appropriate.⁶²

In considering an appeal on a point of law the Court of Appeal may, but need not, set aside the decision of the Upper Tribunal.⁶³ If a decision to set aside is made the court must either re-make the decision or remit the matter to the Upper Tribunal with direction for re-consideration.⁶⁴ In cases where the matter is remitted to the Upper Tribunal the Court of Appeal may make directions as to the composition of the panel so as to ensure that the same person does not re-hear the matter being remitted.⁶⁵

Judicial review

An application for permission to apply for judicial review may be made in the first instance to either the Upper Tribunal⁶⁶ or the High Court.⁶⁷ Where the Upper Tribunal is satisfied that each of four conditions is met it has the function of deciding the application for judicial review.⁶⁸ Where the High Court is satisfied that each of four somewhat different conditions is met the case must be transferred to the Upper Tribunal⁶⁹ and if all of the conditions save for condition 3 are met, the case may be transferred to the Upper Tribunal.⁷⁰

Conditions 1, 2 and 4 are likely to be met in the majority of tax cases which means that the High Court may transfer the case to the Upper Tribunal. Condition 1⁷¹ is likely to be met as the relief likely to be sought in a tax case would fall within section 31(1)(a) or (b) of the Supreme Court Act 1981. The reliefs available under that section include mandatory and prohibitory injunctions, quashing orders and declarations. A mandatory injunction may be required where HMRC are refusing to abide by the terms of an existing settlement agreement, to require HMRC to abide by its terms or to issue a closure notice without

⁵⁸ SI 2008 No.2834, Art.2.

⁵⁹ TCEA 2007, s.11(1) and 13(1).

⁶⁰ TMA 1970, s.56A.

⁶¹ *Edwards v Bairstow* [1954] AC 14 (HL).

⁶² TCEA 2007, ss.9(8) and 12(4)(b).

⁶³ TCEA 2007, s.14(2)(a).

⁶⁴ TCEA 2007, s.14(2)(b).

⁶⁵ TCEA 2007, s.14(3)(a).

⁶⁶ TCEA 2007, s.18(1).

⁶⁷ TCEA 2007, s.19(1) amending the Supreme Court Act 1981 (SCA 1981), by inserting s.31A.

⁶⁸ TCEA 2007, s.18(2).

⁶⁹ SCA 1981, s.31A(2).

⁷⁰ SCA 1981, s.31A(3).

⁷¹ TCEA 2007, s.18(4) and SCA 1981, s.31A(4).

which a taxpayer's rights to appeal would be frustrated. A declaration may be required as to the true meaning of the agreement. A prohibitory injunction may be required where, for example, HMRC are taking steps to remove documents or computers from premises which are not relevant to a taxpayer's affairs. A quashing order may be required where an order has been issued by a Court requiring production of documents which the taxpayer is able to show are not relevant documents.

Condition 2⁷² is likely to be satisfied as it requires that the application does not call into question anything done by the Crown Court. As the Crown Court's jurisdiction covers only criminal conduct it will be rare for this to be a relevant consideration in tax cases.

Condition 4 with respect to an application made to the High Court is unlikely to be relevant in a tax case.⁷³ With respect to an application made directly to the Upper Tribunal condition 4 is that the presiding judge is a judge from the High Court, Court of Appeal or a person agreed to by the Lord Chancellor and the Lord Chief Justice.⁷⁴ This is to ensure development of the law in this area on a consistent basis.

The High Court must transfer the case to the Upper Tribunal where condition 3 is also satisfied. Condition 3⁷⁵ requires the application to fall within one of the classes of case specified in the practice direction. This Practice Direction was made by the Lord Chief Justice on October 28, 2009⁷⁶ and specifies classes of case including a decision of the First-tier Tribunal where there is no right of appeal to the Upper Tribunal⁷⁷ and the decision is not an excluded decision⁷⁸ under the Excluded Decisions Order.

Costs

The rule in relation to costs before the General and Special Commissioners was that the General Commissioners had no power to award costs and the Special Commissioners had no power to award costs save where a party had acted wholly unreasonably.⁷⁹

The rules governing the new tribunals' ability to award costs have been relaxed.⁸⁰ Costs may be awarded at the request of a party and upon the tribunals' own initiative in a number of circumstances.

Common to both the First-tier Tribunal and the Upper Tribunal is the ability to award costs in three circumstances.

The first circumstance is where there have been "wasted costs".⁸¹ Wasted costs are costs incurred by any party either (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative or (b) which, in the light of any such act or omission occurring after they were incurred, the relevant Tribunal considers it unreasonable to expect that party to pay. This would cover the cost of hearings dealing with failure to comply with directions of an

⁷² TCEA 2007, s.18(5) and SCA 1981, s.31A(5).

⁷³ SCA 1981, s.31A(7).

⁷⁴ TCEA 2007, s.18(8).

⁷⁵ TCEA 2007, ss.18(6) and 19(1) inserting SCA 1981, s.31A(6).

⁷⁶ Practice Direction (Upper Tribunal: Judicial Review Jurisdiction) [2009] 1 WLR 327, para.2(b).

⁷⁷ SI 2009 No.275.

⁷⁸ SI 2009 No.275, arts 2 and 3.

⁷⁹ TMA 1970, s.56C(2).

⁸⁰ TCEA 2007, s.29 and SI 2009 No.273, r.10 and SI 2008 No.2698, r.10.

⁸¹ TCEA 2007, s.29(5).

earlier hearing (the most obvious of which is failure to produce documents or exchange witness statements or produce them on time), the costs incurred due to failure to attend hearings, and the costs of hearings to deal with unnecessary directions.

The second circumstance is where the tribunal considers that a party has acted unreasonably in bringing, defending or conducting the proceedings.⁸² The adverb “wholly” has been dropped from the previous rule. It would be surprising if this power were to be exercised in circumstances other than where a party has acted capriciously or frivolously. For a citizen to assert his rights to be taxed according to statute and to question the application of a statute to a particular set of facts would *prima facie* always be reasonable.

The third circumstance is where the case is allocated as a complex case.⁸³ However, the taxpayer has the right in relation to complex cases to request that the proceedings be excluded from the potential liability to costs or expenses under the rule.⁸⁴ The taxpayer must do so within 28 days of receipt of a notice that the case has been allocated to the complex track. This is a welcome exclusion from the general rule but where HMRC are seeking to determine the meaning of legislation which will affect a wide body of taxpayers there is the element of unfairness that the cost of doing so falls upon a particular taxpayer.

The Financial Services Secretary to the Treasury (Lord Myners) and the Financial Secretary to the Treasury (Stephen Timms) made a written Ministerial Statement on March 30, 2009 setting out the policy of HMRC in relation to costs.⁸⁵ It indicates that HMRC are willing in appropriate circumstances to consider waiving any claim to costs in the Upper Tribunal and the appeal courts, in particular where HMRC seek to appeal a decision of a lower tribunal or court. The factors HMRC will take into account in exercising their discretion are the financial hardship it would cause, the involvement of a point of law the clarification of which would be of benefit to a wider group of taxpayers and the efficient collection and management of revenue for which HMRC have responsibility. The policy indicates that where HMRC are to come to such an arrangement of this nature they would expect to do so in advance. The policy statement replaces that made in 1980 by Mr Peter Rees, the then Minister of State at the Treasury.⁸⁶

The Upper Tribunal has power to award costs in proceedings on appeal from the First-tier Tribunal and in cases of judicial review.⁸⁷ The High Court had the power to make an award of costs in tax cases involving judicial review prior to April 1, 2009.

As one would expect if a party asks for an award of costs it is for that party to provide details to the other party and for that other party to be able to make representations in relation to the award.⁸⁸ The costs can be awarded by the tribunal concerned by summary assessment, by agreement between the parties or by assessment upon application to the High Court.⁸⁹

⁸² SI 2009 No.273, r.10(1)(b) and SI 2008 No.2698, r.10(1)(b).

⁸³ SI 2009 No.273, r.10(1)(c).

⁸⁴ SI 2009 No.273, r.10(1)(c)(ii).

⁸⁵ *Hansard*, HC Vol. 490, col.29WS (March 27, 2009) and *Hansard*, HL Vol.709, col.WS60 (March 30, 2009).

⁸⁶ *Hansard*, HC Vol. 980, col.572 (March 12, 1980).

⁸⁷ SI 2008 No.2698, r.10(3)(a) and (b).

⁸⁸ SI 2009 No.273, r.10(3) and (5) and SI 2008 No.2698, rr.10(5) and (7).

⁸⁹ SI 2009 No.273, r.10(6) and (7) and SI 2008 No.2698, r.10(8) and (9). In the case of the First-tier Tribunal, application may be made to the county court.

As discussed more fully below under the heading *Transitional provisions*, where a taxpayer has appealed against a decision before April 1, 2009 but the hearing had not taken place by that date, the old rules as to costs may apply in place of the new rules.⁹⁰

Independence

As mentioned above the reform of the tribunals system was in response to the report of Sir Andrew Leggatt, a former Lord Justice of Appeal. He summarised the problems that had arisen from the piecemeal development of the tribunal system and the solutions required in the report as follows:

“In the 44 years since tribunals were last reviewed, their numbers have increased considerably and their work has become more complex. Together they constitute a substantial part of the system of justice in England and Wales. But too often their methods are old-fashioned and they are daunting to users. Their training and IT are under-resourced. Because they are many and disparate, there is a considerable waste of resources in managing them, and they achieve no economies of scale. Most importantly, they are not independent of the departments that sponsor them. The object of this review is to recommend a system that is independent, coherent, professional, cost-effective and user friendly. Together tribunals must form a system and provide a service fit for users for whom they were intended.”⁹¹

Sir Andrew Leggatt noted with regard to the independence of the Commissioners:

“For example, the General Commissioners of Income Tax, although now sponsored by the Lord Chancellor’s Department, are still wholly dependent on the Inland Revenue for case listing and for the flow of information to enable them to take their decisions.”⁹²

The TCEA 2007 does create a structure which is independent of the sponsoring government department. However, it is likely that track allocation under rule 23 of the First-tier Tribunal Rules⁹³ will continue to be carried out by a current HMRC incumbent for the time being although the writers would expect the function to become independent in due course. Further, the writers were hoping for substantial independent practice directions from the Ministry of Justice, and there have been some which have been useful, but it is notable that the majority of guidance to date has emanated from HMRC.

Section 1 of the TCEA 2007 extends the guarantee of judicial independence set out in section 3 of the Constitutional Reform Act 2005 to the Senior President of Tribunals. The Senior President of the Tribunals is appointed upon the recommendation of the Lord Chancellor following consultation with the Lord Chief Justice of England and Wales, the Lord President of the Court of Session and the Lord Chief Justice of Northern Ireland.⁹⁴ Carnwath L.J. was formally appointed to the position of the Senior President of Tribunals in November 2007.

⁹⁰ SI 2009 No.56, Sched.3, para.7(7).

⁹¹ 2001 Leggatt Report, fn.1, “An Overview”, para.1.

⁹² 2001 Leggatt Report, fn.1, Ch.1, para.1.19.

⁹³ SI 2009 No.273, r.23.

⁹⁴ TCEA 2007, Sched.1, para.2.

Appointments are made to the First-tier Tribunal and Upper Tribunal by the Lord Chancellor.⁹⁵ Where the terms of appointment provide for the provision of a salary once that person is appointed as a judge of the Tribunal that person may only be removed from office by the Lord Chancellor on the ground of misbehaviour or inability.⁹⁶ The rules permit the appointment of judges and deputy judges who have appropriate qualifications and experience and the appointment of judges and deputy judges transferred in from the Special Commissioners.⁹⁷ Newly appointed judges must swear the oath of allegiance and the judicial oath upon taking office.⁹⁸ The quality is to be maintained through appropriate training.⁹⁹ The Senior President of Tribunals is responsible, within the resources made available by the Lord Chancellor, to ensure appropriate training of the judges.

It is understood that all of the full-time Special Commissioners were transferred in and became judges in the new tribunals and the part-time Special Commissioners were transferred in and became deputy judges.¹⁰⁰ The TCEA 2007 contains no specific provision designed to preserve the appearance as well as the fact of independence where part-time judges are also practitioners.

Transitional provisions

The transitional rules are dealt with by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.¹⁰¹

Where a notice of appeal has been given to HMRC prior to April 1, 2009 but no party has served notice on an existing tribunal the taxpayer may request HMRC to review their decision under the new review procedure. If the date on which a review is required or offered falls on or after March 31, 2010 the period for HMRC to give notice of their conclusions for the purposes of the review is to be 90 days (unless the parties agree otherwise).¹⁰² The effect of this is to give HMRC 90 days instead of 45 days to conduct their internal review during the first year of the new tribunal rules. Any appeal will be to the new tribunal and the new tribunal rules will apply.

Where a notice of appeal has been given to HMRC and the notice has been served on the existing tribunal there is no option for the taxpayer to request an internal review by HMRC.¹⁰³ The proceedings will continue in the new tribunal.¹⁰⁴

The new tribunal may make directions to apply the old rules or disapply the new rules in order to deal with cases fairly and justly.¹⁰⁵ An order for costs may only be made if,

⁹⁵ TCEA 2007, Sched.2, para.1(1) and Sched.3, para.1(1).

⁹⁶ TCEA 2007, Sched.2, para.4(2) and Sched.3, para.4(2).

⁹⁷ For First-tier Tribunal judges and members see: TCEA 2007, s.4(1) and Sched.2, paras 1 and 2, and for Upper Tribunal judges and members see: TCEA 2007, s.5(1) and Sched.3, paras 1 and 2.

⁹⁸ TCEA 2007, Sched.2, para.9(1), and Sched.3, para.10(1).

⁹⁹ TCEA 2007, Sched.2, para.8 and Sched.3, para.9.

¹⁰⁰ SI 2009 No.56, Art.5.

¹⁰¹ SI 2009 No.56.

¹⁰² SI 2009 No.56, Sched.3, para.5(1) and (2).

¹⁰³ SI 2009 No.56, Sched.3, para.3(6).

¹⁰⁴ SI 2009 No.56, Sched.3, para.6.

¹⁰⁵ SI 2009 No.56, Sched.3, para.7(3).

and to the extent that, an order could have been made before the commencement date, regardless of when the costs have been incurred.¹⁰⁶

The tribunal must be comprised of the same panel member(s) as previously.¹⁰⁷ Any time periods which had started to run before April 1, 2009 will continue to run¹⁰⁸ and any directions or orders made or given and in force immediately before the commencement date will continue to apply.¹⁰⁹

There is no express provision dealing with an appeal against a decision of the Special Commissioners that has been notified to the High Court before April 1, 2009. As the High Court's jurisdiction has not been expressly transferred to the Upper Tribunal it would seem that these appeals will continue to be dealt with by the High Court.

Where a decision by an existing tribunal has not been appealed the new appeal process is to apply as if the decision had been made by the new tribunal. Permission will therefore be needed to appeal either a decision of the Special Commissioners to the Upper Tribunal or a decision of the High Court to the Court of Appeal.¹¹⁰ Where a decision of the Special Commissioners is appealed the writers would expect the President of the Upper Tribunal to exercise his power to ensure that the composition of the panel of the Upper Tribunal will be different from the composition of the panel of the Special Commissioners that made the decision that is the subject of the appeal.

The overriding objective

What may appear to many tax practitioners as novel is the introduction of the concept of the "overriding objective" into the tribunal rules.¹¹¹ However, this concept will be familiar to those who have experience of litigation before the civil courts; the overriding objective is a central part of the reforms to our civil court procedure contained in the Civil Procedure Rules (CPR) introduced in 1999 following a lengthy review intended to modernise such procedure overseen by Lord Woolf of Barnes. The overriding objective in the civil courts is for the courts to deal with cases "justly". The tribunals appear to bear the greater burden of dealing with cases both "fairly and justly", although it is unlikely that the difference in drafting will be of any practical consequence.

The overriding objective is to be met by the tribunals by reference to a number of factors, such as dealing with a case in a way which is proportionate to its importance, complexity, anticipated costs and the resources of the parties. The tribunal must also, for example, avoid unnecessary formality and avoid delay, so far as is compatible with the proper consideration of the issues.

The tribunals must seek to give effect to the overriding objective when exercising their procedural powers or interpreting rules or practice directions.

There are some minor differences in the drafting of the CPR and tribunal rules versions of the overriding objective. One difference of note is that the tribunal version of the overriding objective does not reproduce the CPR requirement that the civil courts must

¹⁰⁶ SI 2009 No.56, Sched.3, para.7(7).

¹⁰⁷ SI 2009 No.56, Sched.3, para.7(2).

¹⁰⁸ SI 2009 No.56, Sched.3, para.7(6).

¹⁰⁹ SI 2009 No.56, Sched.3, para.7(5).

¹¹⁰ SI 2009 No.56, Sched.3, para.11.

¹¹¹ SI 2009 No.273, r.2 and SI 2008 No.2698, r.2.

ensure that the parties are on an equal footing. This is typically understood to mean an equal financial footing. If the parties are not equal in that respect, the party in the weaker position may be afforded additional time to meet deadlines or given other appropriate procedural protections. As no taxpayer can marshal resources equivalent to those of the state, it is perhaps no surprise that this consideration is absent.

The new rules require the parties to help the tribunals to further the overriding objective and to co-operate with the tribunal generally. Whilst the spirit of this requirement may be laudable, it creates uncertainty as to the extent of the parties' obligations, including in particular the possibility that a taxpayer's substantive legal rights may be compromised because a tribunal determines that such right is inconsistent with its obligation to deal with cases fairly and justly.

The success or failure of the introduction of the overriding objective, which sensibly provides the tribunals with an ability to exercise some discretion in order to deal with cases fairly, will depend not upon the wording of the rules but upon how effectively individual tribunal members apply them. Increased judicial case management has generally been welcomed in the civil courts, but consistency is important and is a key requirement for a judicial system to achieve fairness. Consistent application of discretionary case management powers may be difficult for a body of members with very different backgrounds and specialisms.

Strike out

The tribunal rules empower the tribunal to strike out cases prior to a final hearing.¹¹² The power arises when a party has failed to comply with a direction that stated that non-compliance would lead to strike out, or if the tribunal does not have jurisdiction. Importantly, it also applies if the tribunal considers there is no reasonable prospect of the appellant's case succeeding.

A case can also be struck out if a party has failed to cooperate with the tribunal in such a way that the overriding objective of dealing with the case fairly and justly cannot be implemented.

The power to strike out bad cases early is sensible, in order that such cases do not proceed to a full hearing at much greater cost. Such a power has long existed in the civil courts, although recent collapsed trials have led to criticism, unfair in most cases, that judges should have been more willing to exercise their power to strike out bad cases at an early stage. The strike out jurisdiction is therefore likely to give rise to controversy before the tax tribunals, in particular if it is used inconsistently by different judges/members in relation to cases which raise similar issues.

Respondents will not have their cases struck out but face the prospect of being barred from taking further part in the proceedings. If such an order is made the tribunals *need not* consider any response or submission made by that respondent and *may* summarily determine any or all issues against that respondent.

The drafting of this provision suggests an inherent bias in favour of the state. In all cases in the First-tier Tribunal the appellant will be the taxpayer and HMRC the respondent. If a taxpayer's appeal is struck out, the assessment of tax payable by the taxpayer stands and the tax is due, even if incorrect or unlawfully demanded. The tribunal does not

¹¹² SI 2009 No.273, r.8 and SI 2008 No.2698, r.8.

appear to have any jurisdiction to review an assessment independently of a taxpayer's appeal, unless the tribunals' obligations under the overriding objective or general case management powers could be interpreted as creating such a jurisdiction. By contrast, the tribunal has discretion as to how it should treat the arguments raised by HMRC where they have been barred from taking part in the proceedings, which suggests that a taxpayer may not avoid scrutiny of its case and receive a windfall simply because HMRC have their case struck out due to procedural delay.

Alternative dispute resolution

The emphasis in the new tribunal rules on Alternative Dispute Resolution (ADR)¹¹³ is in tension with HMRC's published Litigation and Settlements Strategy (LSS).¹¹⁴ The LSS states a number of matters that HMRC should consider in determining their approach to litigation and settling cases, including an expectation that, where HMRC have a strong case, they should seek full value from settlement or take the matter to litigation. It also places emphasis on the wider impact of cases which are litigated as well as their individual value. HMRC are also discouraged from entering into "package deals", i.e. a single settlement covering a range of individual disputes with a taxpayer.

These principles may place HMRC in a position that is insufficiently flexible to make ADR worthwhile in some cases, in particular if HMRC are pursuing a point because of its wider impact rather than its importance to the taxpayer in question. It will be of interest to see whether tribunals demand reasons from HMRC if they refuse to participate in ADR and whether those reasons are linked to the LSS. We may also expect to see amendment to the LSS to acknowledge HMRC's obligations under the tribunal rules to engage in ADR in appropriate cases. ^{LT}

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¹¹³ SI 2009 No.273, r.3 and SI 2008 No.2698, r.3.

¹¹⁴ Available at: www.hmrc.gov.uk/practitioners/lss.pdf (accessed May 5, 2009).

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