

## **THE 2009 REFORMS OF THE TAX APPEAL TRIBUNALS**

**by John Walters**

The tribunal reform which takes effect UK-wide on 1 April 2009, and which was legislated for by the Tribunals, Courts and Enforcement Act 2007, will see the disappearance of all tax tribunals and tax appeal Commissioners, which have been so familiar a feature of the tax landscape for so long. They will be replaced by a two-tier tribunal arrangement, the Tax Chamber of the First-tier Tribunal and the Finance and Tax Chamber of the Upper Tribunal. The Finance and Tax Chamber of the Upper Tribunal is intended to function principally as an appeal tribunal, taking appeals from the First-tier tribunal. Appeals from the Upper Tribunal will lie to the Court of Appeal, and so, in a sense, the Upper Tribunal is taking the place of the Chancery Division of the High Court in the existing system.

The existing tribunal judiciary and tax appeal Commissioners (with the exception of the General Commissioners, who have been abolished) will function as transferred-in judges of the First-tier Tribunal (allocated to the Tax Chamber) and judges or deputy judges of the Upper Tribunal. In addition new judges of the First-tier Tribunal have been appointed and will be allocated to the Tax Chamber, principally to deal with much of the work hitherto done by General Commissioners. High Court judges, and others, are automatically judges of the Upper Tribunal (and the First-tier Tribunal) and apparently the Chancery judges are keen to sit on the Upper Tribunal, and, in that way, they will not lose all their current tax work.

The reform is not, of course, confined to tax tribunals. It is part of a wide-reaching reform of most existing tribunals in the UK. It is to an extent a “rolling” programme. The new tribunal structure first began to operate on 3 November 2008 dealing with social security appeals. The accession of tax appeals to the structure with effect from 1 April 2009 will be part of the second wave.

There has been a tension between the policy of providing an overall tribunal structure with the same (or very similar) rules, and the need, in the tax area, to take account of the unusually wide scope of complexity of appeals which have to be dealt with. They, of course, range from the very simple to the extremely complicated, and there are arrangements in the Tax Chamber of the First-tier Tribunal to deal with “streaming” cases according to their complexity. There is also a procedural possibility of starting an appeal in the Upper Tribunal, but the indications are that this will be allowed in only a handful of cases each year, according to criteria which have yet to be announced. Starting an appeal in the Upper Tribunal will mean that the Upper Tribunal costs regime will apply from the start (see below).

Procedural rules have been published for both the Upper Tribunal (as a whole) and the Tax Chamber of the First-tier Tribunal. These rules will also operate as from 1 April 2009.

The receipt at the new Tribunals Service Centre in Birmingham of a notice of appeal or other initiating notice to the First-tier Tribunal will start the appeals process off. The first stage will be the allocation of a case to one or more of the following categories: “Default Paper”, “Basic”, “Standard” or “Complex”.

The “Default Paper” category will be cases which can usually be dealt with on paper, although a party can require an oral hearing. They will be matters such as applications by HMRC for directions for daily penalties under s.93(3) TMA for the non-delivery of a return.

“Basic” cases will be those where there is no requirement for HMRC to serve a Statement of Case, for example VAT default surcharge appeals. They will proceed directly to a hearing.

“Standard” will be the default category for other cases, which do require a Statement of Case but are not judged to require any or much judicial case management.

“Complex” is the category for those cases which will require substantial case management, in the form of one or more pre-trial reviews. These will obviously be the heavier cases, involving complex or important issues of law, or with complex facts and a large amount of evidence, or involving large amounts of money. A different costs regime (see below) applies to cases in the “Complex” category.

It is only “Complex” cases that the First-tier Tribunal may transfer to the Upper Tribunal. The procedure will be that a transfer will require the consent of both parties, the agreement of the (First-tier) Tribunal seized of the case, and the agreement of both the President of the Tax Chamber of the First-tier Tribunal (Sir Stephen Oliver) and the President of the Finance and Tax Chamber of the Upper Tribunal (Warren J).

There is a new procedure allowing a Tribunal to correct, set aside or review a decision which it has made. This is primarily intended to apply in particular where there has been some procedural defect in the hearing: for example some evidence emerges late.

Appeals will lie from the First-tier Tribunal to the Upper Tribunal only with permission (which must be applied for in writing), which can be given by the First-tier Tribunal or the Upper Tribunal. Where an application for permission to appeal is made to it, the First-tier Tribunal must always consider whether to review its decision. An application for permission to appeal to the Upper Tribunal can only be made if the First-tier Tribunal has refused or not admitted an application for permission to appeal. This is, of course, a change of substance, in that at present appeals to the High Court in tax cases are as of right.

The power to award costs in the Tax Chamber of the First-tier Tribunal is limited, except in “Complex” cases, to the power to make a wasted costs order and a power to award costs if the Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings. This is a more confined costs jurisdiction than that currently in the VAT and Duties Tribunal, but it is a wider jurisdiction than that currently in the Special Commissioners – which requires the party against whom costs are ordered to have acted “wholly unreasonably”. The present practice of HMRC not to ask for costs in the VAT and Duties Tribunal in most cases where they are successful is to be discontinued.

In “Complex” cases it is the default position that the normal (High Court) costs regime will apply – i.e. costs will usually follow the event, *except* where a taxpayer

has not made a written request to the Tribunal, within 28 days of receiving notice that the case had been allocated as a “Complex” case, that the proceedings be excluded from the default costs regime. There is therefore an “opt out” of the default costs regime in the First-tier Tribunal in “Complex” cases, but only the taxpayer can “opt out”. If a taxpayer “opts out” he will not, of course, recover costs against HMRC if he wins.

In the Upper Tribunal the normal (High Court) costs regime will apply (without any possibility of “opting out”). However it is understood that a practice may develop of not awarding costs in the Upper Tribunal to an unsuccessful taxpayer who has been appealed unwillingly to the Upper Tribunal (perhaps because HMRC regard his case as a test case or otherwise raising a point of principle which they regard as important).

There is provision in the Tribunals, Courts and Enforcement Act 2007 for the Upper Tribunal to have a “judicial review” (JR) jurisdiction – the inverted commas appear in the rubric to section 15 of the Act. The jurisdiction is in principle a full jurisdiction including power to make a declaration or a quashing order and power to award damages or restitution. The High Court has, in the negotiations and consultations involved in the introduction of the reforms, been very jealous of its historic role in supervising administrative action, and so the JR jurisdiction of the Upper Tribunal is much more confined and procedurally confusing than many practitioners hoped it might be. The existing procedure in the High Court requiring permission to apply for JR is replicated in the arrangements to apply in the Upper Tribunal. An application for JR can only be initiated in and dealt with by the Upper Tribunal if (*inter alia*) the application falls within a class of applications specified for the purpose in a direction given under the Constitutional Reform Act 2005. It is understood that as yet no such direction has been given in relation to applications in the tax field. Also, an application for JR initiated in the Upper Tribunal can only be dealt with there if the judge presiding at the application is a High Court judge or other judge approved specially for the purpose. That procedure cannot (yet) be used in the tax field. The alternative procedure, which must for the time being be followed in all cases, is for an application for permission to apply for JR to be made to the High Court (Admin. Court). The High Court has power to transfer the application to the Upper Tribunal “if it appears to the High Court to be just and convenient to do so” (new s.31A(3) Supreme Court Act 1981, inserted by s.19 Tribunals, Courts and Enforcement Act 2007).

Hearings in “Basic” cases are expected to be at local hearing centres convenient to the parties throughout the UK. “Standard” cases and “Complex” cases will be heard by the Tax Chamber of the First-tier Tribunal (as now) at a limited number of centres organised through the London, Manchester and Edinburgh tribunal centres. The Upper Tier is to be based in the Bedford Square premises where hitherto the Special Commissioners have sat.

This is an outline of how the reformed tribunals are expected to operate. Much detail has been omitted, principally for reasons of space. There is great uncertainty as to how the reforms will work out in practice, but for most tax litigation of the type undertaken by Grays Inn Tax Chambers the expectation is that the procedure may change but that in practice appeals will run (at any rate in the Tax Chamber of the First-tier Tribunal) on very familiar lines. Probably not much will change on the ground – at any rate initially. It will be some time before the Upper Tribunal gets into

its stride and the expectations of how it will operate in practice (clearly differently in style, if not in substance, from the High Court) are much more vague.

There have been aspirations to reform the tax appeal procedures for many years. It has been hoped, particularly, that at appellate levels more specialist judges could be involved in hearing tax cases. There is scope for these aspirations to be met by the new system. Only time will tell if they can be realised.