



Tribunals Service

Tax Appeals Modernisation Design & Implementation Project

Proposed approach to costs in the tax appeals system

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Document Purpose: **This paper is sent to the Project Board for their information/comment and the Stakeholder Group for their views on the proposed approach to costs in the new tax appeals system. Views are requested by Friday 31 August.**

Amendment History

Issue	Date	Amended By	Amendment Details

PROPOSED APPROACH TO COSTS IN THE TAX APPEALS SYSTEM

Background

1. The work of the Tax Appeals Modernisation Project has previously identified the need to develop a consistent costs regime for the new tax appeals system. There is considerable interest in this issue among stakeholders, among both User Groups and HMRC. In October 2005 the Stakeholder Group ran a limited consultation with key stakeholders on four options that extended current practice in the four tax tribunals across the new chamber
2. The Tribunals, Courts and Enforcement Act 2007 provides (at Clause 29) a general power for costs to be awarded at the discretion of the tribunal, subject to Tribunal Procedure Rules. It is likely (although subject to general consultation in the Autumn Document) that where cost regimes already exist in individual jurisdictions they will transfer across into the new system.
3. However, as the policy objective for tax appeals reform is to develop a consistent approach across direct and indirect taxation, the differing approaches taken by the General and Special Commissioners and the VAT & Duties Tribunal should not be maintained on transfer to the new tax chamber. In summary the present position is:
 - General Commissioners – no costs
 - Special Commissioners – costs may be awarded against a party who has acted wholly unreasonably in connection with the hearing.
 - VAT and Duties Tribunals – have power to award costs. In theory this means costs would usually be awarded to the successful party, but in practice HMRC pays costs whenever the Department loses and seeks costs only in limited circumstances when it wins (for example in complex or vexatious cases).
 - Section 703 Tribunal – no costs.

Principles

4. The Ministry of Justice has therefore considered the options for costs in the tax appeals system in the light of previous responses and bilateral discussions. In developing a preferred approach we have had regard to the following criteria
5. A very high proportion of tax appeals are on comparatively straightforward matters which do not involve difficult points of law, but which are of material significance to the taxpayers concerned. It follows that whether costs are awarded or not, the first tier of the new tribunal should, apart from the exceptional complex case, be an easy access and 'low cost' environment.
6. While there may be categories of cases to which different costs rules could be applied, the nature of the tax involved (direct, indirect etc) should not of itself be the determining factor. A costs regime should serve the interests of justice. For these purposes it should meet the following criteria as far as possible:

- **Accessibility** – costs should not impose a barrier to justice, in the sense that appellants with meritorious cases should not be deterred from accessing the Tribunal for fear of costs awarded against them if they lose;
- **Proportionality** – should recognise instances where costs are or are not appropriate (for example, appropriate where unreasonable behaviour or a substantive and complex case); and
- **Transparency** – in the sense that parties must be aware of the potential for costs prior to appeal;
- **Fairness** – either party should be allowed costs in appropriate circumstances
- **Value for money** – costs should recognise the expense of some appeals to the taxpayer, and not encourage appeals purely on the grounds of expectation of costs.

Any option for costs needs to be developed around these principles, which should not alter the current burdens of proof on the taxpayer, nor affect the seeking of representation where this is appropriate to the case.

Proposed Preferred Approach

7. On this basis, MoJ has developed a Preferred Approach to costs in the tax appeals system. The intention is to set out this option as a preferred approach in the autumn consultation document and consult formally. However, ahead of this we want to ascertain the views of the Stakeholder Group on the broad design of the option itself, as well as how it might operate with appropriate safeguards for the individual appellant, whilst allowing costs for those cases where this is appropriate.
8. MoJ considers that costs are likely not to be appropriate for the majority of tax appeals, on the basis of cases currently heard by the four tax appeal tribunals. A regime where costs are generally available runs the risk of deterring appellants from appealing, especially those who are unrepresented.
9. However costs should be available in some cases. As a minimum the present power of the Special Commissioners to award costs where a party is behaving (or has behaved) unreasonably should be extended across all jurisdictions.
10. We also propose that costs should be awarded in especially difficult or complex cases. We believe it is reasonable where significant costs have been incurred in taking forward a case that the successful party should be able to apply to recover those costs.
11. Our working assumption is that, in the Upper Tribunal, costs will be generally available. However, we also believe that there will be a number of cases in the first tier where an award of costs will be appropriate, although they will be exceptional and relatively few in number.
12. The power to award costs will be at judicial discretion. However it will need to be exercised within clear and published criteria so that the parties can consider the

risk of losing their case before they apply. We believe that there might be a number of case types where it can be agreed that costs will never be appropriate, others where costs will be awarded on a case by case basis and a further category where costs are always likely to be appropriate.

13. More detailed proposals are currently being developed and will be issued to stakeholders following their agreement to these general principles.
14. It is likely that the general power to award costs might be set out in rules. However we expect that the criteria will also need to be amplified, in separate published guidance or practice directions issued by the President of the tax chamber.
15. The cost regime in the tax chamber needs to allow the parties to apply for costs before a hearing of an appeal or an application relating to that appeal (e.g. for directions). This needs to be done in the full knowledge that they would be subject to award of costs if they lose. There might also be an ability to apply for costs after a hearing.

Specific Questions for feedback

There are a number of questions around how the cost regime would work and we would welcome your initial thoughts on these. It is envisaged that, as well as setting out the broadly defined Preferred Approach, the autumn consultation would also seek views on how the approach should work in practice.

- **What are your views on the preferred approach?**

The rationale for the Preferred Approach is that it would provide for the award of costs when this is appropriate, whilst not deterring individual appellants from taking meritorious cases for fear of having costs decided against them.

- **What are the types (or features) of cases that you think should be subject to an award of costs?**

The award of costs regime could be based around judicial discretion without specifying case type or be available according to case type. Both options would include published and transparent criteria for the award of costs. The general power to award of costs could be set out in Rules and amplified in published guidance or practice directions.