TAX LAW REVIEW COMMITTEE

INTERIM REPORT ON

THE TAX APPEALS SYSTEM

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EXECUTIVE SUMMARY

Introduction

1. Income tax has been with us for nearly 200 years, while VAT was introduced little more than 20 years ago. Between these two massive pillars of the tax system are many other taxes (e.g. corporation tax, capital gains tax inheritance tax, stamp duty and stamp duty reserve tax, petroleum revenue tax, insurance premium tax, together with excise and duties). All of these empower central government, through the various revenue departments, to raise money from individuals and corporations, supported by an armoury of sanctions for non-compliance. With this background, the right to raise an objection to a tax claim is critically important. Equally important is the right to ensure that, if the dispute cannot be settled by agreement, it should be heard and determined by an impartial body which has the experience and expertise to deal with the matters in dispute.

2. Each tax carries appeal rights which cover most of the types of dispute likely to arise in practice. But they are not comprehensive, as there are certain categories of dispute (including some of great importance) which simply do not fall within the appeal provisions for any given tax. There is also a bewildering lack of uniformity in the present appeal arrangements: this is particularly apparent in the composition of the tribunals which hear the initial appeals, and the routes by which further appeals are taken through the courts.

3. Many members of this Committee have been a party (on one side or the other) to tax appeals; some have represented parties to such appeals; and others have heard tax appeals in a judicial capacity. From each of these three perspectives our members' experience covers the whole range of appeals from the initial tribunals through to the House of Lords. Drawing on this collective experience, we have reviewed the current tax appeals arrangements with two objectives in mind:

(i) to see how well, or badly, they operate in practice; and

(ii) where we believe that the current system is not good enough, to recommend practical changes which will improve the position.

4. We have approached this topic with no pre-conceptions. Nor have we set out to produce the sort of grand recommendations which make headlines today and gather dust on the shelves thereafter. Instead we have evaluated as thoroughly as we can the strengths and weaknesses of the present system, the numerous proposals for reform which have been mooted in the past (together with suggestions generated within the Committee itself) and the practical consequences of making any given change. We are most grateful to the wide range of people with experience of the appeals system at all levels who have assisted us in this process. The Lord Chancellor's Department, Inland Revenue, Customs & Excise, the Scottish Office, the Secretariat of the Council on Tribunals and individual Court Service staff have together provided us with a great deal of essential information and their help has been invaluable. We have also been very grateful for the substantive comments we have received at various stages of the project from the Lord Chancellor's Department, the revenue departments and a large number of individuals, including members of the judiciary and of the tax tribunals, who gave generously of their time to assist us. We have tried to give due weight to all the various comments made and concerns expressed during our consultations as the work has proceeded, but naturally none of those we have consulted should be held responsible for our conclusions.

5. The object of this interim report is to set out the provisional conclusions which we have reached at this stage. However, we have not addressed here the difficult issues which arise in determining the borderline between the statutory appeal procedures and judicial review proceedings. A substantial part of the tax code is now operated by reference to practice statements and other forms of guidance issued by the Revenue and Customs. Some of this guidance is published, but guidance may also be provided to individual taxpayers in correspondence or orally. At present there is no right of appeal against the way in which such guidance is interpreted or applied by the Revenue or Customs. Disputes over this have to be taken by way of judicial review proceedings to the Crown Office List of the Queen's Bench Division, or else dealt with extra-legally by a complaint to the Adjudicator or Ombudsman. We will set out our analysis of the existing problems and our initial suggestions for reform in a separate paper to be issued next year.

6. It will be seen that our recommendations in this interim report fall into two broad categories:

(i) changes which can and should be implemented immediately, so as to improve the quality of appeals under the existing system; and

(ii) proposals which would make for a more rational, comprehensive and uniform appeals system.

We envisage the second category being introduced after a period of consultation and on a staged basis, over a time scale of about five years.

7. This executive summary highlights our main recommendations. The omission from the summary of many more detailed recommendations does not imply that we regard them as being of lesser importance. We believe that all our proposals and their implementation over time should contribute significantly to an improved system of tax appeals. The provisional conclusions we have reached at this stage are summarised at the end of each chapter after a full discussion of the issues involved. The conclusions are brought together in Chapter 13.

Consultation and comments

8. Before formulating our final proposals we would like to be able to take into account the views of a wider cross-section of those interested in the tax appeals system. This may include individuals at grassroots level as well as representative organisations. **For this reason, our intention is that this interim report should also function as a consultation document. Comments on any aspect of the report, on any omissions, or on any issue relating to the tax appeals system will be welcome. These will be taken into account before we formulate our final recommendations for reform, which will be published in 1997 in our final report on this project.** Comments should be sent to:

The Secretariat
Tax Law Review Committee
Institute for Fiscal Studies
7 Ridgmount Street
London WC1E 7AE

Fax no. 0171-323-4780

They should be submitted as soon as possible and in any event no later than 30 April 1997.

Main recommendations for immediate implementation

The tax tribunals

9. The General Commissioners are the local tribunals which deal with the vast majority of appeals relating to the main direct taxes (e.g. income tax, capital gains tax and corporation tax). Currently the General Commissioners are a tribunal of lay men and women who are assisted by a clerk (who is usually, but not invariably, legally qualified). They are the linchpin of the appeal system for these taxes. Until now they have been mainly concerned with "delay" cases. These are cases where the taxpayer has appealed against an assessment, but has failed to send in his tax return or provide other information needed by the tax authorities. The inspector then asks the Commissioners to confirm, or

"determine" the assessment. The introduction of self-assessment will make a dramatic change, and within a few years most of the cases before the General Commissioners are likely to be contentious cases—cases where there is a dispute on one or more points of fact or law.

10. General Commissioners for many districts perform their functions extremely well, and are respected by taxpayers and inspectors alike for the way in which they conduct themselves and the quality of their decisions. But the structures within which they are appointed and discharge their responsibilities have not kept pace with change in other areas. They are not well adapted to meet the demands on a modern appeals body which will soon be required mainly to adjudicate on contentious cases. **Our recommendations are designed to ensure that the General Commissioners for all districts are well equipped to deal with such cases and have the support which they require to maintain a high quality of decision-making. These recommendations include proposals for improving the method of selecting Commissioners and their clerks, and the introduction of effective training programmes for both Commissioners and clerks.**

11. The other two main tax tribunals are the Special Commissioners, who hear the balance of direct tax cases, mainly those involving complicated or technical issues, and the VAT and Duties tribunal, which first decides all appeals relating to VAT, excise and duties. They have much in common, including many of their legally qualified members. But different rules governing the composition of the Special Commissioners and VAT and Duties tribunals prevent each tribunal from taking advantage of some of the strengths of the other. **We consider that the composition of both these tribunals should be flexible, so that it can be tailored to the nature of the case in point. VAT tribunal chairmen should, like Special Commissioners, be able to sit in pairs where a case centres on a complicated point of law. Special Commissioners, on the other hand, should be able to sit with lay members where their experience would be valuable—for example, where a case turns on disputed factual evidence.**

12. We would also like to see some clarification in the criteria for appointment to these two tribunals. **In particular, it is important that legally qualified members should have a reasonable level of experience in tax or some other aspect of fiscally related law. We welcome the open recruitment policy recently adopted by the Lord Chancellor's Department, but consider that additional initiatives are required to extend the pool of applicants, particularly for full-time appointments.**

The High Court

13. The increasing complexity of tax legislation also calls for the appropriate degree of experience and expertise in the courts—which is where binding interpretations of the law are made. Until the 1970s, appeals relating to the direct taxes were in practice heard by a relatively small number of judges who were in this way able to develop their expertise in dealing with tax cases. The abandonment of this system has meant that the cases which reach the High Court and beyond tend to be spread thinly among a large number of judges. This diluting effect has been added to by the fact that appeals in VAT cases are heard by judges in the Queen's Bench Division, while other appeals are heard by judges in the Chancery Division.

14. **We consider it essential that *all* tax appeals should be heard by a single division of the High Court, and preferably by a small panel of judges within that division. Having regard to the other areas of law where cases are allocated to the Chancery Division, we think that it will be sensible for all tax cases to be heard by this division. As an important point of detail, we recommend that those judges in the Queen's Bench Division who have significant tax experience should be appointed additional judges of the Chancery Division for this purpose.**

The appeals legislation

15. Urgent action is also needed to improve one other important aspect of our tax appeal system. This is the legislation itself, and the way in which it is enacted and amended. At present it is not apparent to those outside the revenue departments how policy on appeal rights and related matters (such as the body which hears appeals at first instance) is formulated and implemented. Given that the sponsoring revenue department is also the body against whose decisions appeals lie, this inhibits proper consultation and debate. In addition, the evidence from the legislation is that there is a lack of consistency between appeal provisions enacted piecemeal over time.

16. **We recommend that appeals matters should be the subject of a clear, coherent and publicly available policy.** This should help reduce concerns about the potential conflict of interest resulting from the twin roles of the revenue departments, as parties to appeals and sponsoring departments for much of the legislation governing these. It should also make for greater consistency in the drafting of appeals provisions, and encourage informed comment on these from third parties, including tribunal user groups.

17. The way in which the legislation relating to the main direct taxes is structured also makes for practical problems. It can be very difficult to find out what rights a taxpayer has to appeal against a particular decision. Surprisingly, the rules on appeals in relation to the main direct taxes are scattered over various parts of the tax code, with little or no cross-referencing. These need to be gathered together and dealt with in a single piece of tax legislation. The principles here are in line with those set out in our own previous reports on tax simplification, and acknowledged by the Revenue in its consultation documents. It is around these principles that the Revenue is now planning a re-write of the tax legislation. **We recommend that the drafting of a comprehensive set of rules relating to appeals should be an early priority in the re-write process.**

Proposals leading to longer-term structural reform

A single appeals system for all taxes

18. Although there are historical reasons for the existence of separate appeal procedures for the various taxes, we have not found a rational justification for its continuance. At the level of the Special Commissioners and VAT and Duties tribunals there is already a *de facto* merging of the two jurisdictions in that the majority of the Special Commissioners are also Chairmen of VAT and Duties tribunals, and the same individual heads both tribunals. Implementing our recommendations for improving the selection and training of General Commissioners would pave the way for bringing the two main appeal systems together into a single system covering all forms of tax.

19. The present system for dealing with the majority of disputes over national insurance contributions is not satisfactory. We consider there is a case for referring such disputes to the tax tribunals, at least on questions of employment status where there is an overlap between income tax and national insurance issues. This would avoid the need for two separate sets of proceedings and the risk of inconsistent determinations. It would also be in accord with the principles underlying the joint working programme between the Revenue, Customs and the Contributions Agency.

20. Because tax appeals cover such a wide spectrum of issues, and vary so much in complexity and value, our view is that two forms of appeal tribunal will be required. Local tribunals would continue to deal with the more straightforward cases, while a tribunal able to draw on greater specialist knowledge would decide the more complicated and technical appeals. However, the second tribunal must still be accessible to ordinary taxpayers and, as with the VAT and Duties tribunals at present, there should be a regional network of hearing centres. We also suggest a rationalisation of the existing system for allocating appeals between tribunals.

21. As an option for further consideration, we discuss whether the local tax tribunals under a unified system should include a professionally qualified chairman.

Reducing the tiers of appeal

22. There is one further measure of rationalisation which we believe should be considered. This is to reduce the number of stages of appeal in the High Court and beyond. Although theoretically it is possible to "leap frog" from the Special Commissioners to the Court of Appeal, or from the High Court to the House of Lords, in practice nearly all appeals in tax cases (in England) go from the Commissioners or VAT and Duties tribunals to the High Court, and then to the Court of Appeal, with a possible further appeal to the House of Lords. We think it would be sensible (in England) to cut out one stage. This would bring the procedure in England closer into line with that already in force in Scotland and, for direct taxes, in Northern Ireland. We suggest how this might be achieved.

We put these proposals forward for further consideration on the basis that they should offer a practical method of achieving a fairer, more rational and cost-effective tax appeals system.

CHAPTER 1. INTRODUCTION

Background

1.1. The impetus for this project arose from widespread concern about the present tax appeals system. Various proposals for reform have already been put forward over a lengthy period by the Keith Committee,[1] the Inland Revenue and Customs,[2] the Council on Tribunals,[3] the Revenue Law Committee of the Law Society[4] and a number of individual commentators.[5] However, the recommendations of the Keith Committee were implemented only in part. None of the other proposals has to date resulted in any substantial change, with one notable exception—the introduction, in 1994, of procedural rules for both Special and General Commissioners. The form of these was very controversial,[6] although there was widespread support in principle for the introduction of procedural rules.[7] The same problem appears to have been at the root of inaction over more fundamental problems: although there is widespread agreement that there is room for improvement in the tax appeals system, there has been a lack of consensus on the right way forward.[8]

1.2. Accordingly, we considered that the time was ripe for a thorough and systematic review of the existing appeals system, its strengths and weaknesses, and alternative proposals for change.

The introduction of self-assessment

1.3. An additional factor which strengthens the case for review at this stage is the introduction of self-assessment. This will bring in its wake major alterations in the pattern of tax appeals affecting income tax, capital gains tax and corporation tax. Some of these are the direct result of changes in the underlying administrative framework. Others were the outcome of policy decisions about the way in which the appeals system should be adapted to the new

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[1] See principally 10.7 and 25.1-8 (disputes procedures).

[2] A consultative document issued jointly by the Revenue and Customs in 1980 proposed a merger between the Special Commissioners and VAT tribunals, to form a new "Tax Appeals Tribunal". This also discussed the changes in composition, procedural matters and staffing which this would entail. The consultative document is set out in full at [1980] STI 666-72. However, it apparently received a mixed response and was not pursued.

[3] The Council on Tribunals has over a long period pressed for reform of the tax tribunals in a number of respects but, in accordance with its remit and general terms of reference, has focused mainly on the scope for improvement of the tribunals within their existing structures rather than the scope for structural change. An exception to this was its response to the 1980 Consultative Document (see note 2 above). The Council welcomed the proposals for merger between the Special Commissioners and VAT tribunals and made additional recommendations in relation to the proposed merged tribunal, including a proposal for right of appeal from that tribunal direct to the Court of Appeal or Inner House of the Court of Session (*Annual Report* 1980-1 p.15-16 paras 3.24-29). It subsequently expressed disappointment about failure to proceed with the proposals (*Annual Report* 1981-2 p.24 paras 3.45-46). Otherwise the recommendations given particular prominence in recent years (excluding those addressed as part of the consultation process over the General and Special Commissioners' procedural rules) have been: (i) a call for a general review of the functioning of the General Commissioners and associated concerns (*Annual Report* 1984-5 p.25-26 paras 3.37-39), some of which were reiterated subsequently (*Annual Report* 1985-6 p.58 paras 4.67-68; *Annual Report* 1986-7 p.26-8 paras 3.33-41; *Annual Report* 1987-8 p.3-7 para 2.2-21, and see also the response of Lord Chancellor: *Annual Report* 1988-9 p.30-31 paras 2.52-56); (ii) a recommendation for comprehensive review of the 1986 VAT Tribunal rules as being too complex and legalistic (*Annual Report* 1985-6 p.59-60 paras 4.70-73); and (iii) strong opposition expressed to proposals for certain VAT appeals to be heard by lay tribunals (*Annual Report* 1986-7 p.38-9 para 3.84-87).

[4] *Tax Appeals: A Report by a Sub-Committee of the Revenue Law Committee*, Law Society, May 1989.

[5] Including some of considerable distinction. See e.g. Monroe (1969); Lawton (1988); Williams (1988); Miller (1990); Colley (1990); Avery Jones (1994) (cf. also the earlier editorial notes (1979) (1981)); Oliver (1994) and (1996). A number of common threads can be discerned, but no clear consensus on the direction of change.

[6] Hence the prolonged period between the issue in November 1991 of the original consultation document *Procedural Rules for General and Special Commissioners* (jointly by the Inland Revenue and Lord Chancellor's Department), and the eventual implementation of the rules in revised form, in July 1994, with effect from 1 September 1994.

[7] A matter on which the Council on Tribunals was first informally consulted in 1964! (*Annual Report* 1964 SO Code No 39-81-6-65 p.3-4 para 10).

[8] For a methodical summary which addressed the wide range of alternative, and frequently incompatible, proposals for reform to the date of publication, neatly illustrating this point, see Bartlett (1988).

regime.[9] There are still some uncertainties about the way in which the new regime will operate. What is clear is that, first, once most assessments are (or are treated as)[10] self-assessments, appeals against assessments will arise only in the small minority of cases where assessments continue to be issued by the Revenue, as discovery assessments[11] or assessments to recover excess repayments of tax,[12] or under specialised provisions. Second, at present the Revenue makes a decision on a claim after it is made, and if the claim is disallowed in whole or part the taxpayer may appeal. Under self-assessment, most claims will instead be processed automatically under the "process now-check later" system. As a result it is expected that the total number of appeals will decline.

1.4. However, under the new system it is likely that the majority of appeals will have some contentious element, because they will be against the new penalties and surcharges, or will arise following an enquiry, and will be against amendments made by the Revenue, either of the taxpayer's self-assessment or of an amendment previously made by the taxpayer.[13] The likely resulting shift in the General Commissioners' workload in favour of cases with some contentious element is important for two reasons.

1.5. First, it is not clear whether the total *time* required to discharge the General Commissioners' caseload will diminish in line with the *numbers* of appeals. Because cases with a contentious element are much more time-consuming to decide, a relatively small increase in their numbers may compensate for the decline in delay cases. Second, the functions of the General Commissioners have in the past sometimes been seen as primarily administrative or supervisory, rather than adjudicative or judicial. Self-assessment will focus attention more sharply on their role as independent adjudicators in substantive disputes between the Inland Revenue and the taxpayer.

1.6. This second effect of the move to self-assessment was noted by the Lord Chancellor as long ago as November 1994, in his address to the AGM of the Greater London Association of General Commissioners:

> The reduction in the number of "delay appeals" will allow you to focus on your primary roles as arbitrators and as the judges of fact. And while your role as judges of fact will remain substantially unchanged, your role as arbitrators will become more important, and your responsibilities in this area will be increased, on the introduction of self-assessment.
>
> Self-assessment necessitates the Revenue moving to a "process now-check later" system. This will mean that, particularly in the area of "check later", the Revenue will normally take control of processes, such as

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[9] Changes which might come into this category include: (a) the absence of a right of appeal against a determination issued by the Inland Revenue where there is no self-assessment; (b) some new rights of appeal corresponding to new powers held by the Revenue for the purposes of the scheme; (c) minor changes in the basis on which partnership appeals are conducted; (d) minor alterations in the rules determining when appeals lie only to the Special Commissioners and, as a corollary of these, provision to refer certain questions to either the Special Commissioners or the Lands Tribunal for determination even where the appeal as a whole is being decided by the General Commissioners; (e) new rules for assigning proceedings between different divisions of General Commissioners; and (f) new rules governing the payments of disputed amounts in advance of appeals and governing the running of interest where payment has been postponed pending an appeal.

[10] Note that assessments made by the Revenue under TMA s.9 (substituted by FA 1994 s.179, 199(1)(2)(a))are treated for the purposes of subsequent provisions of the Act as self-assessments.

[11] TMA s.29 (substituted by FA 1994 s.191,199); TMA s.30B (inserted by FA 1994 s.196,199 and Sched 19 para 6) (amendment of partnership statement where loss of tax discovered).

[12] TMA s.30 (as amended, *inter alia*, by FA 1994 ss 196,199 and Sched 19 para 4).

[13] Delay appeals may still arise following the issue of discovery assessments by the Revenue, for the same reasons as at present, but will be very much rarer. It may also be that some appeals against amendments will function more like delay appeals than contentious cases. This will depend in part on the Revenue's policy as to the use of its new information-seeking powers for the purpose of an enquiry: in some circumstances where the taxpayer fails to produce evidence in support of a self-assessment, the Revenue may respond by closing the enquiry and making an amendment. If the taxpayer appeals against the amendment, but still fails to adduce the evidence, the appeal might function very much like delay cases at present—though it may be that because of the enquiry process already completed adjournments will be less common.

the precept power to obtain information, that you currently exercise. Once your hand has been removed from the initiation of these processes it is manifestly right that taxpayers should have safeguards that allow them to challenge the Revenue's use of these powers. Under self-assessment your role is to have independent, and even-handed, oversight of the operation of such powers through new rules that will enable taxpayers to apply to you and for you to review and, as necessary, amend or reverse the Revenue's actions.[14]

1.7. The new emphasis on cases with some contentious element will mean that it is crucial that the General Commissioners have adequate support in discharging their role. It also removes a key distinction between the role of the General Commissioners in direct tax cases and that of the VAT and Duties tribunals. We believe that this marks the right time to re-evaluate the structure of both forms of tribunal and the division of responsibilities between them.

Summary

1.8. The advent of self-assessment will be followed by a marked decline in the number of delay appeals, and the burden of the General Commissioners' work will tilt markedly in favour of cases with some contentious element, rather than cases where the taxpayer has appealed against an estimated assessment but failed to provide information in support of his appeal. As a result, the extent to which their function can be regarded as administrative or supervisory rather than adjudicative or judicial will diminish, and a key distinction between their role and that of the VAT and Duties tribunal will disappear. While it is too early to judge the impact of the changes on their overall workload, self-assessment will strengthen the case for a general review of the tax appeals system which had already been accepted by a wide range of commentators over a long period.

[14] Text kindly supplied by the Association.

CHAPTER 2. THE FUNCTIONS OF THE APPEALS SYSTEM

Introduction – the underlying principle

2.1. The appeals system is a crucial safeguard for the taxpayer. If the appeals system is ineffective or inaccessible, taxpayers are for practical purposes unable to challenge the revenue departments' own interpretation of the law. Improving the appeals system should therefore be seen as a vital part of the initiative to improve the standards of customer service by the revenue departments at the most fundamental level—namely, the performance of their obligation to collect tax only in accordance with the law.

2.2. Of course, in the vast majority of cases, the taxpayer's affairs will be settled without any need for recourse to an independent body. Normally, no serious dispute will arise.[15] Even where there is a genuine point of difference, often this will be resolved at an early stage by negotiations between the taxpayer and Customs or the Revenue. Cases where there is a persisting disagreement are therefore the exception. But in such cases the taxpayer will believe that the revenue department has made a mistake about either the correct interpretation of the law, or its application to his circumstances. The object of the appeals system is to allow the parties to obtain a ruling on this from an independent tribunal or, on a point of law, the courts.[16] It is crucial therefore that the appeals system is fast, effective and affordable. We note, in this context, the views of the Keith Committee:

> A point which we have made throughout this Report is the necessity for the Revenue Departments to have sufficient powers to make taxpayers comply with their obligations and to investigate those who do not. The counterpart of such powers is the right of the taxpayer to dispute cases in which he considers the exercise of those powers to have been excessive ... What is needed ... is a proper disputes procedure under which the taxpayer can complain to an independent tribunal when he considers that powers have been misused. Accordingly we consider that this subject is central to the theme of providing the necessary balance between the taxpayer and the Revenue Departments.[17]

2.3. We also note the general principles set out by the Deregulation Unit in its May 1995 Consultation Document on a Model Appeals Mechanism. These emphasised the importance of a fair and independent appeals process against enforcement action by government departments and agencies, and were confirmed in the introduction to the Model Appeals Mechanism published in March of this year. It was accepted that a more accessible and simpler appeals process is likely to generate an increase in appeals and that, where appeals are slow and costly, businesses may be deterred from challenging an enforcement decision they feel to be unfair. The uncertainty created by delays, it was considered, could adversely affect investment and other business decisions. The link between prompt and fair dispute resolution and good enforcement was also acknowledged. These points hold good in the tax context. It should also be noted that tax liabilities disputed by businesses, as a potential direct cost, will often be locked into tax provisions until the dispute is resolved.

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[15] Notwithstanding the high number of "appeals" under the present direct tax system, which are in reality merely a prelude to negotiations for the settlement of an assessment at a figure which is satisfactory to the taxpayer and the Revenue.

[16] As with any other form of independent scrutiny, it may also influence the way decisions are taken or even, in some cases, the decisions actually reached, as the decision-maker takes into account the possibility he will be required to defend the decision to an independent adjudicator. (For decision-makers' own assessment of the influence of the appeal system on their decision making process in the context of social security see Baldwin, Wikeley and Young (1992) pp.83-89. This study suggested that officers who had direct contact with the tribunal were also more likely to be influenced by the approach they expected the tribunal to take to a case than officers who would not personally be involved in tribunal hearings.)

[17] At 25.1.1.

Taxpayers currently using the appeals system

2.4. For these reasons, the importance of the tax appeals system cannot be judged by the number of appeals alone. And the form of the available statistics makes the numbers of contentious tax appeals a controversial issue in any event.[18] On the direct tax side the problem is that the huge numbers of cases disposed of by the General Commissioners at present disguise the proportion of these which are contentious.[19] But, although it is undoubtedly true that only a small proportion of the appealable decisions issued by the Revenue or Customs result in appeals heard by any of the tax tribunals, on any reading of the figures, there are still a significant number of aggrieved taxpayers who seek redress through the appeals system and for whom it is crucial that this is both accessible and effective.

2.5. There are two further difficulties in using the number of cases as a means of assessing the importance of the appeals system. First, it assumes that taxpayers are in all cases aware of their appeal rights. Second, it involves assumptions as to the reasons why taxpayers decide to settle or not to pursue an appeal.

Awareness of appeal rights

2.6. On the first point, it seems questionable whether all taxpayers who would contemplate an appeal actually know enough about the appeals system to reach an informed decision. In the VAT *Business Needs Survey*[20] undertaken for Customs in 1994, over half of the businesses questioned said that they had never heard of the formal appeals procedure. This is a disturbing statistic. There are no comparable data for Revenue-administered taxes. We have been told that the Revenue believes that there is a satisfactory level of taxpayer awareness of the direct tax appeals system, in part because this is of much longer standing. This may be true but, in the absence of any evidence, it is impossible to demonstrate. And it is difficult to be confident that this is the case. There is no reason why the large mass of individual taxpayers should be better informed in respect of their appeal rights for revenue taxes than the VAT-registered businesses involved in the *Business Needs Survey*. The VAT appeals system is explained in the VAT *Guide*[21] and is referred to in a number of other Customs publications. Further, VAT-registered businesses might be expected to have a higher general level of tax awareness than the most individual taxpayers.

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[18] In 1994, the General Commissioners are estimated to have disposed of around 215,000 cases (Council on Tribunals, *Annual Report* 1994-5 p.78). A high, but unrecorded proportion of these will have been delay cases. Only 17,000 were attended by the appellant or the appellant's representative, and the proportion which involved points of principle will have been much smaller. The Special Commissioners heard only 70 cases in 1995, all contentious, out of an original 178 contentious cases lodged with them. They also heard 14 applications. The VAT and Duties tribunals heard over 1,100 appeals in 1995, the vast majority of which were VAT appeals (c.1% only were duties cases). 6,452 VAT and Duties appeals were received, but the Lord Chancellor's Department noted that a "large number" of these were simply to preserve the appellant's position pending the outcome of high -profile test cases. But the different administrative systems linked into the different forms of appeal also affect the figures. All VAT appeals are still made direct to the tribunal (and will therefore appear in the statistics); duties and insurance premium tax appeals can be made only after a request for review has been made and the time for review elapsed; while the vast majority of appeals in Revenue administered taxes will be settled before the involvement of the Commissioners by means of a request for listing.

[19] We understand that 1991-2 was the last period for which the split between contentious and delay cases was estimated. The figure then given for contentious cases was 115,230, but it is unclear either how accurate this was (Council on Tribunals, *Annual Report* 1991-2 p.70), or how much the picture has changed since then. It has been suggested to us on a number of occasions that the figures for contentious cases were substantially over-estimated, partly because of the difficulty of defining/establishing which cases are contentious (see also the figures in the previous note for cases actually attended). We have been informed that neither the Lord Chancellor's Department nor the Inland Revenue now keeps any statistics from which it can be assessed how many of the appeals to the General Commissioners are delay cases of a type not likely to arise following self-assessment.

[20] London, HMSO, 1994. The survey was of a representative sample of more than 1,060 VAT-registered businesses. For further details of sampling and methodology see p.3-5 and Appendix I.

[21] Notice 700, section 13, paras 13.1-5, which also draws taxpayers' attention to the explanatory leaflet produced by the VAT and Duties tribunal and how to obtain this (though it would be even more helpful if it gave the address of at least one tribunal centre).

Significance of decisions to settle

2.7. On the second point, a decision to settle will often indicate that the appeals system has served its purpose by requiring both parties to take a fresh look at the issues and reach a sensible compromise.[22] But it may also be due to taxpayers being insufficiently aware of their rights or to perceived or actual shortcomings in the appeal system, which may mean that either the revenue department or the taxpayer[23] feels obliged to settle the case on terms which they believe are unsatisfactory, rather than pursue this to hearing. It is particularly difficult to judge what significance should be attached to the number of cases which are settled in Revenue-administered taxes, because appeals are made to the Revenue and not to the Commissioners, so that the appeals only appear in the statistics in the small minority of cases where a request is made for listing. But, in the absence of proper research into this, we do not think it can simply be assumed that, where a case is settled, the parties believe the outcome is satisfactory. Either party may feel obliged to settle on unsatisfactory terms because of the nuisance value or time required for appeal proceedings, the costs or delay involved, or a lack of confidence in the appeal process.

2.8. Where a taxpayer with what he[24] believes to be a legitimate grievance feels obliged to settle on unsatisfactory terms because he lacks confidence in the appeals system, or the appeal tribunals are not sufficiently accessible, this is likely to have a detrimental effect on his relationship with Customs or the Revenue. It may even affect his approach to compliance. If this is not merely an isolated instance, there is likely to be a more widespread effect on taxpayer attitudes.

The common perspective: objectives shared by the revenue departments and the taxpayer

2.9. It is just as important for the revenue departments as for the taxpayer that the appeals system should operate effectively and without unnecessary delay. The Revenue and Customs may have to defend their position against what they may regard as an unreasonable or even, in some cases, an opportunistic challenge by a taxpayer who either does not understand the tax rules or is simply trying to postpone payment.

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[22] See e.g. Genn (1989) at p.135-38, where it is suggested that facilitating a satisfactory settlement (or, in the case of social security cases, satisfactory outcome on an internal review) is an important function of an appellant's representative.

[23] In a small-scale survey of 90 tax practitioners done for the purposes of gaining background information for this project, and which focused primarily on appeals to the General Commissioners, only 28 respondents (31%) said that they had never known a taxpayer who had a reasonable case in law settle with the Revenue on terms which they regarded as unsatisfactory rather than pursue an appeal to hearing before the General Commissioners. Eleven (12%) said they had known this happen often, 21 (23%) sometimes, and 29 (32%) occasionally. In an entirely open question requesting further information about the reasons for this, 39 of the 53 respondents who answered this question (or 43% of the total sample) referred to costs in some form—either in absolute terms, or in relation to the amount of tax at stake, or in relation to the taxpayer's finances. Of a (provided) list of seven possible deterrent factors, responses could be ranked in the following order as to the frequency with which a particular factor was seen as a deterrent: (1) cost (most frequent), (2) risk of further appeal, (3) intimidation at the prospect of the actual hearing, (4) possible adverse effect on future relationship with the Inland Revenue, (5) likely delay before appeal decided, (6) complexity of rules governing appeal, (7) difficulties or delays in arranging a local hearing (least frequent). The outcome of this survey must be taken as illustrative only, because the raw results have not been adjusted to take account of possible distortions in the sample by reference to such factors as the type of tax work done or the size of firm worked for, or for the fact that the sample was skewed in favour of more experienced and senior practitioners. However, in the absence of further evidence, it does suggest there is little room for complacency about the reasons why appeals in relation to Revenue-administered taxes are settled prior to hearing. (See also Genn (1989) at 87-89 and, for studies of the problems faced by "ordinary" individuals negotiating with experienced defendants in the very different context of personal injury cases, see Harris (1984) Ch 3 and Genn (1988) for the general themes highlighted at Chs 1 and 9).

[24] Unfortunately we have found it impossible to draft this report in gender-free language, or to take account of the fact that taxpayers may be corporations rather than individuals, without undue clumsiness of expression. We have therefore adopted traditional practice. We are, however, conscious of gender-related issues, and have specifically focused on one area of the tax appeals system—the composition of the General Commissioners—where we consider that there is a substantive problem.

2.10. They also have to rely on the appeals system to determine difficult and controversial points of law in test cases with far-reaching implications. The quality, as well as the speed, of decision-making in such cases is vital for efficient tax administration. Poor quality decision-making at the lower tiers of appeal will result either in a need to settle cases on unsatisfactory terms or in additional costs and delay as further appeals are pursued. Serious problems will arise for the revenue departments as well as the taxpayer if the appeals system allocates cases for first instance hearing at an inappropriate level, or forces some cases through an excessive number of tiers of appeal.

2.11. The revenue departments and taxpayers therefore have a common interest in the following objectives for the appeals system.

(a) **It must ensure a high quality of decision-making.** This entails:
- that each case should be allocated to a suitable level within the appeal system, by reference to the nature and complexity of the issues involved; and
- that decision-makers at all levels of the appeals system, from the tribunals to the higher courts should have adequate relevant expertise and experience.

(b) **It must be fair.** The system needs to be:
- even-handed as between the parties to an appeal, normally a taxpayer and the Inland Revenue or Customs;
- even-handed as between different taxpayers.

(c) **It must resolve cases quickly and efficiently.** This means that:
- successive tiers of appeal should be kept to the necessary minimum;
- cases should be allocated to an appellate level suited to the determination of the issues at stake;
- procedure should be streamlined, and procedural rules should not generally operate to prevent issues arising out of the same or closely related facts being dealt with as part of a single set of proceedings in a single forum.

Differences between the perspectives of the taxpayer and the revenue authorities

2.12. We have noted that taxpayers and the revenue authorities have a common interest in the quality of decision-making in the appeals system, and in the speed, efficiency and cost-effectiveness with which appeals are handled. Nevertheless, there are some important differences in their perspectives. These arise out of:

(a) the relationship between the appeal system and collection and enforcement mechanisms;
(b) the fact that key rules governing tax appeals are treated as simply one facet of tax administration;
(c) the fact that in tax appeals the revenue departments are "repeat players", while taxpayers are "one shotters" (these terms and their applications are explained at 2.30-2.33 below);
(d) the relative importance of costs to taxpayers and the revenue departments.

These differences, the way in which they affect the appeals system and their relevance when devising criteria for an effective appeals system, are addressed in more detail below.

(a) The relationship between the appeal system and collection and enforcement mechanisms

2.13. Where one of the revenue departments makes a decision that a taxpayer is liable to tax, interest or penalties, or as to the amounts due, the taxpayer can normally[25] challenge the decision only through the appeals system. If he fails to make or to pursue an appeal, the department will be able to set in motion collection and enforcement procedures, and the taxpayer will have no further redress in law. In VAT cases, if an appeal is not made or is settled, the full amount due is recoverable as a debt due to the Crown.

2.14. Although there is no formal statement of Customs' practice, they have informed us that they are always prepared to allow a taxpayer to file a late return, so that the taxpayer can, in effect, use such a return to displace an estimated assessment. Where it is only after recovery proceedings have started that the taxpayer produces evidence that the figures in an estimated assessment were in fact substantially too high,[26] Customs may still be prepared to reduce the amounts it seeks to recover. But in this context, each case would have to be considered on its merits. In Revenue-administered taxes, where an assessment has been confirmed which is demonstrably excessive, the taxpayer may be able to rely on the practice known as "equitable liability".[27] Again, this is a wholly discretionary matter, and the Revenue requires "acceptable evidence of the reduced liability". At this stage there will, of course, be no oversight by any independent body.

2.15. Under self-assessment, where no self-assessment is filed by the due date, the Revenue may issue a determination (on a similar basis to an estimated assessment under the present system).[28] There is no right of appeal against such a determination. This means, first, that the taxpayer cannot argue through the appeals system that the determination is excessive and, second, that although a determination, like an estimated assessment under the old system, has to be made to the best of the officer's information and belief, it is not possible for the taxpayer to argue through the appeals system that this requirement has not been met.[29] The only way for the taxpayer to displace a determination is by filing a self-assessment—but self-assessments can only be made up to the end of five years from the filing date for the relevant year or (if later) a year after the issue of the determination. If the taxpayer fails to file a self-assessment within the relevant time limits his only option will again be to rely on the practice of equitable liability, provided the necessary conditions are met. He has no legal remedy.

2.16. Accordingly, where there is a difference of view as to any tax liability, the way in which the collection mechanisms burden is generally on the taxpayer to show why the revenue authority is wrong. The revenue department's view may prevail by default.[30] It is clearly

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[25] Assuming that the decision would not, either of itself or because of the circumstances in which it is made, found an application for judicial review or a complaint to the Adjudicator.

[26] E.g. because the officer had assumed that a curve of rising turnover had continued, whereas in fact the business had run into difficulties and turnover had declined steeply.

[27] Outlined in the *Tax Bulletin* for August 1995 at p.245. The title derives from the fact that in a bankruptcy or winding-up in such circumstances the effect of an excessive claim by the Revenue would be to disadvantage other creditors.

[28] Under section 28C TMA (inserted by FA 1994 s.190,199).

[29] The circumstances in *Scott* v. *McDonald* [1996] STC 381 might be taken as evidence that cases where this requirement would be held not to have been satisfied may exist, even if they are very rare.

[30] This position was nicely summarised in argument by Customs in one VAT tribunal appeal: "The Commissioners of Customs and Excise, who are charged with the care and management of VAT, are entitled to interpret the VAT legislation and to issue guidance, by means of Public

unsatisfactory if this occurs because the taxpayer is not aware of his filing obligations or appeal rights, because he lacks confidence in the appeals system, or because this is insufficiently accessible.[31]

(b) The rules of tax litigation as part of the tax administration system

2.17. The most important features of the rules of tax litigation are devised, or strongly influenced, by the Revenue and Customs. They no longer administer the tax tribunals, or have power to make their procedural rules. But the matters determined by primary and secondary legislation enacted on the advice of the revenue departments include the much more fundamental questions of when the taxpayer has a right of appeal, how this must be exercised, the body which will hear the appeal, and the scope of any rights of further appeal. Essentially, provisions relating to appeals are dealt with as merely one facet of tax administration. The influence exercised by the departments is illustrated by the differences between the appeals systems for taxes administered by the Revenue and those administered by Customs.[32]

2.18. This is not a unique arrangement—it is mirrored, for example, in the social security appeal provisions. But there is clear potential for a conflict of interest in the present combined roles of the revenue departments, as defendants in all appeals concerning the taxes which they administer, and originators of the key rules governing appeal rights and the exercise of appeal rights.

2.19. If the appeals system is to function as a mechanism for ensuring that the revenue departments collect tax only in accordance with the law, it is crucial that the mechanism actually achieves that objective. Three key factors in achieving this will be the scope of appeal rights, the way in which these must be exercised, and the body to which the appeal lies.

The scope of appeal rights

2.20. The scope of appeal rights is, with one important exception, not a major problem. Most provisions which seek to impose a liability to tax are subject to appeal. There are some omissions at the level of detail,[33] and appeals in stamp duty matters continue to be dealt with

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Notices or otherwise, on their view on the liability to the tax of particular supplies or classes of supply of goods or services. In the absence of contrary judgments by the VAT tribunals or higher courts, they are entitled to enforce payment of tax in accordance with their views." *Grimsby and District Sunday Football League* v. *C&E Comrs* [1982] VATTR 212.

[31] c.f. Genn (1994) p.265-6, (1989) p.130-34; Baldwin, Wikeley and Young p.68-69.

[32] See further Chapter 5.

[33] For example: there is no right of appeal against:

- a decision by Customs to levy interest or a surcharge, although there are other discretionary decisions which are subject to appeal, notably a decision to require security or to refuse group registration, and pleas about mitigating circumstances can be considered, within strictly defined limits, for the purposes of reasonable excuse cases.
- a decision of the Board on a clearance application under s.225 ICTA (payments made on redemption, repayment or purchase of own shares). There is a right of appeal against refusal of other forms of clearance application, which enables the Special Commissioners to consider the merits of the case and not merely to consider whether the initial decision was unreasonable (see ICTA s.215(7); s.705(8)). It is understood that the broad intention was that decisions on clearances should not be subject to appeal, but that this has not been consistently applied.
- a decision to levy surcharge under self-assessment, or any right to appeal against a decision of the Revenue not to reduce the amount by reference to mitigating circumstances. Because this is a new point, we specifically asked the Revenue what the reasons for the decision to provide no right of appeal were. The only response was that "Surcharge is a fixed sum, but it is not a penalty. The Board can mitigate surcharge under their 'care and management' powers (s. 59C(11)), but the Commissioners cannot vary the quantum of the surcharge". Here as elsewhere, the assumption seems to be that there is no obligation to disclose for discussion the policy reasons underlying a decision to exclude appeal rights.
- a number of decisions or directions in relation to schemes or matters provided for in regulations, such as
  - a decision that a borrower is not entitled to the benefit of the MIRAS scheme (see *R* v. *Inspector of Taxes e.p. Kelly* [1991] STC 566)
  - a decision of the Board to make a direction under the PAYE regulations to recover tax from the employee (SI 1993/744 reg 49(6), (7))
  - a decision not to approve a plan manager under the Personal Equity Plan Regulations (SI 1989/469) (as opposed to a decision to withdraw approval (reg 13)) (contrast the wide right of appeal in relation to refusal of a sub-contractor's certificate under ICTA s. 561(9),

by the outmoded procedure of appeal to the High Court on a case stated from the Commissioners of Inland Revenue.[34] However, these are relatively minor points. The main problem with the scope of appeal rights under the present system relates to decisions and actions taken by the revenue departments in the exercise of the wide discretion afforded to them by their statutory powers of care and management. This applies particularly to the issue of extra-statutory guidance, either in the form of published material or to individual taxpayers or groups of taxpayers, the terms of which cannot generally be taken into account for the purposes of deciding an appeal. This is a very important area, which raises a number of questions affecting the scope of statutory rights of appeal in other areas of law and also difficult questions about the proper borderline between the statutory appeals system and judicial review proceedings. For this reason, we have not tried to deal with these points in this interim report, but will issue a further paper setting out our analysis of the issues next year.

The role of appeals policy

2.21. More generally, it appears from the legislation that decisions in relation to these three factors have often been taken on an ad hoc basis and partly for pragmatic reasons, rather than by reference to a clear policy on appeal rights extending across different forms of tax and different areas of the tax legislation. The resulting problems are compounded by the tendency for appeals provisions to be an incident of changes to the substantive tax law. As a result, appeal rights receive little consideration when attention is centred on the changes to substantive tax law. The consistency of appeal rights with other appeal provisions and their relationship, for example, with the general provisions of the Taxes Management Act (TMA) receive inadequate attention and comment. Problems with the appeal provisions may emerge only at a much later stage, long after the time at which there is a realistic prospect of amendment.

2.22. A clear policy on the scope and nature of appeal rights would provide a benchmark against which to measure new provisions. The absence of appeal rights, or the use of restricted or modified rights, could then be justified as a necessary exception to the general policy.[35] This would provide the basis for a coherent and consistent appeal code with stated exceptions where the circumstances warranted.

2.23. In the context of forms of tax administered by Customs, this could be dealt with as part of the LEGIS project. Appeals have already been identified as one of the cross-functional themes to be addressed under this project, and Customs will in any event therefore be assessing the policy underlying appeals provision and the scope for alignment between different sets of appeals provisions. We welcome this approach, and would hope that formation of a clear, and publicly available policy on the scope of appeal rights could form part of this exercise.

(c) The revenue authorities as repeat players

2.24. Because the revenue departments are parties to every appeal concerning the taxes which they administer, they fall into the category generally described in accounts of the

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and the rights of appeal against approval of share option and profit-sharing schemes under ICTA 1988 Sched 9 para 5); and a decision on an interim claim (specifically precluded by reg 21(3)).

[34] Not only is this cumbersome, but the Commissioners are required to set out the question for determination, though in practice the taxpayer will be given an opportunity to comment on this.

[35] Consultations could include tribunal users' groups.

litigation process as "repeat players".[36] But taxpayers, with a few exceptions, will use the appeals system in one case only—they fall into the category described as "one shotters". As a result the revenue departments enjoy a number of advantages over the taxpayer. The most important of these are their staff's collective experience of the appeal process, and their ability to manage tax litigation in the round.

2.25. It is inevitable that the revenue authorities collectively have more experience of the appeals system than any individual taxpayer. Even where an individual official is relatively new to tax litigation, training, manuals and internal systems enable him to draw on the knowledge of other members of staff, or to refer matters to specialists as appropriate. By contrast, in some appeals dealt with at tribunal level, particularly before the General Commissioners and VAT and Duties tribunals, the taxpayer will be unrepresented, and will have received little or no professional advice. Even where he has a tax adviser, his adviser is unlikely to be able to match the experience of the official handling the case for the revenue authority.[37] A surprisingly high proportion of tax practitioners have never been involved in tax litigation beyond initial negotiations on an appeal.[38] Their inexperience may tell at a hearing: and it may also mean that they are more inclined to advise clients to settle an appeal before the hearing stage is reached.

2.26. Further, like repeat players in other contexts, the revenue departments can, in general, afford to look at the outcome of litigation in the round. There are, of course, a small minority of individual cases which one of the revenue departments feels it simply cannot afford to lose, *Primback*[39] being the most recent example. However, the loss of an individual case, perhaps on a bad decision, will generally be much less important for the revenue authority than for the individual taxpayer concerned, particularly where the decision was at tribunal level. An adverse decision on particular facts need not prevent the Revenue and Customs pursuing very similar arguments on slightly different facts elsewhere. In cases involving principles of wider application, it may also be possible for the Revenue or Customs to select carefully which disputes to settle and which to pursue either to tribunal level or beyond. This means that for the purposes of litigation they may select cases where the facts are perceived to be most likely to contribute to a favourable outcome. And where the outcome is unfavourable, in rare cases the revenue departments may seek to establish the principles rejected by the courts, at least for the future, by introducing new legislation. The risks of litigation are therefore higher for the taxpayer and the incentive to settle correspondingly greater.

2.27. In a small minority of high-profile and high-value cases, or test cases with strong industry support, some of these points may not hold good. In particular, the taxpayer's own experience deficit, if any, will be offset by the fact that he will employ a very experienced adviser or representative. He may have taken a calculated decision to incur the costs of testing the law. And test cases being supported by a trade association or other interest group, may have been very carefully selected. But normally the taxpayer does not have the same freedom

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[36] For the origins of this terminology, which has been widely used in discussions of the litigation process subsequently, see Galanter (1974). For comment on its relevance in the context of social security appeals, see Baldwin, Wikeley and Young (1992), and in the context of negotiating personal injury case settlements, see Genn (1987) Ch. 9.

[37] There is a link here with the existing lack of a regulatory framework governing the provision of tax advice. At present, even where advice and/or representation have been obtained it may be of a quality which varies beyond normally acceptable professional limits: for an analysis of the problems, and some suggested solutions, see Green (1995).

[38] In the survey referred to at note 23, the population of which was skewed in favour of more senior practitioners (74% of respondents were partners, associates or senior managers and only 8% described themselves as having fewer than 5 years' experience of tax practice), 50% had never presented a contentious case before the General Commissioners, and 71% had never prepared a contentious case for hearing by the Special Commissioners.

[39] *Primback v. C&E Comrs* [1996] STC 757, CA.

as the revenue departments in this respect: he has to litigate on the basis of the facts as they are.

(d) Costs

2.28. It is true that the costs associated with appeals may be a serious limitation for the revenue authorities. For example, it may not be cost-effective to appeal from a tribunal decision in the taxpayer's favour where the disputed amounts are small and the case has no wider ramifications, even if the revenue authority considers that the tribunal decision is perverse. It is also true that the costs of litigation need to be met out of a limited budget: they cannot be set against the tax recovered as a result of successful litigation. But the revenue authorities are not generally in the position of being unable to pay for competent representation, or believing they have a strong case in law, with wide-reaching implications, which they are unable to pursue for want of funds.

2.29. By contrast, for many small taxpayers there is no budget from which litigation costs can be met. They may be unable to pay for representation before a tribunal or even for adequate professional assistance in preparing their case. Yet findings in the context of other tribunals suggest that representation is very important to appellants,[40] and may even be the single most important factor in determining the outcome of an appeal.[41] They also suggest that confidence that the tribunal, or an official representing the relevant authority, can offer the unrepresented taxpayer adequate assistance is seriously misplaced. It would be surprising if matters were different in the tax tribunals. And legal aid is not available for any of the tax tribunals, though it is available for appeals to the Lands Tribunal, Employment Appeal Tribunal, Commons Commissioners and Mental Health Review Tribunals.[42]

2.30. There is also a link between the extent to which costs act as a barrier to the appeal process and the rules governing award of costs in the tribunals. In the case of appeals to the Commissioners, costs incurred by taxpayers will normally[43] be irrecoverable even if the appeal is allowed. In VAT tribunal cases, by contrast, successful appellants can recover their costs from Customs, while only in exceptional circumstances will Customs ask for costs where an appeal is rejected.[44]

2.31. A taxpayer who is faced with an unfavourable decision at tribunal level will, in the vast majority of cases, be unable to pursue a further appeal, both because the need for professional representation is greater in the courts, and because of the risk that costs will be awarded against him if he loses. Conversely, if the appeal is successful before the tribunal but the Revenue or Customs then appeals to the High Court, the taxpayer may feel under great pressure to settle. If, in desperation, he deals with a further appeal in person, he will almost certainly be in the invidious position both of losing the case and of being liable for the revenue authority's professional costs in ensuring that its case was competently researched and argued.

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[40] Frost and Howard (1977), Leonard (1987a) (1987b), Gregory (1989), McCrudden, Smith and Brown (1991), Sainsbury and Eardley (1991).
[41] Genn and Genn (1989), Genn (1993). However, see the criticisms of the methodology in the 1989 study put forward by Young (1990).
[42] And although legal aid is not available for immigration appeals, representation and/or advice may be available through UKIAS.
[43] Costs cannot be awarded by the General Commissioners. The 1994 regulations (SI 1994/1811) include provision for the Special Commissioners to award costs of or incidental to a hearing against a party who has acted wholly unreasonably in connection with the hearing (reg 21(1)) and there has now been one appeal (*Scott* v. *McDonald* [1996] STC (SCD) 381) where costs were awarded against the Revenue on the basis that it had acted wholly unreasonably and in bad faith. However, the restrictive conditions which apply mean that such awards will be extremely rare.
[44] See Hansard Vol 102 cols 459-60 (part of which is extracted at Appendix D of the VAT tribunals' explanatory leaflet *Appeals and Applications to VAT Tribunals* (TRIB 90); the part not there extracted adds that costs will normally be sought in unsuccessful appeals against penalties imposed under VATA s.60 for dishonest evasion).

And although the revenue departments will consider waiving their claims to costs on an appeal to the High Court or beyond, this is an entirely discretionary matter.[45]

2.32. Again, there will be exceptions to these general rules. In a small minority of high-value cases the stringent controls on costs which must be exercised by the Revenue or Customs will put them at a disadvantage by comparison with a taxpayer with superior resources, such as a major international corporation. There will also be a small number of appeals where the taxpayer has taken a commercial decision to pursue what amounts to a speculative case on the basis that the costs of litigation are a fair risk set against a potentially large tax bill. Such appeals will tend to be high profile—but they are also atypical.

The policy implications of the differences in perspective

The scope of appeal rights

2.33. It should be uncontroversial that the effectiveness of the appeals system will depend on the scope of appeal rights. Unless this is adequate, the system will fail at the point of entry. The effectiveness of the system, and its fairness, would be assisted if both existing and new appeal rights could be tested against a clear and publicly stated appeals policy. Provisions which, directly or indirectly, restrict the scope of appeal rights should be justified by reference to that policy and the particular circumstances that warrant some restriction. This would apply, for example, to provisions which:

- modify or determine the onus of proof on an appeal;[46]
- determine the scope of the issues to be considered by the tribunal;[47] or
- restrict rights of onward appeal. [48]

The allocation of appeals in Revenue-administered taxes between the different bodies with first instance jurisdiction would similarly be tested against the established appeals policy.

The importance of accessibility

2.34. The existing system assumes that it is fair to put the onus onto the taxpayer to challenge the revenue departments' actions on appeal if he believes that there are grounds for doing so. However, this is fair only if the appeals system is sufficiently accessible to make appeal a realistic prospect for taxpayers. Ease of access is also important given the revenue departments' status as repeat players, and the extent to which costs may act as a deterrent to taxpayers. Nothing can be done to change these factors, but they should be taken into account in addressing how the appeals system can minimise their impact on taxpayers—especially those without the benefit of professional advice and representation.

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[45] 12 March 1980 HC Written Answer Vol 980 col 572; *Inspector's Manual* para 5045.
[46] E.g. The Personal Equity Plan Regulations (SI 1989/469) reg 13(3).
[47] E.g. section 84(4) VATA (appeals in relation to input tax disallowed by Customs by reference to the use made of a supply which is itself a luxury, amusement or entertainment), which permits the tribunal only to consider whether the Customs decision was unreasonable, rather than whether it was correct (effectively affording it a review jurisdiction only on a matter not expressed in the substantive legislation to involve any discretion on the part of Customs). Conversely a right of appeal which would otherwise probably only afford the appeal tribunal the type of jurisdiction held to apply in *John Dee Ltd v C&E Commissioners* [1995] STC 941, may be extended (as in ICTA s.251(7); s.705(8), which provide for the Special Commissioners to take a decision *de novo*, putting themselves into the shoes of the Board).
[48] E.g. in relation to error or mistake claims under TMA s.33(4) or s.33(8), or apportionment disputes under ICTA s.660D(2).

Objectives for the appeals system arising out of the differences in perspectives

2.35. These different perspectives on appeal rights and procedures suggest three further objectives for the appeals system:

(a) **It must be adequate in scope, and all the key rules governing its operation (not merely the procedural rules for the tribunals) must be the subject of a coherent and publicly available policy.** This principle derives from the fact that the value of the appeals system to the taxpayer depends on the extent of his appeal rights and the way in which these can be exercised.

(b) **It must be accessible.** This means it must be:
- affordable;
- as simple and easy to understand as possible, so that procedural formality and complexity are kept to a minimum consistent with the achievement of other objectives;
- physically accessible, offering sufficiently local hearings not to deter appellants or cause them unacceptable cost or inconvenience; and
- able make adequate provision for information and assistance for taxpayers about the way in which they should prepare an appeal and what will happen at an appeal hearing.

(c) **It must be flexible**, so that there is adequate provision for the full range of tax cases and for taxpayers of widely differing degrees of sophistication.

Summary

2.36. The appeals system is a key element in maintaining the balance of power between the revenue departments and the taxpayer. It must provide an adequate and timely remedy where there is a dispute on a technical matter or where the taxpayer argues that the revenue departments have exceeded their powers. Conversely, it is essential that the goal of efficient tax administration is not prejudiced by poor quality decision-making within the appeal system, or by delays which may encourage opportunistic challenges by taxpayers trying to postpone payment of amounts legally due. This means that taxpayers and the revenue departments have in many key respects a common interest in the effective and efficient functioning of the appeals system.

2.37. However, there are also some significant differences in their perspectives. In particular, there is at present a potential conflict of interest in the role of the revenue departments as both the instigators of key appeal provisions and the defending party in all individual cases concerning the taxes which they administer. We believe that there needs to be a clear, publicly available policy as to the scope of appeal rights to underpin discussion of individual decisions in relation to the extent of appeal rights or the rules governing the exercise of these. Together with the restructuring of the direct tax appeals legislation (see Chapter 4 below), this should help to ensure that decisions about the scope of appeal rights are, and are seen to be, based on legitimate policy considerations rather than being haphazard. By increasing transparency, it would also reduce the scope for fears—however unfounded—that decisions about the extent of appeal rights

may on occasion be tainted by the desire to protect administrative decisions from external scrutiny.

2.38. We have also derived from our consideration of the functions of the appeals system six key objectives for the tax appeals system.[49]

(i) **It must be adequate in scope, and all the key rules governing its operation (not merely the procedural rules for the tribunals) should be the subject of a coherent and publicly available policy.** This principle derives from the fact that the value of the appeals system to the taxpayer depends on the extent of his appeal rights and the way in which these can be exercised.

(ii) **It must ensure a high quality of decision-making.** This entails:
- that each case should be allocated to a suitable level within the appeal system, by reference to the nature and complexity of the issues involved; and
- that decision-makers at all levels of the appeals system, from the tribunals to the higher courts, should have adequate relevant expertise and experience.

(iii) **It must be fair.** The system needs to be:
- even-handed as between the parties to an appeal, normally a taxpayer and the Inland Revenue or Customs;
- even-handed as between different taxpayers.

(iv) **It must be accessible.** This means it must be:
- affordable;
- as simple and easy to understand as possible, so that procedural formality and complexity are kept to a minimum consistent with the achievement of other objectives;
- physically accessible, offering sufficiently local hearings not to deter appellants or cause them unacceptable cost or inconvenience; and
- make adequate provision for information and assistance for taxpayers about the way in which they should prepare an appeal and what will happen at an appeal hearing.

(v) **It must be flexible**, so that there is adequate provision for the full range of tax cases and for taxpayers of widely differing degrees of sophistication.

(vi) **It must resolve cases quickly and efficiently.** This means that:
- successive tiers of appeal should be kept to the necessary minimum;
- cases should be allocated to an appellate level suited to the determination of the issues at stake;
- procedure should be streamlined, and procedural rules should not generally operate to prevent issues arising out of the same or closely related facts being dealt with as part of a single set of proceedings in a single forum.

2.39. It will not be possible for any appeals system to achieve all of these objectives completely. And there will always be room for debate about the point at which the best

[49] These are in broad accord with those set out in the Introduction to the Deregulation Unit's Model Appeals Mechanism (see 2.3 above), although they are more detailed and particularised.

compromise has been reached between conflicting priorities–for example, the requirements for high-quality decision-making and for affordability. However, we believe that they provide a useful framework for assessing both the existing appeals system and proposals for reform.

CHAPTER 3. INTERNAL REVIEW AND DISPUTE RESOLUTION

Introduction

3.1. As already noted, the majority of tax disputes are resolved by negotiations either before or after an appeal is actually made. But there has been little attempt to explore other methods by which it might be possible to filter out of the appeals system cases which could be resolved to the satisfaction of both parties more cheaply and quickly by other means. Although an effective appeals mechanism is, for the reasons discussed in the previous chapter, a vital component of the tax system, it is also in a sense, a failsafe mechanism. It is there to provide a solution to disputes when these cannot be settled to the parties' satisfaction by other means.

3.2. Any appeal which proceeds to hearing involves direct costs for the taxpayer and for the revenue department concerned and indirectly affects the cost of running the appeals system as a whole. The costs of running the appeals system, like the costs incurred by the revenue departments on appeals, are ultimately borne by the general body of taxpayers. It is also inevitable that even the most efficient appeal system will involve some delay before a case can be decided. Litigation is a stressful process and may be particularly intimidating for unrepresented taxpayers, even at a tribunal hearing where formalities can be kept to a minimum. The amount which, psychologically and financially, the parties invest in "winning" at a hearing may also encourage an adversarial attitude which makes settlement after the formal appeal process has begun more difficult to achieve. These problems are generally acknowledged in the context of civil litigation in the courts. And while it is true that an informal, accessible tribunals system will help to reduce the problems, it cannot eliminate them entirely. This means that cases should end up in the appeals system—the failsafe mechanism —only where it is not possible to resolve the dispute more quickly and cheaply by other means.

3.3. Of course, no system will be able to provide a perfect method for screening out all bad cases. But, wherever possible, cases which are unsustainable should be resolved before reaching a tribunal hearing. It is in no-one's interest for the tribunals to have to spend time hearing cases which relate to obviously bad decisions by the revenue departments, "appeals" on matters which fall outside the appeals system,[50] or cases where it is clear from the outset that the taxpayer has no realistic prospect of success. It is equally important that even where an appeal has to go to hearing, the issues are narrowed down to the core points of dispute, so that the tribunal can focus on these, rather than on a number of issues on which the parties might have reached agreement.

3.4. However, at present where negotiations reach a stalemate there is little provision for a fresh approach. The tribunals themselves can do very little about this. A hearing for directions may offer some scope for assistance from the tribunal,[51] or may draw the parties' attention to particular aspects of the dispute on which it should be possible to reach agreement, but the

[50] For example, where the taxpayer's real complaint is about a purely administrative matter, such as discourtesy or delay, which should have been dealt with by a complaint to the Adjudicator or Ombudsman.

[51] There is specific provision for a preliminary hearing in the Special Commissioners' rules (SI 1994/1811 reg 9), though not, despite their length and formality, in the VAT tribunal rules, though there is provision for the issue of directions.

tribunal will have to decide the case if a settlement is not reached and certainly cannot attempt to broker negotiations between the parties.

Reviews of decisions within the revenue departments

3.5. We have looked for the purposes of this project at some of the key features of tax appeal procedures in Australia, Canada, Germany, New Zealand, the Netherlands, and the USA. This comparative work is not yet complete, but a summary of some preliminary findings is set out in Appendix 1 to this report.[52] One of the most marked discrepancies between the UK and these other jurisdictions is at the pre-adjudication stage. All the other jurisdictions except the Netherlands have some provision[53] for a formalised review of all or part of the issues in dispute by an independent decision-maker (normally still within the revenue department), before the stage of litigation is reached. In New Zealand new and elaborate internal review procedures have just been introduced (with effect from October 1996) as part of a package of reforms for dealing with tax disputes.[54]

3.6. In the UK the position depends on the type of tax in question. There is no formal review arrangement for Revenue-administered taxes. In VAT cases Customs will review a disputed decision prior to appeal, but under a procedure which is still informal and, essentially a matter of internal administration. In duties and other taxes administered by Customs, a formal review is a compulsory precondition to an appeal, and Customs have propose extending this to VAT also. However, it is questionable whether the review arrangements meet the standards for an independent review that have been accepted, in principle at least, in the other jurisdictions referred to.

Revenue-administered taxes

3.7. Although there is no formal system of internal review for Revenue-administered taxes, the Revenue's internal procedures will mean that some cases are considered afresh by one or more members of staff other than the inspector originally handling the case. The steps taken prior to hearing appear to differ depending on whether the appeal is to the General or Special Commissioners.

3.8. In the case of a contentious appeal to the General Commissioners, the position will depend on the arrangements made within the local tax office. In some cases a detailed review of the case will be undertaken by the District Inspector before the case goes forward for hearing. In others, the District Inspector may have little involvement, or may have been handling the matter personally in any event. In such a case the terms offered for, and procedures adopted to promote settlement are at the discretion of the individual inspector, subject to a general instruction to encourage settlement where possible.[55] Prior to a request for listing, all that may be involved in such cases is what the Inspector's manual described as a "stock-taking" by the Inspector concerned.[56] Exceptions will be any case in which the taxpayer

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[52] We are particularly grateful to KPMG, which provided us with a considerable amount of information on tax appeal procedures in other jurisdictions.

[53] We understand that in Australia provision for internal review is limited to high value disputes. However, tax disputes in Australia can proceed to the Administrative Appeals Tribunal, which will review facts and law and is able to hold pre-hearing conferences to promote settlement.

[54] This was introduced in the wake of the Richardson Report which was issued in April 1994, and recommended a radical overhaul of the existing dispute resolution system.

[55] Inspector's Manual 4902

[56] Inspector's Manual 5053-60, and the more specific guidance set out there, which shades into advice on preparation for the hearing.

proposes to be represented by counsel, or any case where a point of exceptional importance or difficulty is likely to arise, when the Deputy Controller must be supplied with a statement of the points at issue and the file.[57] Arrangements may then be made for the Revenue to be represented through Solicitor's Office, or for advice to be obtained from a technical specialist or Solicitor's office.

3.9. By contrast, where the appeal is to the Special Commissioners a specialist must be consulted before arrangements are made for listing.[58]

3.10. Where a decision adverse to the Revenue is made by either set of Commissioners, a specialist will generally be involved. In the case of an appeal to the General Commissioners a specialist must be consulted.[59] Where an adverse decision is made by the Special Commissioners on a case which was still being handled locally, the inspector must, effectively, follow the instructions given by the specialist at pre-hearing stage.[60] The same will apply where the taxpayer is appealing against an adverse decision of either set of Commissioners to the High Court.[61] Further proceedings (including asking for, or commenting on, a case stated following a General Commissioners' decision) will be by, or on the instructions of, Head Office.[62]

3.11. The result is that the basis for the original decision may be reconsidered internally by a number of people, depending on the nature of the case and the stage which the appeal has reached. However, this process is one in which the taxpayer is not directly involved, and of which he may even be unaware, unless he is informed by the inspector or contacted direct by Head Office. Indeed, in some cases the taxpayer may simply think that the inspector takes an inordinately long time to deal with the substance of issues raised in correspondence, when in fact the delay is because the issues are being reconsidered and a fresh judgment reached.

3.12. The taxpayer also has no control over the process of referral. All the key questions—whether his case is referred to someone else, the person to whom it is referred, the stage at which it is referred and the issues addressed—are matters of internal Revenue procedure. The taxpayer has no right to request a reconsideration by a specialist or, necessarily, to make representations direct to any person reconsidering the case. Where the appeal turns on questions of fact, or raises no major issues of principle, the case may be handled only by the inspector dealing with the file or, even if referred to the District Inspector, may not be looked at in any detail.

3.13. The arrangements for reconsideration are essentially part of the Revenue's internal arrangements for the management of cases. One of their objectives, of course, is to maintain consistency and to ensure that decisions have been reached by someone with an appropriate level of knowledge of the technical issues. In some larger cases, or cases involving issues of principle (questions of statutory interpretation, for example) and where an appeal has already been successful before the Commissioners, their effect may be very similar to an internal review. But there is no similar provision for the majority of small cases which are still to

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[57] Inspector's Manual 5061-2

[58] Inspector's Manual at 4940. This is specifically stated to apply whether an election has been made for the Special Commissioners or whether they have exclusive jurisdiction. This may be at the root of anecdotal evidence from some practitioners that they tend to advise taxpayers to opt for the Special Commissioners, on the basis that the Revenue is then much more likely to reconsider whether the case is worth pursuing.

[59] Inspector's Manual at 4916a; 5036

[60] Inspector's Manual at 4916c; 5029; 5036, 5042

[61] Inspector's Manual at 5036

[62] Inspector's Manual at 5037, 5037a, 5039a,b, 5042

proceed to hearing before the General Commissioners. Indeed, in such cases, depending on the policy of an individual District Inspector, the event most likely to trigger a general reconsideration of whether the case is worth pursuing may be a change in staffing which results in the transfer of the file to a different inspector. We do not believe that this is a satisfactory state of affairs.

Taxes administered by Customs

3.14. In duties cases and for the purposes of insurance premium tax and, now, landfill tax, the position is diametrically opposed to that in Revenue-administered taxes. In such cases, an internal review by Customs is a compulsory precursor to an appeal. Indeed, technically, it is the decision on the review (rather than the original decision which prompted the review) which is the subject of the appeal. This system does not apply to VAT at the moment, but in a consultation document issued in July 1996,[63] Customs proposed that it should be extended to VAT appeals. The consultation period has now expired, but we understand that no firm decision has yet been taken on whether to implement the proposals.

3.15. We recognise that internal review may be one effective method of promoting the objectives identified in 3.2. above. To this extent we welcome Customs' adoption of a formalised internal review procedure, with a clear timetable for decisions following requests for review. We also welcome, as a step towards this, the informal review arrangements already in place for VAT. But we have a number of concerns about the existing review arrangements for duties, IPT and landfill tax and about the proposed scheme of compulsory review for VAT disputes.

Compulsory review

3.16. First, we consider that, as a matter of principle, internal review should not form a barrier between the taxpayer and an independent appeal tribunal. Although we note that this does arise in tax cases in some other jurisdictions,[64] this is unusual in comparable administrative appeal systems in the UK: a right to request internal reconsideration of a decision is relatively common, but it is not usually a compulsory prelude to any appeal to an independent body. Such a system has, with some justification, been described as requiring the person dissatisfied with the decision to appeal twice before receiving an independent hearing.[65] It may also be argued that this amounts to giving Customs two attempts to make the right decision, and that it therefore actually reduces the incentive to get things right first time.[66]

3.17. The delay occasioned by a compulsory review period of up to 45 days may also cause practical problems in some cases—especially import duty cases where goods have been warehoused pending resolution of the dispute. Where the decision is upheld on review, and the taxpayer wishes to pursue an appeal, this delay has to be added to the further wait time for a tribunal hearing. In urgent or complex cases it may also be very difficult for the taxpayer to avoid incurring further professional costs during the period of review, either on preparations

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[63] *Proposal for the introduction of a two stage procedure for VAT appeals*, Customs and Excise, 17 July 1996. The consultation period ended on 11 October 1996.

[64] Including New Zealand, under the package of reforms already referred to. In Canada internal review may be bypassed with revenue consent, and in the USA it is possible to proceed direct to litigation, although this may affect the position on costs at a later stage.

[65] Sainsbury (1994) at p.295, in the context of disability working allowance and disability living allowance (the provision for a compulsory rather than optional internal review of decisions on these benefits before an appeal to a tribunal is unusual in the social security context).

[66] Anecdotal evidence suggests that in the USA one complaint about the system operated by the IRS is that a substantial proportion of the cases dealt with by the Appeals Office are actually attributable to poor decision-making by the Examination section.

for an appeal in case this is required, or for the purposes of negotiations or information required for the review itself. This means that there is a link with the question of costs on a review, discussed below.

3.18. We understand from Customs that the desire to reduce costs was not a material factor in the decision that the review should be a pre-requisite for an appeal. The July consultation paper indicates rather that the proposed review procedure will in general benefit appellant taxpayers by resolving some cases earlier, speeding up appeal procedures for the reminder of cases and making it easier for businesses to argue their own cases without professional representation.

3.19. That being so, it is difficult to see what arguments there could be in favour of making the review procedure compulsory rather than providing this as an alternative to an appeal, during which the normal time limits for appealing would not run. If seeking review rather than pursuing a case direct to appeal is in the best interests of a business, it seems reasonable to assume that businesses will very quickly come to appreciate this. Where a system of internal review does indeed provide a fast, effective and relatively low cost method of resolving disputes, the likelihood is that the vast majority of taxpayers will be keen to seek review before pursuing an appeal. Making this compulsory removes the opportunity for taxpayers in exceptional circumstances (perhaps because speed is particularly important) to decide to proceed straight to appeal. It also raises questions about why Customs is not satisfied that individual taxpayers should be allowed to be the best judges of their own interests in this respect.

Review arrangements and procedures

3.20. Second, there are a number of more detailed issues about the way the review procedure is organised where we are uncertain that the present scheme will operate to best effect. If an internal review procedure is to function effectively, it must function, and be seen to function, as a genuine "hard look" at the relevant law and facts by someone not previously involved in the case and who is wholly independent of the original decision-maker. This principle is accepted in the USA and Canada. It was also part of the rationale underlying the setting up of a new adjudication unit and other provision for adjudication within the Inland Revenue Department in New Zealand under the package of reforms referred to at 3.5 above.[67]

3.21. If this is to be achieved, the following issues might be considered relevant:

- the management structure under which the reviewing officer works;
- the level of seniority and experience of those appointed;
- the period for which they are appointed;
- whether they work as part of an operational unit or separately;
- whether they also have operational responsibilities;
- the information available to the reviewing officer for the purposes of the review; and
- any continued involvement of the original decision-maker in the review process.

[67] It should be noted that another part of the package is that the IRD has power to issue a disclosure notice, which requires each party to put forward both the facts and legal arguments on which it wishes to rely. Only in exceptional circumstances is it possible to raise matters not disclosed at that stage subsequently in litigation. It is understood that only the more substantial cases will be dealt with through the adjudication unit, others being referred to technical specialists but who are still clearly separated from the original decision makers.

3.22. The last point does appear to have been addressed: Customs have told us that the original decision-maker has no further involvement after supplying documents and information to a reviewing officer. The reviewing officer notifies the decision on review direct to the business concerned. However, we have been unable to establish that Customs has any clear policy on the first four points,[68] and on the fifth a great deal seems to be left to the discretion (and training) of the individual reviewing officer.[69] This appears to be partly a function of the delegation of decision-making to regions. While we understand why some element of regional decision making may be operationally desirable, it is not clear to us why this cannot be informed by a general set of guidelines which could then be adapted to local circumstances. We recognise that the figures for decisions on customs and excise matters which were varied or overturned on review (26% in customs cases for the year to March 1996 and 10% in excise cases for the year to December 1995)[70] indicate that the review alters the decision in a significant minority of cases. We are also aware that relatively low figures for decisions altered on review may simply reflect a high standard of initial decision-making: it cannot, of itself, be taken as an indication of shortcomings in the review process.

3.23. Nevertheless this apparent lack of a clear underlying policy to secure the independence of the review process increases our concerns about the proposal to extend review as a compulsory matter to VAT. We also find it surprising that the way in which the review would be conducted and the administrative arrangements for achieving an independent review were not focal points in the consultation document.

Costs on review

3.24. At present there is a mismatch between the rules on costs which apply to an appeal to the VAT and Duties tribunal and those which apply on review. Normally, where a tribunal allows the taxpayer's appeal, he will be awarded costs. But if a decision is overturned on review, he has no prospect of recovering any of the costs which he would normally be awarded by the VAT and Duties Tribunal following a successful appeal. This may be justifiable in a case where the original decision is overturned because of new information which the taxpayer should have supplied at an earlier stage, or when any costs relating to the review itself[71] are minimal. However, where the taxpayer incurs professional costs in connection with the review itself, the reasons for the mismatch may seem less apparent. [72]

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[68] Customs has informed us that the line management of the reviewing officer will be different from that of the original decision maker. However, it appears that there is no set grade or seniority for reviewing officers, nor a set period of appointment, and that some reviewing officers carry out other duties. Customs does not believe this compromises their independence. The number and location of review officers is seen as a decision for management at regional level. Customs considers it is important that reviewing officers should have operational experience, on the basis that this means that they bring up-to-date work experience and expertise with them. Some operational experience is clearly desirable, not least so that the officer concerned has an adequate grasp of any technical issues. It is also true that if there is a two way flow of personnel between review and operational functions this may help to disseminate best practice, and encourage a critical perspective among those in operational roles. However, against this has to be weighed the need to ensure that the reviewing officer evaluates cases, so far as possible, from a detached and neutral standpoint.

[69] It would, of course, be impossible to have a wholly standardised procedure, as the information required will depend on the circumstances of each case. However, again, guidelines could be made available to both the reviewing officer and the taxpayer, so that it was clear what was to be expected. The only reference to this in the July consultation paper was that "businesses would be able to discuss/ negotiate disputed decision with reviewing officer".

[70] The figures are for decisions varied or overturned as a proportion of requests where a review was either completed or the request withdrawn by the trader. We understand that there are no separate figures for the number of cases where decisions were varied and where they were completely overturned.

[71] As opposed to, for example, the costs incurred in the course of an investigation which ultimately results in the issue of the disputed assessment, and which would not be allowable on appeal either.

[72] Similar restrictions on costs apply to review procedures in other jurisdictions - but appear also to be a source of complaint in other jurisdictions.

Re-evaluation of internal review

3.25. We think there is a need for both revenue departments to re-evaluate both the contribution which could be made by internal review procedures to the settlement of tax disputes and the procedures which should be adopted. But particularly while the structures for review are still at a relatively undeveloped stage, we believe that it is counter-productive to impose these as a barrier between the taxpayer and the appeal tribunals. Instead, we would suggest that the departments should work together to devise a procedure for internal review where requested by the taxpayer. Arrangements to ensure the real practical independence of the reviewing officer from the operational sections, and appropriate training, would be essential. The scheme should be piloted and evaluated through feedback from both taxpayers and revenue department staff before being more widely implemented. As part of the pilot exercise, it would be important to try and judge whether this is actually a more cost effective and speedy way of disposing of a proportion of appeals than a tribunal hearing.

Alternative methods of dispute resolution

3.26. In other areas of civil litigation there is a growing emphasis on methods of alternative dispute resolution (ADR). Indeed, some would see tribunals themselves as providing one form of ADR. However, as indicated above, appeals to tribunals may themselves have some of the features which attend court litigation and which have led to increased interest in ADR both in the UK and in other jurisdictions. The form of ADR most likely to be of potential interest in the tax context is mediation. The value of mediation has been long accepted in areas of the law where the purely legal questions to which a dispute gives rise are closely related to non-legal questions of welfare or general policy, such as family and employment law. However, it is increasingly recognised as a useful form of ADR for a wide range of matters, from small disputes between ordinary individuals to substantial commercial cases. It is likely that fresh impetus will be given by the Woolf report[73] to the steps already taken to promote and develop mediation in a range of different contexts by bodies such as the Centre for Dispute Resolution (CEDR), the City Disputes Panel and Mediation UK.

3.27. At present there is no provision for mediation of tax cases in the UK. In the USA the initial period for a pilot study of mediation in tax appeals set up by the IRS has just ended (on 31 October 1996) but the extent to which this has been used has been limited. This may be in part because of limitations on the categories of case eligible for mediation under the pilot.[74] We believe that further consideration should be given to whether mediation could serve as a useful and cost-effective method of promoting settlement of tax disputes in the UK. The most likely categories of case to benefit are large scale disputes involving complicated factual issues, cases where there is a dispute mainly as to the amount at stake rather than the underlying legal principles, and cases where it may prove possible for a mediator to facilitate progress in negotiations which have previously become deadlocked, perhaps because of personal factors.

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[73] See in particular Lord Woolf's recommendations in Chapter 18 of *Access to Justice: Interim Report,* and the recommendations arising from this, incorporated as recommendations 295-303 at p.326 of his *Final Report.*

[74] Mediation was only available for cases in the Appeals Office but not yet docketed in court, was only to extend to issues of fact, and certain types of case were specifically excluded. It is understood that, as at October 17 1996, mediation had only been requested in nine cases, and four of these were rejected as non-qualifying cases. Of the five accepted, two had been resolved and three were still undergoing mediation. It is understood that Appeals Office was at that stage still evaluating the success of the pilot and assessing whether the project should be extended.

Summary

3.28. Further work is required to assess the scope in the UK for pre-adjudication procedures which would help to ensure that only cases founded on real disputes reach the tax tribunals, and facilitate settlement by agreement. The present arrangements for internal reconsideration by both the Revenue and Customs are unsatisfactory, though for rather different reasons. We suggest that a new scheme should be drawn up, with common principles applicable to all forms of tax, and that this should be piloted. Proper evaluation of the pilot results should be completed before a decision is taken as to whether the scheme is extended and the types of case most likely to benefit.

3.29. We also think that there is a need to explore the scope for mediation in tax cases further, although the nature of the procedure and potential time and costs involved are likely to mean that this is useful in only a limited range of cases. Again, a pilot would be required for evaluation. It might even be that a reference to mediation could, in some cases, be dealt with as part of an internal review.

CHAPTER 4. A RATIONAL LEGISLATIVE CODE FOR APPEALS

Introduction

4.1. The case for rationalising the legislative code for appeals rests on three of the criteria for an effective appeals system identified in Chapter 2: the scope of the appeals system, fairness and accessibility. The form of the legislation governing appeals has a direct effect on accessibility. The appeal provisions are not exempt from the general problems of complexity and impenetrability addressed in our earlier reports on tax legislation. In addition, they give rise to a number of more specific problems. The scope and extent of these differs somewhat as between forms of tax administered by the Revenue and forms of tax administered by Customs.

Taxes administered by the Revenue

The problems: absence of structure, complexity and anomalies

4.2. There are three further, more specific problems with the primary appeals legislation relating to taxes administered by the Revenue. These are:

- the structure of the legislation or, more accurately, the absence of a clear structure;
- the complexity of the rules governing the scope of appeal rights, the forum for hearing appeals at first instance, and the division of cases between different bodies of Commissioners; and
- a number of specific inconsistencies and anomalies in these rules.

These problems are linked. A clear structure would tend to reinforce the existence of a coherent appeals policy in place of a large number of separate rules devised to meet various circumstances on a piecemeal basis. It would also make the rules easier to follow. Any inconsistencies would be more apparent and therefore less likely to be perpetuated by default. The substance of the rules governing the allocation of appeals at first instance are considered in more detail in Chapter 9. Here we focus on the broader picture in relation to the appeals legislation as a whole.

The criteria for the Tax Law Rewrite project

4.3. In its consultative document *Tax Law Rewrite–The way forward,* the Inland Revenue set out three criteria for the ordering of tax legislation.[75] It said that the people using tax legislation need:

- to know where they should start;
- to identify all the relevant provisions, because they are gathered together or are clearly sign-posted; and
- to grasp readily how the provisions fit together, and how they relate to the wider picture.

[75] Section 4 paragraph 4.

4.4. If these criteria are accepted, it should be uncontroversial that the present tax appeals provisions are a resounding failure on all three counts. The user of the Taxes Management Act would probably assume that he would find the answer to appeals-related questions in Part V, which is entitled "Appeals and other proceedings". However, this would tell him nothing about whether there is a right of appeal in the first place. Rights of appeal against assessments, amendments of self-assessments and amendments of partnership statements are provided for in Part IV, at section 31. Rights of appeal against amendments of claims made outside a return are dealt with in Schedule 1A paragraphs 9-11.

4.5. Part V (with Schedule 2) does include the rules for allocating appeals between divisions of General Commissioners—but not the provisions governing the allocation of appeals (or issues arising in appeals, following self-assessment) between the Special and General Commissioners. Instead, these are with the provisions about rights of appeal. Moreover, they are not self-contained: in the case of an appeal against an assessment or in connection with a claim, the taxpayer is expected to know whether the assessment was made by the Board or the claim was one which had to be made to the Board. If he does not, he can only find out by locating the relevant charging or relieving provision elsewhere in the Taxes Acts, without the benefit of any cross-referencing.

4.6. The provisions which give the taxpayer the right to elect for a hearing before the Special Commissioners are also with the provisions creating the rights of appeal, rather than in Part V—but having located these he must refer back to Part V to find how to exercise his right of election and also to find the provisions for transfer of appeals between the General and Special Commissioners. There is no cross-reference to the transfer provisions in any of the provisions relating to election for the Special Commissioners, although they are a factor which may be relevant when a taxpayer is deciding whether or not to make an election.

4.7. There is also no indication in the Taxes Management Act that the provisions on appeals are incomplete even as regards the main direct taxes, much less any cross-referencing to the many additional provisions scattered among charging or relieving provisions or provisions for notices or directions elsewhere in the Taxes Acts.

4.8. Once the taxpayer is satisfied he has a right of appeal, he will need answers to the further questions "Who can I appeal to?", and "What are the time limits for an appeal and any relevant elections?". It is in answering these questions that the complexity of the existing rules, and a number of anomalies, become apparent. In fact, the existing rules determining which body has jurisdiction to hear appeals at first instance are so complicated that it would be almost impossible to draft a leaflet or booklet which would provide taxpayers in this position with reasonably comprehensive and accurate answers to these questions.[76] When the procedural rules for the Commissioners were introduced, the underlying policy was to keep these as straightforward and easy to understand as possible. It is understood that this was one

[76] IR 37, the current leaflet on appeals illustrates the problem. It is clear and easy to read - but there are many circumstances in which the information provided will be inadequate. This is not a criticism of the leaflet: it simply reflects the complexity of the underlying rules. The Special Commissioners' own explanatory leaflet, for understandable reasons, omits the questions of the scope of appeal rights entirely, and on the question of jurisdiction merely states that the Special Commissioners "are an alternative Tribunal to the General Commissioners in relation to many appeals but in some appeals the Special Commissioners have exclusive jurisdiction and in a small number of appeals the General Commissioners also have exclusive jurisdiction". While factually accurate, this seems less than helpful for the unrepresented taxpayer and does not refer to the election process at all. (It also seems curious in this context to choose a technical term such as "exclusive jurisdiction" which may be meaningless to a small businessman, in preference to everyday language, such as "some appeals can only be heard by the Special Commissioners".)

of the reasons for the divergences between these and the VAT and Duties tribunal rules. But this is not the only stage at which simple and readily intelligible rules are important. Arguably, they are even more important at this earlier stage of the proceedings, when no help will be available to the taxpayer through the tribunals themselves.

The practical effects of the present problems

4.9. For cases at either end of the spectrum, the complexity of the existing rules may not matter very much most of the time. In the high-value and high-profile case which may well proceed beyond the Commissioners, the taxpayer will have the benefit of expert advice to disentangle the provisions. Generally he will in any event either be obliged to appeal to the Special Commissioners or will elect to do so, and there will be no question of the case being transferred. At the other end of the spectrum, it may be that in most mark-up cases and penalty appeals the taxpayer would in any event not seriously consider appealing beyond his local division of General Commissioners—though even here, it might be that the new self-assessment provisions for election between different divisions of General Commissioners would give him pause for thought. However, with cases in the middle of the spectrum, the taxpayer may need to acquire a clear picture of the issues at stake. The right of election for the Special Commissioners, or between different divisions of General Commissioners, is irrevocable without the Revenue's agreement, and the taxpayer does not have very much time to decide whether to make it. He needs to discover he has a right to elect, weigh up the advantages and disadvantages of doing so, and make any election at the same time as the appeal itself, within 30 days of the disputed decision—even if it is far from clear at that stage what the disputed issues will be. The Revenue may permit late elections, but is under no obligation to do so.

4.10. The rules governing the allocation of appeals in the Taxes Management Act have been described by two well-known members of the Revenue Bar in the following terms:

> It is simply not possible to state concisely and clearly whether an appeal, in the first instance, lies to the General Commissioners or the Special Commissioners. Reference should be made to the following provisions [five separate sets of provisions, the references to which will alter somewhat as a result of the changes for self-assessment, though the general point will hold good]. Save that section 42 refers to Schedule 2, only one of these provisions contains any clear indication that the other provisions exist. Judges often condemn a statutory provision as a "trap for the unwary." These provisions are far worse. That they are permitted to survive is, arguably, evidence of contempt in the official mind for the rights of ordinary taxpayers.[77]

4.11. Without necessarily subscribing to the concluding view as to the reasons for the continued existence of the present provisions, it is fair to say that any non-specialist trying to make sense of the legislation is likely to become completely bewildered. And although we noted in our *Interim Report on Tax Legislation* that unrepresented taxpayers will seldom read fiscal legislation,[78] a taxpayer trying to prepare a case for appeal will sometimes be an exception to this rule. Generalist practitioners are also likely to struggle: they may overlook something which is potentially relevant and, as with other areas, complexity will tend to push up the professional costs incurred.

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[77] Potter and Prosser (1991) at 1-04.
[78] At para 1.31.

4.12. Further, as already noted, the rules in the Taxes Management Act are only part of the picture: these are supplemented by provisions elsewhere in the Taxes Acts. The appeals provisions in relation to inheritance tax, stamp duty, and stamp duty reserve tax are contained in the charging statutes and, for a combination of administrative and historical reasons, make different provision for first instance hearings from those which apply for the main direct taxes.[79]

4.13. The problems are not confined to the taxpayer, either. Although the decision whether to appeal and the making of the appeal are matters for the taxpayer, the official dealing with the case will, effectively, have to check that the taxpayer, or his adviser, has answered the questions correctly, and, even if he has, whether a transfer can and should be sought. Unnecessary complexity in the appeals system at this level therefore creates problems, and increases actual or notional costs (in terms of time expended) on both sides of the dispute.

Forms of taxation administered by Customs

Structure, complexity and anomalies

4.14. By contrast, the indirect tax appeal provisions in primary legislation have long been contained in a single group of sections, now at Part V VATA 1994, and Schedule 12 to the Act. The effect is, that, paradoxically, these come much closer to meeting the Revenue's three criteria for the ordering of legislation. Part V and Schedule 12 provide the two main points of reference for the taxpayer or his adviser, and are cross-referenced to each other. It is easy to tell where the relevant provisions start and finish, and much easier to see how the system fits together. The same model was followed, and the same benefits achieved, in the appeal provisions for insurance premium tax and, subsequently, for excise and duties and landfill tax.

4.15. The difference between direct and indirect taxes in this respect is well illustrated by the clear and specific "list of appealable matters" which it has been possible to furnish in the explanatory leaflet for VAT and Duties tribunals (at Appendix B) and, in a rather more detailed form, in the VAT Guide.[80] In direct taxes, it has not been possible to furnish this type of list in either IR 37 or the explanatory leaflet for the Special Commissioners.

4.16. The main criticisms of the present arrangement of the VAT appeal provisions are, first, that the cross-referencing to other sections of the Act is often more opaque, and the heads of appeal in section 83 are less descriptive than they could be, and, second, that the relationship between these and the procedural rules for VAT and Duties tribunals[81] is less clear than it might be.

4.17. It is not very enlightening to be told that an appeal can lie to a VAT and Duties tribunal in relation to "a claim by a taxable person under section 27" or "any refusal of an application under section 43". While it is true that an adviser, or someone who has found his way to section 83 in the first place can go on to check the sections referred to, it would be better if there were slightly more detail (such as the short title of the section) to avoid the need

[79] The substance of these provisions, and proposals for such appeals, are discussed in Chapter 9.
[80] Notice number 700, at para 13.2.
[81] The Value Added Tax Tribunals Rules 1986 SI 1986/590.

to check a series of opaque references - particularly in relation to penalties, where it may be necessary to battle through a number of sections to find the relevant one.

4.18. It is also true that so long as key procedures for the early stages of an appeal (including how to actually make it) are dealt with in the procedural rules for VAT and Duties tribunal rules, it would be helpful if cross-references to these were more direct and specific. At present it is necessary to rely on commercial publishers' added cross-references or notes.

4.19. It is not surprising that the rules for taxes administered by Customs are superficially more straightforward in many respects, since all appeals, without exception, are heard at first instance by the VAT and Duties tribunals, so removing one of the most important "occasions of sin" for direct tax appeals. For reasons discussed in Chapter 6, we are doubtful whether a single tribunal provides the best available solution but, as we note there, this does have the merit of avoiding complex provisions about the allocation of appeals and difficult decisions at the margins.

4.20. In fact the two main sources of complexity in the tax appeals legislation for VAT are not obvious on the face of the legislation. They are the result of uncertainty as to how this should be interpreted, which has led to conflicting decisions either at or beyond the level of the VAT and Duties tribunals. They are, first, the rules governing the time at which disputed amounts must be paid, and the running of interest on these and, second, the scope of the VAT and Duties tribunal's jurisdiction in relation to appeals against discretionary decisions by Customs, both generally and under section 84(10) VATA. The rules on timing and the running of interest are an issue of considerable practical importance, but are outside the scope of this interim report. We will be addressing the second matter in a separate paper on the borderline between the statutory appeal procedures and judicial review proceedings to be issued next year.

Summary

4.21. We believe that the objectives set out in the Revenue's consultation document *Tax Law Rewrite - The way forward*, would form a useful starting point for the testing and restructuring of appeals provisions for all forms of tax. It would make the appeals system much more transparent, and the fact that it was easier to see how any one provision fitted in to the system as whole would tend to reduce the number of anomalies.

4.22. However, this would not, in isolation, be sufficient to reduce the complexity of the existing appeal provisions in relation to taxes administered by the Revenue—it would simply make this more apparent on the face of the legislation. To address this, the content of the appeals provisions needs to be changed. For direct taxes the rules relating to the jurisdiction of the various appellate bodies at first instance are unacceptably complicated, and if appeals are to continue to be heard by more than one body, these need to be simplified and streamlined.

4.23. For taxes administered by Customs, there would be scope for the issues set out above, and particularly the effect and scope of section 84(10) VATA, to be addressed as part of the LEGIS project. As noted in Chapter 2, while one of the objectives of this

project is to simplify the drafting of legislation, it also goes beyond this to underlying policy issues.

CHAPTER 5. A UNIFIED TAX APPEALS SYSTEM

Introduction

5.1. The sort of issues which normally determine the forum of hearing or the procedure to be used in any form of litigation are the amounts in dispute, the nature of the dispute, the complexity of the case, the time required for hearing, etc. But in tax-related appeals or disputes the body which administers the form of tax in question has devised its own appeal procedure. The effect is that the primary determinant of the forum in which an appeal is heard (and therefore of the procedural rules which apply) is the body which administers the tax. It is only for taxes administered by the Revenue that other factors are relevant. Even then, the type of tax in question has a stronger influence on the way in which appeals are allocated than the nature of the issues. This problem is discussed in more detail in Chapter [8].

5.2. The present system gives rise to three problems. First, there is a rigid division between appeals on taxes administered by the Revenue and by Customs, even where these involve the same or closely related issues. So questions potentially relevant to more than one type of tax cannot be determined in a single set of proceedings if the types of tax cross this administrative boundary. Second, there are major discrepancies between the rules governing direct and indirect tax appeals, for which there appears to be no objective policy justification. Third, while some appeals relating to class 4 National Insurance Contributions (NICs), which are administered by the Revenue, lie to the General or Special Commissioners, other disputes in relation to NICs will generally constitute "section 17 questions".[82] These are presently to be determined by the Secretary of State rather than through either the tax tribunals or any party of the social security tribunal system. In practice, determinations are given under delegated authority by the Office for Determination of Contribution Questions (ODCQ).

5.3. A related, but separate issue is that there are one or two types of dispute relating to Revenue-administered taxes which are not dealt with under the normal appeals provisions, but for which specific provision has been made. The value of these special arrangements now seems questionable, and we have considered whether it is still appropriate for these issues to be dealt with outside the mainstream appeals system.

The rigid division between direct and indirect tax appeals

5.4. The existing demarcation between direct and indirect tax appeals does not generally cause problems for the revenue authorities, or for those tax professionals who specialise in only one of these area. However, it does cause problems for businesses, which are expected to come to grips with two separate appeal systems. This applies particularly to small businesses and their advisers, who are much less likely to be specialists in one particular form of tax, and therefore have to be able negotiate two separate sets of rules. Replacing the present rigid demarcation with a flexible, unified system would accord with the principles underlying the joint working programmes between the Revenue, Customs and the Contributions Agency.

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[82] Questions which come within Social Security Administration Act 1992 s.17. A summary of the categories of appeal covered is set out later in this chapter.

5.5. The arguments in favour of a unified system have already been recognised at an administrative level. The Presiding Special Commissioner is also President of the VAT and Duties Tribunals. The Special Commissioners and VAT and Duties tribunal in London share the same buildings, and have a joint administrative and support staff, under Mr Richard Lester, who combines the offices of Clerk to the Special Commissioners and Registrar to the VAT and Duties tribunal. This has tended to highlight the arbitrary division between the jurisdiction of the two tribunals. Not only the Presiding Special Commissioner but many other Special Commissioners are also VAT and Duties tribunal chairmen.[83]

Specific discrepancies in the rules governing direct and indirect tax appeals

The extent of the differences

5.6. The practical problems to which the two separate appeals systems may give rise are, from the point of view of businesses, substantially increased by the discrepancies between these. Procedural differences become relevant at an early stage in the appeal process (starting with the way in which an appeal is made), and these affect cases which settle well before hearing.

5.7. Discrepancies in the way in which the appeals legislation has been formulated and structured have already been considered in Chapter 4. The other principal discrepancies which will persist following self-assessment are set out below.

(a) All appeals on VAT, excise and duties lie at first instance to the VAT and Duties tribunals. By contrast, in taxes administered by the Revenue there is a complex web of rules under which appeals may be heard at first instance by the Special Commissioners, General Commissioners or, more rarely, by the High Court or Lands Tribunal.[84] There is no provision for questions relating to the value of land in VAT cases to be referred to the Lands Tribunal.

(b) There are important differences in the composition of the VAT and Duties tribunals as compared with either the Special or General Commissioners, and in their regional organisation.[85]

(c) There may be differences between the jurisdiction of the VAT and Duties tribunals and of the Special and General Commissioners in relation to decisions involving the exercise of discretion by the Revenue and Customs, although there is some uncertainty about the law here.[86]

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[83] The weight of argument in favour of a unified tribunal to replace at least the Special Commissioners and VAT tribunals was recognised in the joint consultative document issues by the Inland Revenue and Customs in 1980 (see note 2 above). Our own views are set out in Chapters 6-8.

[84] These are discussed in more detail in Chapter 8.

[85] See Chapter 7.

[86] Because the primary and secondary legislation relating to VAT contains a substantial number of provisions which afford Customs discretionary powers (including power to make regulations), this is reflected in the types of decision subject to appeal and also in the scope of the VAT and Duties tribunals' powers on appeal: see *John Dee* v. *C&E Comrs* [1995] STC 941 for an explanation of these. However, in relation to VAT appeals the tribunal also has power, under what is now section 84(10) VATA 1994, broadly, to allow an appeal against an appealable decision on the basis that it would have allowed an appeal against a prior decision of Customs on which the appealable decision depended. The effect of this section is difficult to determine and it has been the subject of differing interpretations in VAT tribunal decisions. Some of these have suggested, first, that a prior decision could include a decision not to apply an extra statutory concession and, second, that in order to decide whether it would have allowed a prior appeal against that prior decision, the tribunal is required to decide whether the appellant was within the terms of the concession and whether the decision of Customs not to apply it had been unreasonable. However, in *C&E Comrs* v. *Arnold* [1996] STC 1271 Hidden J rejected this approach on the facts in point, holding that one of the cases in the line of VAT tribunal decisions referred to

(d) As discussed in Chapter 3, in duties and excise cases, insurance premium tax and landfill tax appeals, an appeal only lies against a decision taken on an internal review. Customs has proposed extending this system to VAT cases. In Revenue-administered taxes there are no formal arrangements for internal review.

(e) There are other significant differences between the procedural rules for the VAT and Duties tribunals and for either the Special or General Commissioners.[87]

(f) The rules governing the time at which disputed amounts must be paid and the running of interest are different as between indirect tax and the main direct taxes.[88]

(g) Appeals from VAT and Duties tribunals to the High Court are heard in the Queen's Bench Division, appeals from both sets of Commissioners in the Chancery Division.[89]

(h) Where there has been an appeal from a decision of the VAT and Duties tribunal to the High Court, leave is required for a further appeal to the Court of Appeal. By contrast, there is no leave requirement where the High Court decision is on an appeal from the Special or General Commissioners.[90]

(i) In Northern Ireland, appeals from the decision of the General or Special Commissioners lie direct to the Northern Irish Court of Appeal. However, appeals from the decision of a VAT and Duties tribunal lie to the High Court unless leapfrog provisions apply.[91]

5.8. It is clearly important that proposals for reform should build on the strengths of both systems rather than undermining these. The respective merits of some of the key features of the direct and indirect tax appeals systems are considered in more detail at later stages in this report. The focus here is on whether, given the obvious practical advantages of a unified appeals system, the discrepancies which constitute a barrier to this are objectively justifiable.

Possible justifications for the discrepancies

The effect of delay appeals

5.9. It is true that, traditionally, the making of an appeal has had a rather different function in direct and indirect tax cases. In VAT cases, the making of the appeal marks the transition from an administrative procedure to a pre-adjudicative process. Appeals are made direct to the VAT and Duties tribunal and will normally trigger an obligation for Customs to serve a statement of case, effectively amounting to its defence.[92] In taxes administered by the Revenue, the appeal is made to the Revenue, and the making of an appeal has in reality been part of the administrative process. The vast majority of appeals have been made on the assumption that matters would be settled by negotiation and without any real expectation that

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above had been wrongly decided. The scope of this decision is not entirely clear, and it leaves some remaining doubts about the meaning and effect of section 84(10).

[87] At the level of detail there are a host of minor differences. Some key points are addressed at 8.22-30 below.

[88] Although there are also discrepancies in this respect between some forms of Revenue-administered taxes.

[89] See Chapter 9.

[90] See Chapter 10.

[91] See Chapter 10.

[92] SI 1986/590 reg 8 (appeals other than section 13 penalty appeals and reasonable excuse and mitigation appeals); reg. 7 (section 13 penalty appeals).

the Commissioners would need to become involved. The start of the pre-adjudicative process is instead marked by a party requesting that a hearing date should be fixed, and this would happen in only a tiny proportion of the appeals actually made. It might have been argued that this was a natural corollary of a system under which all assessments were issued by the Revenue, sometimes on the basis of very limited information, and that changing this in isolation from the underlying administrative mechanisms would have been difficult.

5.10. However, under self-assessment, the position will change in relation to the main direct taxes in any event (though not for other Revenue-administered taxes, including IHT). Formally, appeals will continue to be made to the Revenue, and the Commissioners will become involved only when a time for hearing is requested. In practice, it is likely that the room for compromise on a disputed point will already have been explored during and immediately following an enquiry, or during an investigation. Cases where the making of an appeal amounts to little more than a trigger for negotiation about the quantum of an assessment will be much rarer.[93] For this reason, we understand that the Revenue expects the time between the making of appeals and hearings to shorten under the new regime. This means that although the request for listing may still be regarded as marking the start of the pre-adjudicative process, the differences between the main direct taxes and VAT will be no greater than between the Revenue-administered taxes which fall within the self-assessment net and those outside it.

The nature of the taxes and the scope of the appeals system

5.11. While there are differences in the structure, subject matter and administration of Revenue and Customs taxes, these do not justify the existing differences in appeal procedures. Differences in the type of issue to be addressed on appeal are likely to be at least as great between VAT and landfill tax cases, as between VAT and income tax cases, for example. But both the former can be heard by the same tribunal, while the latter cannot.

5.12. There are, arguably, some differences between VAT, duties and excise on the one hand and Revenue-administered taxes on the other which may be relevant at the margins of the appeals system. The most significant of these is the role of European law in relation to VAT, duties and excise. As yet this is of less importance in most circumstances for Revenue-administered taxes. This factor may need to be taken account in relation to the composition of tribunals, to ensure that cases involving European law issues are heard by a tribunal competent to deal with these under a unified appeals system. However, this has no bearing on any of the other discrepancies under the existing arrangements.

5.13. Other differences potentially relevant to appeals are that, arguably:

- individuals may be more concerned about the confidentiality of appeal proceedings than businesses;[94]
- the direct tax system includes a larger number of taxpayers whose knowledge of the tax system is minimal;[95] and

[93] It may still apply, for example, where a discovery assessment has been issued.
[94] It is probably true that concern about the disclosure of detailed financial information will be more widespread in cases involving personal tax than in VAT cases, but in small businesses the two may be very closely related, and businesses of any size may be concerned about disclosure of information where this could become available to competitors.
[95] Although this will change, at least to some extent, under self-assessment.

- indirect tax appeals which result in a repayment of tax give rise to special problems of unjust enrichment.[96]

To the extent that there are such differences, they are not related to, and could not justify, the actual discrepancies in the present appeals arrangements except, possibly, some of the differences in the procedural rules for the tribunals. But a unified appeals system could also accommodate such differences at procedural level.

Administrative differences

5.14. There are, of course, substantial differences in the power and duties of the Revenue and Customs under the administrative provisions governing direct and indirect tax. These affect the scope of rights of appeal, because these must reflect the powers and duties of each of the revenue authorities. For example, there is no need for a right of appeal against a decision to require security if the Revenue has no power to require security. The larger number of statutory provisions which give Customs discretionary powers is likely to mean that a larger number of appeals relate to the exercise of such powers. But the root of the appeal procedure is the need to ensure that there is an independent mechanism to test whether the revenue authorities are exceeding those powers, and that is common to all taxes. With one notable exception in para 5.9 (f) (the rules on payment of tax and the running of interest), variations in the administrative regime are not the source of the discrepancies identified between the direct and indirect tax appeals system, nor do they translate into other differences in appeal mechanisms.

5.15. There is also some anecdotal evidence that differences in the "culture" of the two revenue departments may sometimes affect the way in which they deal with disputes. Whether or not this is the case, we do not believe that any internal differences of this sort between revenue authorities should affect the design of the appeals system, even if they may influence the basis on which settlements of appeals are negotiated.

The case for a unified appeals system for taxes administered by the Revenue and by Customs

5.16. As already noted, it is difficult to explain, either in principle or to a taxpayer contemplating an appeal, why a VAT case and an income tax case involving very similar issues should be subject to substantially different rules. Some of the discrepancies—for example, some of the procedural differences—are, in themselves, fairly trivial. On the other hand, it may be argued that this makes them difficult to defend, since it is hard to see that they can be attributed to any clear policy objective. Others make a considerable difference to the extent to which the appeals system is able to meet the objectives set out in Chapter 2.[97] It is unlikely to be clear to a small taxpayer why his direct tax penalty appeal should be heard locally before a lay tribunal under a very informal set of procedural rules, while an indirect tax penalty appeal by the business next door is heard less locally before a tribunal which includes a qualified chairman, under a much more formal set of procedural rules. He will find it even more difficult

[96] However, in some circumstances similar issues may arise in direct tax cases, even if less obviously, because the (original) tax costs will have been built into the price of a product or service and passed on to a purchaser or consumer.

[97] We also noted that, in general, the appeals system in other jurisdictions we have considered appear to have a better harmonised approach to different forms of taxation: see Appendix 1.

to understand why he should be unable to recover professional costs incurred in connection with his appeal, even if he is successful, whereas the business next door will generally be awarded costs by the VAT and duties tribunal if its appeal is allowed.[98] Such apparently arbitrary discrepancies do nothing to encourage confidence in the appeals system as a whole.

5.17. Insofar as the existing discrepancies reflect conscious differences of policy, they appear to be the product of different answers being given to the same questions by the different revenue authorities and not of intrinsic differences either in the nature of the tax or the type of issues which arise on appeal. Given the difficult policy questions which may be involved, and a generally changing climate of opinion about the role of tribunals, it is perhaps not surprising there has been room for differences of opinion. However, the fact that it is difficult to decide whether *x* or *y* is the better solution is not a good reason for applying *x* to one tax and *y* to another, in the absence of any relevant differences between them.

National insurance disputes

5.18. It is the Department of Social Security rather than the Treasury which is responsible for giving effect to social security legislation, and the Contributions Agency which administers Classes 1, 1A, 2 and 3 contributions. Class 4 is administered by the Revenue. There is therefore a division of responsibility at the administrative level. This reflects the fact that although national insurance is often argued to be, in economic terms, a form of income tax and, for practical reasons, class 1 contributions are usually collected by the Revenue, entitlement to some social security benefits depends on an individual's contributions record.

5.19. The division of administrative responsibilities is reflected in the way in which disputes are handled. Class 4 matters, except where these raise section 17 questions, are subject to appeal on the same basis as tax matters, and the appeal lies to the General or Special Commissioners. But even in the context of class 4 contributions a question as to whether the individual is excepted from liability or is entitled to have liability deferred is treated as a section 17 question. Other section 17 questions are, broadly:

- whether an individual is an "earner" for NIC purposes and, if so, whether he is employed or self-employed;
- any question relating to class 1A contributions;
- whether the contribution requirements for entitlement to any benefit are satisfied; and
- any question "otherwise relating to a person's contributions" (including those made by a secondary contributor such as an employer).

5.20. As already noted, where a dispute arises on such matters, an interested person's only right of recourse, after exhausting the Contributions Agency's internal procedures, is to refer the matter to the Secretary of State. In practice, this means it will generally be determined by the ODCQ under delegated authority. In 1995-6 653 cases were referred for determination, of which 106 were disputes as to whether a person was an employee or self-employed (employment categorisation questions). This, of course, is a matter which is relevant for PAYE as well as NIC purposes.

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[98] See 8.27-29

5.21. The ODCQ has independent status, and is not involved in the formulation of DSS policy or procedures, although it is staffed by civil servants attached to the DSS. They have no formal legal training but do build up considerable expertise in dealing with section 17 questions. Many cases are dealt with in writing only. Enquiries will be made by the ODCQ to establish the facts. It will then send a detailed letter to the questioner setting out the facts on which the disputed question is to be decided and inviting comments. Subsequently, unless there is to be an oral hearing, the matter will be referred to a senior member of the ODCQ's staff for decision on behalf of the Secretary of State.

5.22. A formal oral inquiry will only be held in cases perceived to be legally or factually complicated. In 1995-6 this applied to about 35% of cases on employment categorisation.[99] In such cases an Inquirer will be appointed by the DSS. He will be legally qualified and may be an independent practitioner or a DSS-based lawyer. The Inquirer then reports to the Secretary of State and this report forms the basis of the determination of the case. The Inquirer is appointed by the ODCQ and may be a DSS-based lawyer.

5.23. There are two separate questions about the way in which NIC disputes are presently dealt with. The first is whether the present system is offers a satisfactory resolution to disputes centring on section 17 questions, viewed in isolation. The second is whether it is appropriate for NIC disputes to be divided between the tax appeals system and the procedure for determinations by the Secretary of State along the current lines.[100]

Section 17 determinations

5.24. The procedures for determining section 17 determinations have been the subject of some criticism. Concerns have tended to centre on the following areas.

- Although the interested party (questioner) applies for a section 17 determination, the question for determination is usually drafted by the DSS itself.

- The interested party has no right to insist on an oral inquiry, no voice in the appointment of the Inquirer, and no right to object to the appointment of a DSS lawyer.

- Procedure at an inquiry is inquisitorial and it is common for interested parties to be unrepresented. It is argued that the apparent informality of the hearing lulls some parties into considering that there is no need for representation, and that as a result they are seriously disadvantaged, because they do not understand the legal principles underlying the dispute.

- Decisions are not reported unless there is an appeal to the High Court (below):[101] this leads to a lack of transparency. We understand that this is essentially a problem of resources, and that the ODCQ would in principle like to publish decisions. The present uncertainty as to the future of the arrangements for section 17 determinations appears to have hampered progress toward publication. In the meantime the ODCQ does make decisions available on request.

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[99] This and other statistics in this Chapter about the work of the ODCQ derive from its Annual Report for 1995-6.
[100] See also Appendix 1 for the approach adopted in a number of other jurisdictions.
[101] Until recently Inquirer's reports were also not released, on the grounds that they were legally privileged.

- The ODCQ has made considerable efforts to reduce a backlog of cases which had built up, and in 1995-6 90% of applications were cleared in an average time of just over four and a half months. Nevertheless, the rolling average time to clear employment categorisation cases between 1990-1 and 1994-5 was almost 12 months.

- Because the DSS itself cannot apply for a section 17 determination, if an interested party fails to do so following a dispute, the DSS has to embark on the court proceedings, in the course of which the court itself has to refer the question to the Secretary of State.

- A question of law arising in connection with the Secretary of State's determination may be referred to the High Court (in England and Wales) or Court of Session (Scotland) either by the Secretary of State or by a person aggrieved by the Secretary of State's determination. The decision of the High Court or Court of Session is final: there is no further appeal to the Court of Appeal.[102] In addition, the Secretary of State may in some circumstances review his own decision, although this will be rare.[103]

5.25. These concerns about the arrangements for determination of section 17 questions have led to a number of reviews, the most recent of which was completed in June 1995. However, it has proved difficult to decide on the right way forward,[104] and the arrangements are now part of the wider review by the DSS which resulted in the issue, in July 1996, of the Green Paper *Improving decision making and appeals in social security.* The Green Paper specifically referred to the present lack of appeal rights from determinations on questions of fact.[105]

5.26. The lack of provision for the decision of this category of disputes by an independent body or person is out of line with the principles generally accepted in relation both to tax disputes and to the majority of benefits disputes. We therefore share the view that provision for appeals to be heard by an independent and properly qualified body, under established procedural rules would effect a marked improvement on the present position. This would apply whether the arrangement was made through a specialist tribunal, one of the existing social security tribunals, or the tax tribunals. We recognise that the ODCQ has a considerable body of specialist expertise in this area, but inclusion of a formal appeals procedure would not prevent retention of this either as part of an internal review procedure or even through the ODCQ acting as a specialist advisory agency to the appellate body.

Bringing national insurance contributions disputes within the tax appeals system

5.27. The link between contributions and benefits may suggest that section 17 questions should be dealt with through the social security tribunals rather than the tax tribunals, and we understand that this was the assumption made in the most recent review of the existing arrangements. On the other hand, the division of responsibilities for benefits and the

[102] Social Security Administration Act 1992 s. 18

[103] Social Security Administration Act 1992 s. 18. In 1995-6 there were only five review decisions (as opposed to seventeen in the previous year), two of which led to a revised decision.

[104] The present uncertainty about the future of these arrangements clearly gives rise to problems in its own right. It tends to militate against the making of improvements which could be made within the existing structure (for example, provision for interested parties to be able to request an inquiry in certain categories of case, for Inquirers to be formally independent of the DSS, and for the publication of decisions). It must also create serious problems for the ODCQ's staff, who have to continue to operate the current procedures in the meantime.

[105] Cm 3328, HMSO, London at para. 2.6.

collection of contributions between the Benefits Agency and Contributions Agency means that when contributions issues arise in the context of a claim for benefit they will in any event have to be referred to a different agency. Further, the Revenue's responsibility for collection and administration of certain national insurance contributions, together with the close relationship between issues relevant to the determination of NIC liabilities and those relevant to income tax point in the opposite direction. As already noted, some class 4 issues are already within the jurisdiction of the General or Special Commissioners.

5.28. The need for consistency between the Revenue and the Contributions Agency (and, in some cases, Customs) on matters such as the determination of employment status has already been recognised at an administrative level. This has led to the development of the joint working programme and the "common approach". Provision has been made for joint audits for some large employers and single audit visits for all employers, covering both PAYE and NICs, and a joint form to give the self-employed a single notification point.[106] There has also been a move to align NIC definitions of earnings and expense with the corresponding Schedule E provisions. Transferring NIC issues on appeal away from the tax tribunals to the social security tribunals would undermine this approach. The relatively high proportion of questions for determination which related to categorisation of employment, and the proportion of these considered, even under the present system, to require oral hearing, is an indication that this is an issue of some practical importance. Measures to increase consistency of approach at an administrative level and in the legislation will be of limited value if disputes in borderline cases have to be referred to different bodies. This will result in the duplication of proceedings and potentially also in substantive inconsistencies.

5.29. Accordingly, there appear to be some good practical reasons for referring national insurance disputes relating to matters covered by the common approach, particularly questions as to employment categorisation, to the tax tribunals. We note that this was not an option favoured in the 1995 review of the present section 17 determination procedures[107] or referred to in the DSS Green Paper of July 1996, and our initial view is that it may well be the right solution. We certainly believe that it merits further consideration.

Special appeal procedures

5.30. In relation to Revenue-administered taxes there are one or two issues where there are special appeal procedures. Occasionally, there may be good reason for this.[108] However, we believe that a part of the appeals policy referred to in Chapter 2 above should be the principle that appeals should be ordinarily be dealt with through the mainstream appeals system, and that clear reasons should be given for a departure from this policy.

5.31. We also believe that there are two existing sets of special provisions which are now inappropriate. The first is the provision for questions in relation to section 703 ICTA 1988 (cancellation of a tax advantage on transactions in securities) to be referred to a specially

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[106] See Press Release 95/118 (jointly issued by the three departments) of 19 September 1995.

[107] This suggested as three options for reform (i) retaining the present system but improving visibility and accessibility; (ii) deciding section 17 questions locally with a right of appeal to the social security appeal tribunal or Commissioners and (ii) integrating these into the mainstream social security adjudication process.

[108] For example, the definition of friendly society for the purposes of ICTA s. 266 and Schedule 14 is drafted in terms of the Friendly Societies Act 1992. This means that a right of appeal from a direction of the Friendly Societies Commissioner that a society shall cease to be a qualifying society lies to a tribunal constituted in accordance with section 59(2) of the Friendly Societies Act 1992. It seems appropriate for the relevant tax issues to be determined on this basis rather than by direct provision for an appeal in relation to the tax treatment of the relevant body.

constituted tribunal, generally called the section 703 tribunal. This forms an additional tier of appeal from a decision of the Special Commissioners, and also has power to decide whether there is a prima facie case for proceeding against a person under section 703.[109] While we recognise that the role of the section 703 tribunal was seen as an important safeguard at the time this legislation was introduced, there now seems no good reason why these issues should not be dealt with by means of an appeal to the Special Commissioners and from there on a point of law to the High Court. Appeals to this body are very rare, and it would usually decide no more than a single case each year.

5.32. The main distinction between this body and the Special Commissioners is the provision for it to include in addition to its Chairman (who is currently also the Presiding Special Commissioner and President of the VAT and Duties tribunal) two members with special knowledge of and experience in financial or commercial matters. However, given the number of appeals involved, it is in any event unclear that special provision would be justified on this basis. We also consider that for other reasons, there are arguments for the Special Commissioners to sit, like the VAT tribunal chairmen, with lay members with a broad range of experience. We discuss these in Chapter 8. On this basis, there seems to be little in favour of retaining the existing special provision.

5.33. The other area where we are doubtful about existing provision is in relation to scientific research allowances. At present the question of whether (or to what extent) activities constitute, or an asset is used for, "scientific research" must be referred by the Revenue to the Secretary of State, whose decision is final. There is, therefore, no right of appeal on this issue to an independent tribunal. While we recognise that technical issues may be involved, we do not consider this is a satisfactory arrangement. Again, we would suggest that there should be a right of appeal within the mainstream tax appeals system.

Summary - towards a unified system?

5.34. There are in effect two separate sets of appeal systems arrangements for taxes administered by the Revenue and those administered by Customs. There are also substantial discrepancies between these. Neither the existence of separate arrangements nor these discrepancies appear to reflect objective differences between the taxes in question or the nature of disputes which are likely to arise. Such differences as there are could be better accommodated under a reasonably flexible, unified appeals system, without any of the practical disadvantages to which the existing arrangements give rise.

5.35. We believe that the present artificially fragmented appeals system should be replaced by a unified system covering all forms of taxation administered by the Inland Revenue and Customs. The existing rigid demarcation of appeals makes the system much more complicated to understand and operate, and its main justification appears to be purely historical and administrative. The fundamental role of the appeals system, like that of the Adjudicator, is common to taxes administered by the Revenue and Customs alike. The principle should be that all tax disputes should be dealt with through a unified tax appeals system unless there are clear policy reasons for an exception to the general rule.

[109] ICTA 1998 s.703(10), s.705(2)-(3).

5.36. The present arrangements for dealing with the majority of national insurance disputes is not satisfactory. The system of determining section 17 questions through the Office for the Determination of Contribution Questions (ODCQ) has been criticised on the basis that it lacks objectivity and accountability, and has already been the subject of a number of reviews. While we recognise that there are arguments in favour of dealing with national insurance questions through the social security appeal system, our initial view is that at least those issues where there is an overlap between income tax and NIC matters should be dealt with through the tax tribunals. Any other approach gives rise to the need for two separate sets of appeal proceedings and the risk of inconsistent determinations.

5.37. A unified appeals system for all forms of tax and for at least these aspects of national insurance would also reflect the changes already made at an administrative level—on the one hand, in the joint working programme between the Revenue, Customs and the Contributions Agency and, on the other, in the new arrangements for the Special Commissioners and VAT and Duties tribunal within the Combined Tax Tribunal Centre.

CHAPTER 6. THE ROLE OF THE TAX TRIBUNALS

Introduction

6.1. The tax tribunals are the linchpin of the tax appeals system. Only a very small minority of cases will go beyond them to the courts. As discussed in Chapter 2, both the revenue departments and taxpayers have to rely on the tax tribunals to provide a fast, cost-effective and high-quality resolution to disputes. Tribunals are generally thought to offer, as compared with the courts, greater specialist expertise and to be more accessible, because they are cheaper, procedurally simpler, more flexible and less intimidating for an unrepresented appellant.[110] In the tax tribunals at least, wait times are also shorter. Clearly, these factors go some way towards meeting the objectives already identified for the tax appeals system.

6.2. However, we believe that the present tax tribunals system combines with its undoubted strengths a number of unsatisfactory features. We believe that there are question marks over:

- the composition of the tribunals
- the way in which tribunal members are selected
- the way in which the tribunals are organised and administered
- their regional structure and/or provision for regional hearings
- some key elements of procedure.

The problems here are thrown into sharp relief by the discrepancies noted in the previous Chapter. For so long as there are fundamental differences between the arrangements for direct and indirect tax, it is inevitable that comparisons will be made between these. Both have strengths, and it is crucial that proposals for reform should build on these and not detract from them. But because the issues listed above are closely interrelated, more than a synthesis of the present arrangements will be required to ensure that a unified system achieves the objectives set out in Chapter 2.

A single tribunal or two different forms of tribunal?

6.3. The most basic question for any scheme of reform is whether all appeals should be decided at first instance by a single tribunal, or whether they should be divided between two separate bodies. The main advantages of having one tribunal only are that:

- this is a very straightforward arrangement to understand
- it avoids the need for a dividing line between the jurisdictions of two separate bodies
- it may make it easier to provide appropriate support and administrative staff, because there is only one body to service.

The range of issues and types of appeal

6.4. The main obstacle to a system with a single tribunal deciding all tax appeals at first instance is the sheer diversity of the cases which it would have to resolve. The potential range

[110] These points certainly hold good on a comparison with standard High Court procedure. However, see Genn (1993), (1994) for critiques of the way in which these factors have used in theoretical discussions of the role of the tribunals and for discussion of the gap between theory and practice.

of issues at stake in tax appeals reflects the huge range of different types of arrangement on which a liability to tax may supervene. The main categories are probably as follows:

(a) delay cases and some appeals which, even after self-assessment, will function like delay cases at present;
(b) appeals against assessments based on a "mark-up" (estimated figures based on knowledge of the profit levels achieved by similar businesses in the area) or other "best of judgment" assessments;
(c) investigation/back duty cases;
(d) other types of case where the disputed amounts are relatively small and which turn mainly on issues of fact (e.g. the purpose for which a supply in respect of which input tax credit has been claimed is to be or has been used);
(e) other cases turning mainly on issues of fact (which might be both unusual and extremely complicated but where there is no real dispute as to effect of the relevant legal provisions);
(f) cases turning on points of tax law or mixed questions of law and fact (e.g. whether an operation amounts to a trade or business);
(g) cases turning on points of tax law or mixed questions of law and fact where the appeal is of more than usual complexity or value (e.g. because it involves a difficult point of statutory interpretation, because the *Furniss* v. *Dawson* principle may apply, because the case is a test case with far-reaching implications, or because very large amounts of tax are riding on the outcome of a single appeal)
(h) cases where the tax analysis turns on a question of underlying law (e.g. trust law or property law), which is the real source of the dispute.

6.5. The type of appellant in tax appeals, in terms of resources and tax expertise (or the ability to buy this in) will vary more widely than for most forms of tribunal. The registration threshold for VAT will exclude a substantial number of small businesses, but on the direct tax side there is the potential for disputes or investigations arising out of earnings not very much above the limit of the personal allowance. At the other end of the scale, as noted in Chapter 2, will be multinational corporations engaging in what may well, for internal purposes, be treated in a very similar way to ordinary civil litigation.

6.6. If a single tribunal were responsible for all forms of tax appeal, it would have to cater equally well for cases which, if they were ordinary civil litigation cases, would be allocated to the small claims court and to the High Court—from an appeal by a childminder who wishes to challenge the Revenue's decision to disallow £150 of what she believes is allowable expenditure on toys to the appeal in *Ensign Tankers.*[111] This is an unrealistic objective[112] and, for good reason, would have no parallel elsewhere in the tribunal or court systems.[113]

6.7. To date, the flexibility in the rules governing the composition of VAT and Duties tribunals has helped to accommodate the full range of cases with which they deal, but it is arguable that this is already too broad. Their detailed and formal procedural rules may be well suited to high-value cases, but are much less user-friendly than the rules for the General Commissioners.

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[111] *Ensign Tankers (Leasing) Ltd* v. *Stokes* [1992] STC 226, HL.
[112] At any rate, without an elaborate subdivision of cases within the tribunal's jurisdiction tantamount to a two track system under the umbrella of a single body.
[113] *c.f.* Potter (1970) at p.40.

6.8. In two of the key areas identified at para 6.2—the composition of the tribunal and its procedural rules—there are particularly strong arguments for two separate bodies. This would allow one tribunal to focus primarily on the less technical cases where relatively small amounts are in dispute, and the other on cases centring on difficult questions of law or involving large amounts of what may, depending on the outcome, be public money.

6.9. We consider arguments in relation to the actual composition of the tribunals in Chapters 7 and 8. However, there is clearly an inter-relationship between these two sets of issues. A lay tribunal may be considered quite competent to decide less technical and smaller cases and, at any rate, the value of tax or legal training is limited in this context. The arguments in relation to cases in the second category are entirely different: it would be inappropriate to require cases turning on difficult issues of law or questions of statutory interpretation determined by a body which did not include a lawyer. A two track tribunal system allows scope for such appeals to be determined by a different type of body.

6.10. Similarly, the general tenor of the rules can be geared to the type of case with which the body will primarily deal. Relatively formal rules with provision for the parties to serve what amount to pleadings and for pre-trial reviews,[114] for example, are unsuited to small cases centring on disputes of fact. They may, however, be useful for larger and more complicated cases. It may also be appropriate for specific features of the rules (such as provisions about the award of costs or whether hearings should take place in public), to differ as between the two bodies. The consultation process in relation to the procedural rules for the Special and General Commissioners indicated broad support for this approach.

The range of appellants

6.11. The value of such a two track system is increased by the rough correlation between the type of appellant and the nature of the issues at stake. This is, of course, only a statistical probability—a Schedule E case involving relatively small amounts of tax may involve difficult questions of statutory interpretation of far-reaching significance, as *Pepper* v. *Hart*[115] memorably demonstrated. However, it is always going to be likely, for example, that a disproportionate number of "ordinary" taxpayers will be involved in penalty and mark-up cases,[116] and that larger businesses, who are disproportionately affected by the more novel and complicated areas of tax legislation, will tend to be responsible for appeals challenging the Revenue's or Customs' interpretation of these. This is another reason why there will tend to be a much lower threshold for accessibility in relatively straightforward and small cases, and therefore why it is important to have a tribunal specifically designed to deal with such cases.

Provision for local hearings

6.12. It might also be more difficult to ensure genuinely local hearings for small and relatively straightforward cases under a single tribunal system, than where there are two appeal tracks to separate bodies, one of which is designed specifically to fulfil this role. Again, this is

[114] Even if this terminology is not actually used.
[115] [1992] STC 898, HL
[116] In the VAT context, businesses at the bottom of the VAT turnover bracket appear to be responsible for a relatively high number of penalty appeals: this reflects the fact that in a small organisation it is always going to be more likely that the sort of circumstances will arise which amount to a reasonable excuse. Similar considerations will apply to the main direct taxes following self-assessment.

likely to be particularly important in cases which involve "ordinary" taxpayers and relatively small amounts.

6.13. At present, the VAT and Duties tribunal tries to meet potential problems over hearing centres by offering some measure of flexibility as to the place of hearing. There are at present 20 centres throughout the country in which hearings take place with greater or lesser frequency, and, as with the Special Commissioners, hearings can be arranged elsewhere. This is of course not comparable with provision for local hearings by over 400 divisions of General Commissioners. While it may be difficult to sustain this level of local provision indefinitely, where there is a tribunal which is specifically local, as with the General Commissioners, it is likely that the network of hearing centres will be more extensive.

Related tribunals in other areas of law

6.14. It is true that the Commissioners are at present unique among appeal tribunals in providing a two track system for the hearing of appeals at first instance. In the other areas of law covered by more than one tribunal, normally one of the "family" of related tribunals functions primarily as a further tier of appeal.[117] There is no scope for election between tribunals. However, details of the relationship between the different tribunals vary and, although there are some similarities between the different tribunal families, there is no established pattern which could usefully be adapted to the tax context. The merits of providing for a further tier of appeal within the tribunal system, rather than direct to the courts are discussed separately in Chapter 11 below.

The title of the tribunals

6.15. Our consultations, and responses to the 1991 consultative document on procedural rules for the Special and General Commissioners,[118] suggest that the titles to be used may be a contentious issue. It is seen as affecting general perceptions of the tribunals' role and standing.

6.16. We recognise that the General and Special Commissioners' titles are of very long standing, and a number of General Commissioners have indicated to us that they are strongly in favour of their title being retained. We understand the attachment of some of those involved in the appeals system, including practitioners and inspectors, to a title which they see as symbolising a proud tradition. But there is anecdotal evidence that this confuses a significant number of taxpayers, who associate this with the Commissioners of Inland Revenue, and perhaps also because it suggests that the Commissioners have an administrative role (as they originally did) rather than a judicial function. In a restructured system we are doubtful whether any useful purpose would be served by preserving this title. Because of the relatively high public profile of some other forms of tribunal, notably industrial tribunals,[119] this term is much

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[117] This applies to the Immigration Appeal Tribunal (which hears appeals from Immigration Adjudicators), the Social Security Commissioners (who hear appeals from Social Security Appeal Tribunals, Medical Appeal Tribunals, Disability Appeal Tribunals and Child Support Appeal Tribunals); and the Industrial tribunals and Employment Appeal Tribunal. The Social Security Commissioners and EAT do have an original jurisdiction but this is extremely limited. The only exception to this rule is the Lands Tribunal, which has a substantial original jurisdiction and also hears appeals from local Valuation Tribunals in non-domestic rating cases on matters of both fact and law.

[118] See note 6 above.

[119] Which would be renamed Employment Tribunals under clause 1 of the draft Employment Rights (Dispute Resolution) Bill issued by the DTI in July 1996 with the consultation document *Resolving Employment Rights Disputes: Draft Legislation for Consultation.*

more widely known. It may therefore be appropriate for the new tax appellate bodies to be referred to as tribunals.

6.17. We have reached no firm conclusions on titles for the tribunals at this stage. In this report we have used the terms "general tax tribunal" and "special tax tribunal". These are purely labels for convenience, and are not to be taken as indicating that these are the titles which should be given to the two appeal tribunals under a unified system.

Summary–a unified system with two appeal tribunals

6.18. **Tax appeals range from cases which would, in the civil litigation system, be decided in the small claims court to major commercial cases centring on difficult points of law. It is unrealistic to expect that a single appeal tribunal should be able to deal with the full spectrum of cases. We therefore believe that appeals at first instance need to be divided between two separate tribunals. One of these would hear primarily the more straightforward appeals and smaller cases, with the other deciding the more difficult and technical issues. (More detailed criteria for the division of jurisdiction are discussed in Chapter 9.) The composition of the tribunals, their procedural rules and local organisation should reflect their different roles, to ensure that adequate provision is available for cases at both ends of the spectrum.**

6.19. **In this report we have referred to the two bodies as the "general tax tribunals" and the "special tax tribunal" respectively. These are labels for convenience only. We would welcome views as to the most appropriate titles for the new bodies.**

CHAPTER 7. COMPOSITION OF THE TAX TRIBUNALS—THE GENERAL COMMISSIONERS AND GENERAL TAX TRIBUNALS

Introduction - the three main tax tribunals

7.1. The people who actually sit on the tribunals hold the key to the quality of decision-making at this level. Their knowledge, skills and experience need to be suited to the cases they decide and the procedure employed. The main tax tribunals at present fall into three wholly different categories. On the direct tax side there is a purely lay tribunal (the General Commissioners) consisting of two or more members who are meant to be representative of the local community, and a judicial-style tribunal, consisting exclusively of one or two legally qualified members (the Special Commissioners).

7.2. The VAT and Duties tribunal is more flexible. It must always have a legally qualified chairman, and may also include one or two members drawn from a membership panel. Members are appointed on the basis of a broad range of experience considered to be useful in determining the types of cases heard and are not generally legally qualified. In England and Wales the President decides the composition of the tribunal after examining the papers for each case. Many cases are heard by a chairman sitting alone.

7.3. All three of the tax tribunals are in some respect unusual. There is considerable variation in the composition of tribunals, but the most common formula is a three-person body with a legally qualified chairman and two other members, who may be lay or specialist. None of the three tax tribunals straightforwardly follows this pattern at present. The VAT and Duties tribunal may do so, but the degree of flexibility in its composition has no real analogy elsewhere in the tribunal system. Only one or, arguably, two other tribunals[120] are now lay tribunals in the same sense as the General Commissioners, although the recent Green Paper *Improving decision making and appeals in Social Security*[121] raised the question of whether a limited number of social security appeals should be decided by bodies which did not include a legally qualified member. At present it is arguable that the most closely analogous body may be the lay magistracy rather than another form of tribunal. The Special Commissioners are also relatively unusual in being unable ever to sit with members who are either "ordinary" lay people or specialists in a particular field.

7.4. A unified tribunal system would automatically require some change in the tax tribunals. Proposals that the VAT and Duties tribunals should be merged with the Special Commissioners are of long standing,[122] and have often been accompanied by the suggestions that some of the more straightforward VAT cases should be transferred to the General Commissioners. This would be the easiest solution administratively, and the one requiring least legislative change. But even this would raise some potentially controversial problems about the form of the merged tribunal. And it would not address some existing concerns about the General Commissioners, which will become much more important following the introduction of self-assessment.

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[120] Valuation Tribunals and, arguably, Education Appeal Committees. In the latter case there are formal requirements designed to ensure that all members have some experience of education (the exact provision varies depending on the type of school in question). However, they may include people with "knowledge of local educational conditions", and it is understood that this may be widely interpreted in practice.

[121] HMSO, Cm 3328, July 1996.

[122] See e.g. the consultative document referred to at note 2 above, Lawton (1980), Avery Jones (1981) and (1994), Oliver (1994) and (1996).

7.5. A number of forms of tribunal have been the subject of one or more dedicated studies. Some, notably the social security appeal tribunals, have been the subject of a whole series of studies, some publicly funded, evaluating their performance, the extent to which they meet the needs of appellants, and so on. Tax tribunals, strangely, have been poor relations in this respect. They have not been included in any large-scale published study. We believe that this is unfortunate, given their important role in the tax system and the long-standing debate about their form and functions.

7.6. The outcome is that, in the absence of hard evidence to support contentions on either side, the debate about the strengths and weaknesses of the tax tribunals can only be conducted on the basis of anecdotal evidence. Such evidence will generally come from members of the tribunal or from those who appear before it most frequently—tax practitioners and Revenue/Customs officials. But it may be difficult for practitioners and officials to be objective. Naturally, they may be reluctant to support reform of elements in the system which they believe generally operate to the advantage of the party they represent. It is even more difficult for members of the tribunal themselves to be objective about any weaknesses in the tribunal system generally, or about their own competence in handling particular aspects of hearings or types of case. It follows that any proposals for reform in this area are likely to be controversial. Below is set out our analysis of the existing position, together with some options for change.

The General Commissioners

The General Commissioners' tradition

7.7. We should emphasise at the outset that we are aware of the long and proud tradition of the General Commissioners as a body, and of the valuable contribution they have made to the tax appeals system for little short of two hundred years.[123] They have played an extremely important part in maintaining the balance between the taxpayer and the Revenue, by safeguarding the legitimate rights of the taxpayer while enabling the Revenue to achieve final settlement of amounts of tax legally due. We recognise the dedication and commitment of the individual Commissioners who contribute their time, skills and energies to this form of public service on a purely voluntary basis.

7.8. We also recognise the vital contribution of the clerks to the General Commissioners in ensuring that the appeals machinery runs smoothly, both behind the scenes in the administration carried out before and after hearings, and in advising the Commissioners at hearings.[124] The Commissioners to whom we have spoken have expressed their warm appreciation of their clerks, and have emphasised the importance of their support and advice.

A continuing role for the General Commissioners

7.9. One way forward would be for the General Commissioners to retain their present structure, and in due course to undertake a new role as general tax tribunal for both direct and indirect forms of taxes. This option would, in practical terms, be relatively simple to

[123] For accounts of their history, see Colley (1990), Stebbings (1992) and (1993).
[124] For the history of the clerks and of the statutory provisions governing their office, see Stebbings (1994).

implement. It would recognise the Commissioners' unique place in the history of taxation, together with the commitment to modernisation already demonstrated by large numbers of General Commissioners. It would also avoid any risk that structural reforms might undermine some of the Commissioners' existing strengths, among which are their informality and accessibility. However, if the General Commissioners are to retain their existing structure as a purely lay tribunal, we believe that some changes are required to enable them to discharge their functions better and to meet the new challenges presented by self-assessment. These would cover:

- the way in which Commissioners are selected;
- the present arrangements for training and development;
- the composition of the body actually sitting at a hearing;
- their local and national organisation;
- the arrangements for the appointment and training of clerks; and
- possibly, the way in which they are administered.

7.10. These changes should also equip them to take on responsibility for VAT appeals, forming what we have referred to as the general tax tribunal under a unified tax tribunals system. Under this arrangement, while existing part-time VAT and Duties tribunal members could be appointed as members of the new tribunals on application, it would no longer be possible for them to be remunerated on the present basis.

Existing moves towards modernisation

7.11. The changes required would effectively be building on the steps towards modernisation which have already been taken over the last few years. These have included:

- the formation of a series of regional associations of General Commissioners;
- the formation, following a national meeting in October 1995, of a National Association of General Commissioners;
- a series of new initiatives to promote training of General Commissioners;
- the issue by the Lord Chancellor's Department in August 1994 of formal Notes for the Guidance of General Commissioners, replacing the interim notes issued in March 1989;
- the issue by the Lord Chancellor's Department of Directions for Advisory Committees on General Commissioners, which took effect in April 1995.

The very practical and thorough Notes for Guidance have been made available to tax practitioners, which has helped to increase awareness of the General Commissioners' proceedings.

7.12. These initiatives go some way to address the problems identified during the late 1980s, by the Council of Tribunals and others, and which led to concerns about the operation of the General Commissioners as a modern administrative tribunal.[125] But if this option is to be

[125] See note 3 above in relation to the Council on Tribunals and also Stary (1987), Williams (1988), Colley (1990), Miller (1990), Gunn (1991). A specially commissioned report by the Special Commissioners to the Lord Chancellor (*Report by the Special Commissioners to the Lord Chancellor on the Working Methods and Organisation of the General Commissioners of Income Tax*, December 1990) also noted scope for improvement in certain areas, although the report also made many positive points about strengths of the General Commissioners identified during the observation of hearings. The report was based on observation of forty four hearings, although only one of these was contentious. Two key recommendations—for the introduction of procedural rules and provision for hearing notices to be sent out by clerks to the Commissioners, rather than the Inland Revenue—have already been implemented. The other main recommendations were for (i) training of Commissioners and the issuing of guidance by the Judicial Studies Board to ensure consistency of practice between divisions; (ii) measures to increase the number of

preferred to more radical change, it is important to build on these developments and not to allow them to stagnate. Unlike the lay magistracy, as the Notes for Guidance themselves explicitly state:

> The General Commissioners currently have ... no formal training, no mechanism for ensuring consistency of decision-making and procedures and no standard organisation even at division level.[126]

The other point made at this section of the Notes—that the Commissioners have no national organisation—has now been remedied. This is clearly a very important step. On the most recent figures available to us we understand that about half of the divisions of General Commissioners in England and Wales, as well as all the divisions in Northern Ireland have now become members of a regional association affiliated to the national organisation, and that membership is continuing to expand. We also understand that it is hoped to extend membership into Scotland.

7.13. We believe that the existing programme of change now needs to be expanded in the respects set out at paragraph 7.9 above. The need for change and some specific proposals for reform are discussed in more detail below.

Selection of General Commissioners in England and Wales

7.14. The Lord Chancellor has been responsible for appointing the General Commissioners since 1960 and now does so under an advisory committee system modelled on that for the lay magistracy. The system for General Commissioners remains both less stringent than that for lay magistrates in a number of ways, and less open in its operation. The advisory committee system, and some of these distinctions, are explained in more detail below.

The advisory committees

7.15. The advisory committee system for the Commissioners has, like the operation of the Commissioners themselves, received relatively little attention from bodies or individuals concerned with the judicial appointments system.

7.16. By contrast, its model, the advisory committee system for the magistracy, has attracted significant criticism over the years. As a result, various modifications have been made in the way in which this operates. Most recently, it has been considered by the Home Affairs Committee of the House of Commons in its report on judicial appointments procedure.[127] In evidence given to the Committee it was generally been accepted that there was a need for some reform of the advisory committee system in relation to the lay magistracy. Although this had been the focus of more attention than that for the General Commissioners and greater attempts to professionalise this, the Chairman of the Magistrates Association conceded that there was still:

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times per year General Commissioners sit and the variety of work undertaken; and (iii) steps to ensure that meetings of the Commissioners took place in suitable accommodation. For the purposes of (ii) it was suggested that divisions could be reconstituted, and that the Commissioners' jurisdiction could be extended to enable them to hear appeals in simple VAT cases.

[126] At 2.14.

[127] The Committee's report did not address the system of appointment for members of any tribunal, although the existing arrangements were summarised by the Lord Chancellor's Department in its memorandum of evidence attached to the report as Appendix 1.

considerable variety between advisory committees .... There is a real need to raise the standards of all the advisory committees to the standard of the best.[128]

Although she emphasised the considerable improvement in selection procedures in recent years, she agreed with a description of the advisory committee membership as still a "self-perpetuating oligarchy", which lacked openness and accountability.[129] The Committee itself recommended changes in the procedure for appointing members of the advisory committees on lay justices. It proposed that elections should be held for the vacancies to be filled by magistrates, that other vacancies should be advertised, and that at least one external assessor should sit on each selection panel.

7.17. The evidence is that similar criticisms apply to the advisory committees on General Commissioners. Concerns centre on the way people are appointed to the advisory committees, and the way in which they themselves appoint Commissioners. These two issues are linked, because the membership of the advisory committees may affect the sort of people recruited, and because at present only 17% of the members of advisory committees are not themselves General Commissioners.

7.18. It is very unclear how someone becomes a "candidate" for appointment to a committee. But the only requirement after this stage (subject to exclusions for certain categories of person) is that the candidate is interviewed by the Chairman of the Committee (or his nominee) and its Secretary. If the candidate is approved, a recommendation is then submitted to the Lord Chancellor's Department, on a form which primarily contains basic factual information with a short space for additional comments. There is no requirement for an assessment to be made of specific personal qualities, skills or experience. It also follows that no such information is available to the Department to assist the Lord Chancellor to decide whether the recommendation should be implemented. We understand that over the last ten years such recommendations have been overturned in very few cases.

Advisory committee chairmen

7.19. Of the 78 Advisory Committees in England and Wales, 39 are at present chaired by Lord Lieutenants. Where the chairman is not a Lord Lieutenant, he will normally be appointed on the recommendation of his predecessor. The directions suggest that this should be made after taking "soundings", which should include the views of other members of the committee, taken privately. Again, we understand that very few such recommendations have been overturned in the last ten years.

7.20. We recognise that, as with the advisory committee system as a whole, the role of Lord Lieutenants in relation to the General Commissioners mirrors that for lay justices. In that context, some have argued that they are unsuited to chairing advisory committees because their relatively privileged position may make them more inclined to identify or appoint committee members from a more privileged background. Others have defended their role as being essentially independent and above the fray, and argued that they come into contact with

[128] Home Affairs Committee, Third Report *Judicial Appointments Procedures*, Minutes of Evidence at para 617.
[129] She also confirmed that she herself, despite nearly 25 years as a magistrate and her role in the Association, was unaware of how people were appointed to the advisory committees (*Judicial Appointments Procedures*, Minutes of Evidence at para 657, 662).

a wide range of people in the counties which they serve, and are well placed to make and maintain contacts with local employers and organisations.[130]

7.21. In the context of General Commissioners, whether it is appropriate for Lords Lieutenants to act as advisory committee chairmen, and whether the present arrangements for selecting other chairmen are satisfactory depends on the degree of their involvement in the actual selection process. If the selection process is largely dealt with by a sub-committee, in which the chairman has no direct involvement, the way in which the sub-committee chairman is selected may be of greater practical importance. At present, it is difficult to generalise because of variations in the way in which committees actually operate.

Methods of recruitment and selection

7.22. The Notes for the Guidance of General Commissioners comment that:

> There is no prescribed method of being nominated to be a General Commissioner and it is open to anyone to apply. Very often an existing General Commissioner recommends someone for appointment and his or her candidate is then considered by the Advisory Committee.

This accords with anecdotal evidence, which suggests that in many divisions recruitment is very largely by word of mouth between friends, colleagues, business associates or those pursuing common voluntary activities (including charitable work and membership of other judicial bodies, such as tribunals or the lay magistracy). Occasionally the clerk may be asked to find a suitable candidate. From a practical point of view, this is understandable—it is no doubt seen as the most straightforward and rapid method of identifying potential new Commissioners.

7.23. But this approach tends to produce a relatively small pool of candidates, which is not obviously conducive to the selection of the candidates with the strongest judicial abilities or potential. And the fact that new candidates are primarily drawn from those already known to existing Commissioners will tend to make it less likely that the Commissioners represent a broad spectrum of those who live and work in the area which they cover (see paras 7.25-7.31 below).[131] For this reason,[132] and because of widespread criticism, this method of recruitment of the magistracy has long since been replaced by a range of methods designed to produce applications from a wider cross-section of the community—including advertisements specifically targeted at sectors of the community perceived to be under-represented, requests for nominations from a wide range of organisations, and publicity about both the work of the magistracy and the criteria for selection. There is general agreement that these have been an improvement, although some would argue that there is room for further progress.

7.24. Some members of the advisory committee may have experience of selection procedures in other spheres and, in the case of members of the committee other than General Commissioners, may even be appointed on this basis. But this will not be true of the majority,

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[130] It was on this latter basis that their retention was recommended by the Home Affairs Committee. However, it recognised that the actual selection procedures were normally dealt with by a selection subcommittee, and that the chairmen of such subcommittee could "exert considerable influence over the selection of magistrates". The same was true of other advisory committee chairmen, who would be more likely to chair selection committees personally. The Committee accordingly recommended a reform of the procedures for appointing these figures.

[131] For similar criticisms, see Stary (1987);, Council on Tribunals, *Annual Report* 1987-88 para 2.18.

[132] See e.g. Burney (1979) Chs 4-5, Baldwin (1976).

and no specific training is available for members of the advisory committees in selection procedures.

Representative of the local community?

7.25. The present stated policy of the Lord Chancellor's Department is that "Composition of the [advisory] Committee should broadly reflect that of the area served in terms of age, gender and ethnic origin,"[133] and that "each division [of General Commissioners] should broadly reflect the local community, particularly in terms of gender, ethnic origin and the main economic activities of the area covered". This is almost identical to its stated policy on the magistracy.[134] Appointment of any given individual is, of course, subject to the overriding requirement that the individual is personally suitable for appointment. This means that they must have the ability and impartiality to discharge a judicial role, and either have a practical knowledge of tax or the ability to acquire this.

7.26. This is probably the only sensible policy, in the absence of a change in the structure of the General Commissioners from being a lay tribunal to being a body of which the members are selected for either for legal and/or tax expertise, or some other definite category/ies of knowledge or experience useful to the tribunal. The lay tribunal system is most often defended as offering taxpayers a chance to present their case informally to their peers, in the form of a group of "ordinary" lay people drawn from the local community,[135] who reach decisions on the basis of their general practical experience and commonsense. These qualities are not confined to any one sector of the community.

7.27. But at the moment it seems very doubtful whether the policy is reflected in the actual composition of the advisory committees or divisions. Anecdotal evidence suggests that in many divisions a disproportionate number both of General Commissioners and of advisory committee members are male, white, middle class and over 50. People within this group may, of course, make highly competent General Commissioners or committee members, but there is no reason to suppose that others do not equally possess the necessary skills.

7.28. Figures provided for us by the Lord Chancellor's Department have tended to confirm this anecdotal evidence in certain respects. As at April 1995 out of a total of 504 members of advisory committees for England and Wales, there were only 102 female members (just over 20% of the total) and one solitary member of an ethnic minority community. Only one of 77 advisory committee chairmen is female. For advisory committees covering areas with relatively high numbers of ethnic minority groups, such as Greater London, Luton, Leicester and Bradford, not a single member of any advisory committee was drawn from an ethnic minority. No figures are available for the number of ethnic minority Commissioners, but female Commissioners stand at only 17% of the total.

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[133] *Directions for Advisory Committees* para 2.13.

[134] Except that in the context of the magistracy the political balance of the Bench is also considered to be a factor. By contrast, political affiliation is considered irrelevant in the selection of the General Commissioners.

[135] We have considered, as a possible alternative approach, whether the Commissioners should instead be representative not of the local community, or of taxpayers generally, but of the type of taxpayer whose appeals they hear. But we think this would be unworkable. It would mean either that the Commissioners had to be radically different for each appeal (employees, small businessmen, large businessmen etc.), which is obviously impossible, or that the Commissioners were generally drawn from some group identified as the one responsible for the majority of appeals. This is undesirable in principle, because it makes no provision for other types of appellant, and it is difficult to see how such a group could be defined anyway.

7.29. We recognise that the directions stating the current policy are relatively recent, and that prior to this there may have been greater regional variation in the practice of advisory committees. The Lord Chancellor has specifically stated that he is particularly concerned that "there should be more reflection of both women and members of the ethnic minorities on divisions and on Advisory Committees", and has asked committees to take action to improve the balance where necessary.[136] The Lord Chancellor's Department has informed us that, as a result, the number of female members has been steadily increasing[137] and this trend is expected to continue. But the discrepancy between the General Commissioners and their advisory committees and the magistracy in this respect is still marked,[138] and we are not aware of initiatives to increase the representation of ethnic minorities parallel to those already adopted, with some degree of success, in the case of the lay magistracy.[139] Given the anecdotal evidence already referred to, and the gross under-representation of members of ethnic minorities on advisory committees, we find it strange that no figures are available either for the overall proportion of General Commissioners drawn from ethnic minorities or for the proportion recruited in each year. Nor are there any statistics covering the age of new Commissioners. Again, this does not match the arrangements for the lay magistracy. We would see these as essential tools for monitoring whether the Lord Chancellor's policy is being implemented.

7.30. We recognise some of the practical obstacles in recruiting younger people, whose work and family commitments may make it difficult for them to find the additional time involved. It is clearly sensible that as with lay justices, appointees should normally be over 27,[140] with a view to ensuring the individuals concerned have adequate breadth of experience or maturity. And it is also true that the average age of serving Commissioners will inevitably be higher than the average age of Commissioners appointed. But it is important that efforts are made to ensure that a reasonable proportion of new Commissioners are appointed in their 30s and 40s, rather than in the twilight years of their careers. This should also help ensure that there is an adequate number of Commissioners with sufficient experience for appointment as lay Chairmen. The fact that, even subject to the provision for an increased number of sittings (see below), General Commissioners would sit less frequently than members of some other tribunals, and than lay magistrates, would mean that the commitment of time taken off work is correspondingly lower. This may make it easier to recruit a suitable proportion of younger Commissioners.[141]

7.31. We also consider that General Commissioners, like lay magistrates, should be eligible for a loss of earnings allowance. At present a loss of earnings allowance is payable only to Commissioners who are members of Advisory Committees, in connection with Advisory Committee business. We see this both as a matter of principle and a practical matter. In practical terms this might help with the recruitment of a wider cross-section of the local community by ensuring that prospective candidates should not be deterred by the prospect of being out of pocket (up to a certain earnings level) for time spent at Commissioners' hearings.

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136 *Directions for Advisory Committees* para 2.13.

137 The increase appears to have been quite marked since August 1994, when apparently only 12% of the Commissioners in England and Wales were women (figures provided to the Home Affairs Committee: *Judicial Appointments Procedures* Appendix 1 para 3.6.2).

138 As at 31 December 1994, 47% of active lay justices in England and Wales were female (figures provided to the Home Affairs Committee: *Judicial Appointments Procedures* Appendix 1 para 3.4.2).

139 For recruitment figures for each of the years from 1989 to 1994 see *Judicial Appointments Procedures* Appendix 1 para 3.4.4.

140 *Directions for Advisory Committees* para 3.1

141 It may also help compensate for the fact that being a tribunal member is not attended with the social cachet which some consider still attends the lay magistracy.

7.32. We see the existing under-representation of ethnic minorities as a particularly serious problem, which requires urgent attention. If a readily identifiable section of the community appears to be excluded from an appeal body which is claimed to be representative of the community as a whole, this does nothing to promote the credibility of the appeals system among that section of the community. The problem is all the more important because appeals to the Commissioners will more commonly relate to self-employed people and businesses than to employees. And in a number of areas, including those mentioned at para 7.28 above, members of ethnic minority groups form a very significant part of the local business community.

Training of General Commissioners

Existing provision for training

7.33. Unlike lay justices, there is no formal training programme or training requirement for General Commissioners. Locally, arrangements may be made to provide initial support or training either from experienced Commissioners or Commissioners' clerks, but the extent and nature of this will vary.[142] Recently, it is understood that training for the purposes of the new self-assessment regime has been offered by the Inland Revenue, and that some divisions have taken up this offer. We should emphasise that, although self-assessment is clearly a special case, we do not think that in general substantial components of Commissioner training should be provided by Inland Revenue staff. While it would be perfectly appropriate for an inspector to be one of a number of speakers at a training event, for example, more extensive training through Inland Revenue staff could be perceived as tainting the Commissioners' independence.[143]

7.34. The regional associations of General Commissioners have training as one of their objectives and the newly formed National Association of General Commissioners is strongly committed to training. The regional associations do arrange training events, and bids for funding for such events may be made to the Judicial Studies Board through the National Association (see below). Regional associations are, of course, free to seek other sources of funding for training events. But the National Association, unlike the Magistrates Association, does not receive any direct public funds for the provision of training.

7.35. The Judicial Studies Board has recently taken a number of steps to improve provision for General Commissioner training. The brief of the senior training adviser for magistrates and tribunals covers the General Commissioners and support has been given for a number of training events.[144] However, the present budget for training General Commissioners is limited to £31,500. This amounts to just under £10 per Commissioner per year.[145] A bid to increase

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[142] The lack of adequate training has been a particular concern of the Council on Tribunals over a long period: see in particular its *Annual Report* 1987-88 para 2.15, where the Council emphasised the practical problems to which it considered a lack of training was giving rise, and the very difficult position in which the General Commissioners were placed as a result. Observations of hearings carried out for the Council had indicated that some Commissioners had difficulty recognising when a case was contentious, and that in some cases the Commissioners had failed to explore explanations given by taxpayers, instead reaching summary decisions. The Council subsequently (*Annual Report* 1991-2 para 1.40) welcomed the establishment of more regional associations and the training events organised by the Judicial Studies Board in conjunction with the Greater London Association.

[143] We note that this was also the view taken in the *Report by the Special Commissioners to the Lord Chancellor on the Working Methods and Organisation of the General Commissioners of Income Tax* (see note 125 above).

[144] Expenses in attending such events are payable under the normal expenses arrangements.

[145] Based on a figure of 3,330 General Commissioners in England and Wales, supplied by the Lord Chancellor's Department, as at April 1996. It is difficult to make a comparison with the cost of training lay magistrates partly because of the differences in their role, and partly because there is no specific allocation for the cost of training in the budgets of Magistrates' Court Committees. Further, in some areas a substantial element of

the budget to £50,000 has been made for next year, but at the time of writing it was not clear whether the bid would be successful. We understand that members of the National Association have estimated that a budget of around £100,000 will be required in future. The Judicial Studies Board does not itself provide or organise training, but any event funded out of its budget will be subject to approval, and this provides opportunities for advice and encouragement to be given to improve the qualify of events funded. Some events are of good quality, but provision across the country is still somewhat patchy.

7.36. We fully recognise that these developments represent significant progress in a relatively short space of time, and owe a great deal to the vision, commitment and enthusiasm of some individual Commissioners and divisions. However, there is a need to build on and extend the present initiatives to reach Commissioners in divisions which are still not members of regional associations and to ensure training is more widely available across the country.

The case for a formal training scheme

7.37. We believe that this would best be achieved by means of a formal training scheme. Without such a scheme, it is likely that substantial regional differences will continue, and take-up of training may remain variable. The need for specific training is widely recognised not only for the lay magistracy but for many other forms of tribunal,[146] and applies even to tribunal members who are highly qualified specialists in the relevant field of law. We do not see why the parties to General Commissioners' hearings should not have the same reassurance as users of the social security tribunals, industrial tribunals, immigration tribunals, VAT and Duties tribunals and Special Commissioners in this respect.

7.38. Further, as already noted, it follows from the General Commissioners' role as "ordinary" lay men and women that they are not required to have any knowledge of tax or legal procedure before their appointment. Rather, they are merely required to demonstrate the ability to acquire this. But at the moment there is no guarantee that they will be given adequate information and support to do so before starting their new duties. It is not satisfactory that they should have to try and glean basic information piecemeal from the clerk, the Notes for Guidance, and observation of actual hearings.

7.39. Training is not, of course, a panacea. It requires an additional time commitment from tribunal members, and also an additional commitment of funds. We recognise that this involves asking the General Commissioners to dedicate additional time to their duties without remuneration.[147] The nature and extent of the training needs to be carefully addressed to ensure that this provides value for the additional money and time invested. We would also hope that the times at which training is offered could be sufficiently flexible to avoid Commissioners for whom this would be a difficulty having to take additional time off work. But we see this as one essential component of a package designed to ensure that all tribunal

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training is provided internally (normally by Justices' clerks) so that no direct costs are incurred, making the real cost difficult to quantify. However, in a recent survey of a small sample of MCCs (c.10%) carried out for the Judicial Studies Board it is understood that the estimated annual cost of training varied from £72 per magistrate to £126 per magistrate, £98 being the average figure.

[146] As already noted, the Green Paper *Improving decision making and appeals in Social Security*, HMSO, Cm 3328 presented in July 1996, did contemplate that a limited number of social security appeals should be decided by bodies which did not include a legally qualified member. But it also emphasised the need for the decision-makers to be appropriately qualified and trained. It is understood that responses to the Green Paper have been mixed.

[147] We recognise that, because most individual General Commissioners sit fairly infrequently, the proportional increase in the time spent on tribunal matters which would result from a compulsory training requirement would be relatively high. On the other hand, since infrequent sittings also make it more difficult for the General Commissioners to build up experience and keep up to date, they are also a factor which makes formal training particularly important.

members are familiar with the procedural rules governing their functions, have a sufficient understanding of basic or common technical issues, and are able to discharge their duties confidently and competently.

7.40. We envisage that, for practical reasons, the introduction of the new training package would have to be phased in. The first priority would be to provide training for newly appointed tribunal members, and for tribunal members who chair hearings.[148] The latter would focus on the specific skills required in that role, and might in the longer term be combined with a constructive appraisal system. In the longer term it is also hoped that all Commissioners would carry out a training commitment of a specified number of hours annually or biennially, though the timing and content of the training programme might be varied to suit individual requirements, as with lay justices.

Composition of the Commissioners

7.41. At present a minimum of two Commissioners must sit at a hearing,[149] although the Guidance Notes point out that "it is always safer and fairer to attempt to have a tribunal of three Commissioners".[150] We understand that at present practice varies considerably between divisions: some may still sit fairly regularly with only two Commissioners present; in others the clerk may request the attendance of several Commissioners, so that a panel of four or five Commissioners at a hearing is not uncommon.

7.42. As already noted, the contribution of a lay Commissioner is not technical and procedural expertise, but a rounded, commonsense perspective together with general practical experience. We believe that this principle will be best served by a small group rather than one or two individuals.[151] This means that the tribunal as a whole should be able to arrive at the decision on the basis of different perspectives, without having to resort to artificial and complicated schemes for ensuring a balanced tribunal. We also believe that the two wing members may have an important role to play as counterpoise to the Chairman. Where only two members sit, there is an increased risk that a newly appointed or inexperienced Commissioner will feel diffident about taking a different line from a more experienced colleague. He will also know that in any event, under the present procedural rules, the chairman's casting vote puts the final decision in his hands.

7.43. Against these arguments in favour of a group of lay members must be weighed a number of counter-arguments. Other things being equal, the larger the panel he faces, the more intimidating the hearing procedure is likely to be for the unrepresented taxpayer. The larger the tribunal, the more cumbersome it will be to operate and the more the need for deliberation is likely to slow down the rate at which it can process cases. There is also a point at which a multiplicity of members is likely to be counter-productive of individual contributions, so that it actually increases the risk that some members may play a largely passive role. And, of course, even where Commissioners are unpaid, it will increase the amount of expenses and allowances due in respect of each hearing.

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[148] If training is to become a prerequisite for chairing hearings, some modification might be required to the General Commissioners (Jurisdiction and Procedure) Regulations SI 1994/1812 reg. 11(2) under which the General Commissioners comprising a tribunal are entitled to decide which of them is to preside at a hearing.

[149] General Commissioners (Jurisdiction and Procedure) Regulations SI 1994/1812 reg. 11(1)

[150] *Guidance Notes* para 2.10.

[151] For a more general, and strongly expressed, view on this, see Council on Tribunals, Annual Report 1989-90 at 1.11-1.13.

7.44. We believe that a three-person tribunal represents the best compromise between these conflicting considerations. This is a principle which is widely accepted in other forms of tribunal (and indeed also in relation to the lay magistracy). We appreciate that there may sometimes be practical difficulties in assembling three Commissioners. But we do not believe that it is generally acceptable for cases to be decided by two Commissioners only, particularly where the Chairman has a casting vote. Special provision of the type common to other tribunals would be required to meet genuinely exceptional circumstances, such as the illness of a member after the start of a contentious case.

Local and national organisation

The Associations

7.45. As we have already indicated, the creation of local and national associations of General Commissioners are developments which we believe are important in the interests both of tribunal users and the Commissioners themselves. The associations are an important channel for standardising procedure between divisions, for the dissemination of best practice, and for consultation about proposed tax reforms with a direct effect on the tax appeals system. We are conscious of the need to extend their membership, but recognise that membership is a voluntary matter and that considerable effort is already being devoted to explaining the role of the associations in areas where no regional association has yet been formed.

7.46. It is essential that the associations should be actively involved in devising and implementing the new training scheme already discussed. They should also be able to co-ordinate feedback and assist with fine-tuning the scheme to eliminate any teething problems, and to ensure that the scheme is achieving its objectives.

Structure, hearing centres and administration

7.47. However, we also believe that some reorganisation of the local divisions is likely to be required. We recognise that the principle of genuinely local hearings is fundamental to the operation of the Commissioners and it is also one important criterion of accessibility. There is also a need not to ask individual Commissioners to travel too far from the area in which they live or work. This would be unfair to them, and would also undermine the principle that Commissioners should be drawn from the areas which they serve. But the way in which the divisions are presently organised means that sittings in some divisions are too infrequent for individual Commissioners to build up and maintain an adequate level of experience. It is even more difficult for prospective chairmen to do so. We understand that the present guidelines are that Commissioners should sit at least six times a year, but that there are a number of divisions where this cannot be achieved. Individual Commissioners may also fail to meet the target because of other commitments which clash with sitting dates. This contrasts with the expected minimum commitment for a lay magistrate of 26 sittings a year.[152]

[152] The average is higher, at 35-40 sittings a year. See Circular AC92(5) (reproduced at *Magistrate* October 1992, p.158), and for a further explanation of the Lord Chancellor's policy, and the extent to which the limits may be operated flexibly see Norman, G. "Are you sitting comfortably?" *Magistrate* October 1995 at p.192.

7.48. We think that some reduction in the number of individual appeal bodies is essential in order to ensure that all tribunal members are ordinarily able to sit at least 6 times a year.[153] We appreciate that this will probably mean some reduction in the number of locations where cases are actually heard. In other cases it will mean an extension of existing arrangements under which a single division hears cases in more than one place, so that individual Commissioners may be required to travel to alternative locations. However, we believe that it should be possible to achieve this without seriously compromising the principle that genuinely local hearings should be available.

7.49. Each division has a Chairman, but there is variation in his role, the method by which he is appointed, and the term of his appointment. The members of a division may meet, formally or informally for discussions, but again arrangements vary locally. The Notes for the Guidance of General Commissioners recommend that Chairman should be elected for a term of three to five years, and also make suggestions as to what his duties should be, including the calling of an annual general meeting of Commissioners in his division. We believe that the basis on which Chairmen are appointed, their term of office, and the requirement to call an AGM should be put on a statutory footing. In many divisions this will do no more than formalise established practice. We would suggest that, where more than one candidate stands as Chairman, the clerk should be asked to arrange a postal ballot of Commissioners, and that the appointment should be for a period of three years, with the possibility of re-appointment for one further three-year term.

Appointment and training of clerks to the Commissioners; administration

Appointment of clerks

7.50. At present, each division of Commissioners appoints its own clerk. There is no legal requirement for clerks to have any formal qualification. The Lord Chancellor has power, in consultation with the Commissioners, to dismiss a clerk, but has no statutory powers in relation to a clerk's appointment, and the Lord Chancellor's Department has no involvement in the selection process. The process to be used falls outside the scope of the Directions to Advisory Committees, who have no role in appointing the clerk. The Notes for the Guidance of General Commissioners discuss the clerk's duties in some detail, but do not address the arrangements for appointment.

7.51. Only the City of London division has a full-time clerk; all other posts are part-time. Some clerks are in fact appointed to more than one division but, again, this is a matter entirely for the divisions in question. Conversely, each division may appoint an assistant clerk if it thinks necessary. It appears that this will generally be done on the advice of the clerk. The Lord Chancellor's Department has informed us that it has no information as to how many divisions have an assistant clerk.

7.52. It is understood that in practice most clerks are solicitors or barristers, but a small number are tax practitioners without legal qualifications or are former Inland Revenue employees, although the Lord Chancellor's Department advises that former employees of the Inland Revenue should no longer be appointed as clerks. For those who are legally qualified,

[153] The importance of more frequent sittings for individual Commissioners in some areas was emphasised by the Special Commissioners in their report to the Lord Chancellor: see note 116 above.

the extent of their tax experience will vary considerably. Some will have a great deal of specialist expertise, while others will practise in other fields. Anecdotal evidence suggests that vacancies are not normally advertised, that the recommendation of the outgoing clerk will often carry considerable weight in relation to the appointment of his successor and that, for example, it is not uncommon for a clerk who combines his office with practice as a solicitor to recommend, and be succeeded by, one of his partners.

Training for clerks

7.53. No formal training is available for clerks at present. Because their role is not judicial, but advisory and administrative, they are considered to fall outside the remit of the Judicial Studies Board. Some clerks will already have served as assistant clerk at the time of their appointment. Otherwise, we are informed that provision will usually be made for the new clerk to attend one or two meetings prior to taking over as clerk to the division. Clerks may of course seek advice from colleagues on an informal basis. We also understand that their professional association, the Association of Clerks to the General Commissioners, which meets annually, may provide a forum for exchange of information. The Association also produces a Code of Procedure and Guidance Notes to assist clerks with some of the main issues they will encounter.[154] But a newly appointed clerk, particularly where he has not served as an assistant clerk, will have in many respects to decide how to deal with matters on an individual basis, with the benefit of any advice or guidance which may be available from his predecessor. This is likely to be one of the factors which have led to significant variations in practice between different divisions.

Clerk's responsibilities and role

Outside hearings

7.54. The 1994 procedural rules place responsibility for certain matters specifically with the clerk. In particular, where a case stated is requested he will be responsible for drafting this and ensuring compliance with the timetable set out in the rules. In addition he must provide general advice on law and procedure to the Commissioners at the hearing, and carry out, or arrange for, administration connected with hearings. As the only contact point for the Commissioners outside a hearing, he will also be responsible for dealing with the correspondence connected with appeals, and requests for information or guidance from parties. The way in which these matters are dealt with is largely at the discretion of the clerk. There are no standard forms or letters analogous to those used by the VAT and Duties tribunals, for example. The only exception to this is the form of decision itself.[155] Some clerks will generate their own standard forms or letters, but again the extent of these appears to vary a great deal.[156]

7.55. Nor, with the exception of the short standard notes which appear on the back of an appeal notice prepared by the Inland Revenue, are there any leaflets or notices about appeal procedure or how to prepare for an appeal which the clerk can make available to taxpayers looking for advice. Clerks are given no official guidance as to how they should deal with such requests which, in the case of unrepresented taxpayers, may be very time-consuming. There

[154] The present Notes date from June 1990, before the introduction of procedural rules for the General Commissioners.
[155] Form EX600 (England and Wales); EX 601 (Scotland) and EX 602 (Northern Ireland).
[156] For example, some clerks will prepare their own notices of hearing; others still issue notices prepared by the Inland Revenue.

seem to be considerable variations as to the level of assistance provided in practice, even as to the willingness of individual clerks to make their telephone number available to appellants. We understand that part of the difficulty is that the way in which clerks are remunerated means that more than very limited amounts of time spent providing information for individual appellants will effectively be unremunerated.[157]

7.56. This may be one reason why it is apparently quite common for clerks actively to refer taxpayers to the Inland Revenue for advice and information about the appeal procedure. We do not think this is satisfactory. There may, of course, be a fine line between encouraging a taxpayer to consider settling an appeal prior to hearing (or to deal with the problems which have given rise to a delay appeal), which is quite appropriate, and for which he will need to discuss the position with the Revenue, and referring him to the Revenue for information about the appeal process, but the distinction is important. The taxpayer is entitled to effective advice and guidance through the tribunal itself in relation to the appeal procedure. We believe that this accords with the principles set out in relation to litigants in person by Lord Woolf in *Access to Justice: Interim Report.*[158]

At hearings

7.57. The scope of the clerk's advice to the Commissioners at hearings is limited to matters of law and procedure. Nevertheless, it is standard practice for the clerk to remain with the Commissioners while the parties retire. There is no equivalent of the two practice directions which govern the proper limits of advice by a clerk to lay justices and the way in which the advice is given.[159]

7.58. Where the Commissioners are dealing only with delay cases, and no points of substance are raised, the clerk's functions at a hearing will be largely administrative–ensuring that a record of decisions is kept and informing the Commissioners of previous adjournments of a case, for example. But in cases where the Commissioners have to address points of substance, the clerk's role, like the role of justices' clerk, involves a delicate balancing act. On the one hand, he must ensure that hearings are properly conducted, and the tribunal must be able to rely on his guidance and experience in technical matters. This duty may require him to intervene without invitation during a hearing where the chairman has misunderstood something, for example, or is proceeding in an inappropriate way. On the other, the decision rests with the Commissioners alone, and the clerk needs to ensure that he neither influences them inappropriately, nor does anything which may create the impression that he has done so.

7.59. We believe that the calibre of the clerk is potentially very important if a lay tribunal is to function well and efficiently. Those we have consulted who advocate retention of a lay tax tribunal at this level have emphasised that the reason the tribunal members do not require legal and technical expertise is that they are able to rely on their clerk to provide them with this where necessary. In this context, it is anomalous that the clerks themselves should not be required to have any formal qualifications.

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[157] This is because a "setting up fee" is payable for a hearing, and there is a fixed amount payable in respect of each case listed, but the latter is, in effect, for making standard listing arrangements. There is no separate amount due in respect of other time spent on hearing preparation (or assisting a taxpayer with this), by contrast with time spent on research or preparation of a case stated, or on travelling to and attending a contentious case, for which an hourly rate is payable.

[158] At Chapter 17 and, in particular, the comments in relation to information and advice from the court at paragraphs 14-19.

[159] [1953] 2 All ER 1306 and [1981] 2 All ER 831.

7.60. In contentious hearings the clerk may be required to advise on both the conduct of proceedings and on technical issues, and must do so without the benefit of a standard manual, such as *Stone's Justices' Manual*, designed to provide rapid assistance in such circumstances. We believe that this means he must be able to draw on both general legal knowledge and specific tax expertise.[160] The easiest means of ensuring this is to require clerks to have both legal qualifications and tax experience, and this could be seen as an extension and formalisation of existing best practice. But some divisions may have difficulty finding suitably qualified and experienced candidates of the right calibre. Requiring a legal qualification will exclude some very competent tax practitioners who, with suitable training on the procedural side, would make excellent clerks.

Proposals for change

7.61. Our initial suggestion is that clerks should be required to have both legal qualifications and tax experience until a reasonably sophisticated training programme has been instituted which would overcome the present difficulties.

7.62. We also believe that the present arrangements for the appointment need to be more structured and more open, with a view to ensuring that the best available candidate is appointed. It is clearly crucial that the Commissioners continue to be involved in the appointment process, and they may be very good judges of the clerk's ability to explain complicated or technical issues in a way intelligible to a layman, or of his ability to assist unrepresented taxpayers. But an obvious difficulty with the present appointment process is that Commissioners who are themselves not appointed on the basis of their technical or general legal expertise are required to select the person best equipped to give them technical or legal advice. In some divisions there may in practice be no difficulty, because there will be a number of Commissioners whose professional background makes them well qualified to decide this, but this will not always apply. Further, the closed process by which clerks are often appointed makes it difficult to ensure that the best available candidate has been identified.

7.63. We would suggest that the Lord Chancellor's Department should be directly involved in the appointment process, and that method of the recruitment and selection should be more closely modelled on that used to select VAT and Duties tribunal chairmen at present, with vacancies being advertised and a more structured system for assessing candidates implemented.

7.64. In any event, we consider that, just as a person may not be appointed a General Commissioners where he personally, or his firm, appears before the General Commissioner for the area other than in the occasional appeal, the same requirement should apply to the clerk. For similar reasons, we share the Lord Chancellor's view that normally clerks should not be former Inland Revenue employees. We have been informed that there have been instances where, shortly after leaving the Revenue, an inspector has been appointed as clerk to the General Commissioners for an area covered by the tax office where he served immediately

[160] We note that the *Report by the Special Commissioners to the Lord Chancellor on the Working Methods and Organisation of the General Commissioners of Income Tax* drew attention to the fact that in some cases, because the Clerk's knowledge of technical tax law was limited, an explanation of the legal issues tended to be given by the inspector. The Commissioners pointed out that, first, this might give the lay taxpayer the impression that the Inspector was telling the Commissioners what to do and, second, that the effect in contentious cases could be that the Commissioners were deprived of any view of the law other than that put to them by the Inspector.

prior to his departure. Such an appointment is bound to taint the image of the Commissioners as an independent and impartial tribunal.

7.65. We see it as essential that training should be available to the clerk both immediately on appointment and on a continuing basis for updating purposes. This is important not only to enable him to discharge his duties in relation to appeals effectively, but also to enable him to assist, formally or informally, with the training of Commissioners. We understand that, in many divisions, Commissioners rely on their clerk to update them where necessary, and to help with the induction of new Commissioners. Even with new training arrangements for lay tribunal members, this type of informal support will no doubt continue.

General Commissioners in Scotland

7.66. The General Commissioners in Scotland are appointed by the Secretary of State and not by the Lord Chancellor's Department. There are about 430 Commissioners, grouped in 55 divisions. In many respects their position corresponds to that in England, and the same issues arise. However, there are some material differences on appointment and training which it seemed appropriate to address specifically.

Selection and appointment of Commissioners

7.67. We understand that until 1986 the Justices of the Peace Advisory Committees also advised the Secretary of State on the appointment of General Commissioners. However, the present arrangement is that candidates for appointment are identified by serving Commissioners and then recommended to the Secretary of State. Advisory Committees are only consulted where there had been difficulty in finding a suitable candidate, which is rare. The method by which candidates for appointment are identified is seen as very much a matter for local discretion. There are apparently no statistics showing the make-up of the Commissioners in Scotland.

7.68. It may be that there are factors specific to Scottish appointments which mean that the problems already identified in relation to the appointment of Commissioners in England and Wales are not a problem. However, we are not aware of what these might be.[161] Prima facie the same problems would appear to arise, but given the discrepancies between the Scottish and English systems, in stronger form.

Training for Commissioners and Clerks

7.69. There is no Scottish equivalent to the Judicial Studies Board, and at present the remit of the Judicial Studies Board does not extend to Scotland. There is no public funding or any official provision for training either General Commissioners or their clerks in Scotland. Although it is hoped to extend the National Association of General Commissioners to cover Scotland, we understand that Scottish involvement to date has been very limited.[162] The office of the Secretary of Commissions for Scotland has indicated that there are plans to set up training provision for the General Commissioners in the future.

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[161] Questions about the appointment and training of lay members generally have certainly been canvassed in the Scottish context in relation to different types of body: see Bankowski, Hutton and McManus (1987) Ch 4 (lay justices) and Jones and Adler (1990) (members of Social Security Appeal Tribunals, justices, and members of Children's Panels).

[162] The Association of Clerks to the Commissioners of Income Tax is a national body which covers Scotland.

7.70. Again, in the absence of any special factors of which we are unaware, we would suggest that the steps should be taken to introduce a training scheme along the lines already suggested for England and Wales.

The advantages and disadvantages of introducing a professionally qualified, paid chairman

7.71. As already noted, the General Commissioners are unusual in being a wholly lay tribunal. We have considered carefully the arguments for and against replacing the present system of lay chairmanship with the most common form of tribunal—a chairman appointed by reference to specific professional qualifications,[163] sitting with two lay members. We appreciate that the introduction of a legally qualified chairman at this level would be an innovation in the direct tax field. The Committee of the recently formed National Association of General Commissioners has indicated that it would strongly oppose any such move, and we understand that the views of the Committee are likely to be shared by a large number of individual General Commissioners both within and outside the National Association.

7.72. On the other hand the change in the General Commissioners' workload following the introduction of self-assessment may be seen as marking the right time to re-evaluate the contribution made by different categories of member. Under a unified tax tribunal system covering all forms of tax, the extended role envisaged for the general tax tribunal would increase the weight of argument in favour of the change, because of the wider range of cases with which the tribunal would be expected to deal and perhaps also because of the existing composition of the VAT and Duties tribunals.

Arguments from principle

7.73. It should be uncontroversial that the relative value of a commonsense perspective and of technical or legal knowledge will differ between different types of case. For example, it seems inappropriate for a lay tribunal to be responsible for deciding cases concerned with highly specialised and technical areas of tax law. This is one reason why under the present system, some issues are reserved for the Special Commissioners. On the other hand, a commonsense perspective may be invaluable when the tribunal needs to decide whether a witness is telling the truth, whether profits have been understated, or whether business records are accurate. Lawyers and tax specialists certainly have no monopoly of wisdom on such matters.

The decline in delay cases

7.74. As noted in Chapter 1, traditionally, the vast bulk of appeals dealt with by the General Commissioners have been delay cases, with a significant number of penalty cases and a much smaller number of contentious appeals. In some divisions contentious appeals are very rare indeed. Even where they are more common, they remain a very small proportion of the total number of cases heard. In delay and penalty cases the arguments in favour of a lay tribunal are at their strongest. The vast majority of such cases will centre on issues of fact which are either relatively straightforward or are, at any rate, issues for which legal or tax training or experience are of little or no direct value. Issues of law, or unusual points of procedure will be

[163] We recognise that, of course, many General Commissioners are highly qualified professionals, but they are not appointed by reference to their qualifications, which may be unrelated to either law or tax.

relatively rare, and there seems little reason to object to advice on these being provided through an appropriately qualified clerk. It has also been suggested to us that lay tribunals tend to be more "user-friendly" than other forms of tribunal, both because they are less formal, and because an unrepresented taxpayer finds it less intimidating to deal with "ordinary" people than with professionals. Insofar as this is true, it is likely to be a particular advantage in this type of relatively straightforward case.

7.75. However, once the pattern of appeals shifts in favour of contentious cases following self-assessment, the balance of the arguments will change. There will be far fewer cases but, probably, a larger number of contentious appeals which will arise in connection with the new inquiry procedures. There will, of course, continue to be some cases for which the traditional arguments in favour of a lay tribunal hold good. Some contentious appeals will be concerned with issues of fact which are not particularly technical or complicated, and this will include some categories of case under the new provisions introduced for the purposes of self-assessment. The question of whether an inquiry is being unreasonably prolonged, for example,[164] will normally be as much a commonsense matter as any of the traditional issues referred to above.

7.76. But it is also likely that the new enquiry procedures would, under the existing system, lead to a much higher proportion of the General Commissioners' time being spent on cases centring on relatively complicated questions of fact, involving disputes of evidence, or on questions of law. Under any form of unified tax appeals system, the allocation to local tax tribunals of any categories of indirect tax appeals other than reasonable excuse cases would tilt the balance further in this direction. The question is therefore what sort of body would, under this new system be best equipped to provide a high standard of decision-making and appropriate procedures for the full range of appeals which it would hear.

Role of clerk on questions of fact and questions of law

7.77. We believe that the composition of the tribunal needs to reflect the range of cases with which it is likely to deal. It is crucial that the general tax tribunal should be competent to decide cases which involve some questions of law or mixed questions of law and fact. If its jurisdiction is limited to very straightforward cases of pure fact, its credibility will be undermined. At present the arrangement is that the General Commissioners are advised on matters of law by their clerk. But this structure makes sense only if the main function of the tribunal is not to *decide* matters of law. Where the clerk only needs to draw the Commissioners' attention to a statutory provision of which they may not be aware, or to explain that a particular conclusion is not open to them because it is precluded by a decided case, there is no problem. He is merely ensuring that the Commissioners have all the information which they require on which to reach a sensible decision. However, where the effect of a provision is debatable, or there are conflicting authorities, or it is arguable that an earlier decision is distinguishable, there is a problem in defining the proper ambit of the clerk's and Commissioners' responsibilities.

7.78. The theory is that the clerk advises on the law, and the Commissioners decide the case. But in practice the borderline between providing information and expressing an opinion may

[164] Under TMA s.28(6), (6A), (7); s.28AB (1),(2).

be a very fine one.[165] This means that there is an obvious risk that potentially controversial points of law or questions of mixed law and fact will, in practice, be decided by the clerk, on whom the Commissioners will naturally rely. Even if were possible for the clerk always to follow the counsel of perfection, and to leave the decision entirely to the Commissioners, having explained in detail the niceties of, say, two conflicting lines of caselaw, it is questionable whether a body of "ordinary" lay people is best equipped to decide such issues. Indeed, it is understandable that in such circumstances they may prefer to rely on the opinion of their clerk. The problem is particularly serious where the taxpayer is unrepresented. In such a case he will often have less understanding than the Commissioners about the legal parameters of the arguments. This means that the clerk's explanations and advice to the Commissioners are not supplementing a case already presented by a competent professional on the taxpayer's behalf. While the Commissioners should have the benefit of an alternative explanation of the case for the Revenue, they have to rely exclusively on the clerk's advice in relation to the counter-arguments.

7.79. We believe that it is important for the credibility of the appeals system that issues of law and mixed questions of law and fact should be decided by a tribunal which includes at least one member who is qualified by his training and experience to decide these. The shift from non-contentious to contentious appeals which will follow self-assessment will increase the weight of this argument. This form of tribunal would also ensure that under a unified appeals system, some of the concerns which have in the past been expressed about VAT appeals being decided by a purely lay body would not be revived. [166]

Procedure at hearings

7.80. Such a member should also be competent to ensure that hearings are properly conducted and to deal with any procedural issues which come up. It seems sensible that such a role should be discharged by the chairman of the tribunal. Again, the difficulties in discharging this role from any other position, including that of the clerk, will be much more serious in relation to contentious cases. The majority of delay appeals can be dealt with according to a well-established pattern, which should make it straightforward for an experienced chairman to handle these. Contentious cases are inevitably difficult to standardise. And there is no direct relationship between the degree of technical complexity or amounts at stake in a case, and the difficulty of conducting the hearing.

7.81. Indeed it may be argued that, in purely procedural terms, a tribunal chairman's job will sometimes be easier in high-value cases involving complicated technical questions where both parties have specialist representation, and where little intervention by the tribunal is likely to be needed. Where the tribunal must enable an unrepresented taxpayer to marshal his case, and draw out his arguments by questioning, without compromising its impartiality, the tribunal chairman's job is a very difficult one indeed.[167] In such a case, it does not seem sensible to impose responsibility for guiding the tribunal as to procedure on its clerk, who must remain on the sidelines of the actual conduct of the hearing. For this reason, we have reservations about the argument that a lay tribunal is more "user-friendly", at any rate in the absence of significant amounts of specialised training for the chairman.

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[165] Particularly where there is a close working relationship between the clerk and the Commissioners. Compare the findings of Darbyshire (1980) and McLaughlin (1990) in relation to the same tensions in the role of the court clerk vis-à-vis lay justices.
[166] See, in particular, Council on Tribunals *Annual Report* 1986-87 para 3.84-87.
[167] Lord Woolf *Access to Justice: Interim Report* Chapter 17 paras 41-46.

7.82. On general principles there would therefore appear to be strong arguments in favour of the general tax tribunals including an appropriately qualified chairman.

Possible practical objections

There are, however, practical concerns about the effect of such a change which been forcefully put to us, mainly by General Commissioners. These points are important, and we considered it appropriate that they should be fully discussed in this consultation document.

Costs

7.83. The first issue is that of relative cost. Since the General Commissioners themselves are lay volunteers who receive only expenses it has been suggested to us that including a paid professional chairman would increase the cost of the general tax tribunals considerably. However, this question of relative costs is more complicated than might first appear. First, although the General Commissioners are unpaid, their Clerks are paid. So at each General Commissioners' meeting, there is already a professional in attendance who is paid for his time. Clerks also receive payments in respect of the administration connected with appeals and for time spent on the preparation of a case stated.

7.84. Second, if proper training is to be provided for both the General Commissioners and their Clerks, this will increase the cost of a lay tribunal by comparison with the present arrangements. Proportionately adequate training for lay members will tend to be more expensive than for professionals, in part because they will sit less frequently, and therefore a larger panel will generally be needed to draw on, and in part because there will be more technical training required.

7.85. Third, as indicated at 7.31 above, we consider that lay tribunal members should, in principle, be entitled to a loss of earnings allowance. Again, it is inevitable that this would result in some increase in the cost of a lay tribunal, although it may be that not all members will claim the allowance.

7.86. The question of costs has sometimes been put to us in a form which suggests that the issue is whether a tribunal which contains one paid professional member will be more expensive to run than a tribunal which contains three (or more) unpaid lay members. If this were the question, the answer would seem obvious. In fact, the real question on costs is whether a tribunal with three properly trained lay members (who might also be entitled to a loss of earnings allowance) and a paid, professional, well-qualified Clerk who has also received training in that role, would be more expensive to run than a tribunal with one paid, professional well-qualified member and two properly trained lay members (who might be entitled to a loss of earnings allowance). The answer to this question is much less obvious.

7.87. There are a number of factors which make it difficult to arrive at any realistic estimate for the relative costs of the two systems. In particular, Clerks to the General Commissioners are at present paid under a complicated formula.[168] This means that a direct comparison cannot be made with the likely payments to a part-time professional tribunal chairman, who

[168] This contains in relation to delay appeals, elements for a setting up fee per meeting, a rate of payment by reference to the length of the meeting, an amount per appeal, together with separate amounts in respect of contentious appeals, and preparation of a case stated.

would normally be paid a fixed rate per day or half-day sitting. It is also likely that the purely administrative duties presently dealt with by or on behalf of the Clerk would be carried out by a member of support staff rather than by a professional tribunal member. However, it is difficult to gauge both what the cost would be of having these carried out by administrative staff, and whether this would result in administrative staff being based too far away from tribunal hearing centres[169]—particularly as there is no real basis on which it can be estimated what proportion of the time spent by Clerks at present on General Commissioners' business is occupied with administrative duties outside hearings.

7.88. We will be assessing the question of costs further before issuing our final report on this project, with a view to seeing whether it is possible to arrive at a realistic estimate of the relative costs of a lay tribunal and tribunal with a professional chairman. However, it is important to emphasise at this stage that it is far from self-evident that introducing a qualified chairman would result in a prohibitive increase in the costs of running the general tax tribunal.

Effectiveness of the present system

7.89. It appears that the majority of General Commissioners feel that the Commissioners operate well as a lay tribunal, and that tampering with the system is both unnecessary and risky. They consider that a lay body is capably of making a perfectly competent tax tribunal. Some have indicated to us that they see the lay magistracy as a parallel. A number of General Commissioners have also put to us their view that the small number of further appeals indicates general satisfaction with their decisions and procedure.

7.90. While we recognise that there are some useful parallels between the Commissioners and the lay magistracy, there are also some very important distinctions between them. At the root of the justification for a lay magistracy in criminal cases is the fact that in a summary trial the magistracy replaces the judge and jury in the Crown Court. There are strong constitutional arguments in favour of criminal charges being tried by representatives of the community. These do not apply in the context of tax or any other statutory appeal scheme. Second, the nature of some of the other issues dealt with by magistrates—such as family law and licensing cases—means that their role as representatives of the local community is crucial. Third, as already noted, magistrates sit far more frequently than General Commissioners, which makes it much easier for them to build up both their knowledge of the relevant law and their experience of hearings.

7.91. We believe that the parallels between the tax tribunals and some other forms of appeal tribunal are at least as strong as those with the magistracy. And we note that in social security law, where there are obvious parallels with tax, pure lay tribunals were replaced during the 1980s by tribunals which include a legally qualified chairman. This change reflected, first, a number of dedicated studies which demonstrated substantial shortcomings in the practice and procedure of the former lay tribunals and, second, reforms in social security law which did away with large discretionary elements in the tribunal's jurisdiction, so that its role was more concerned with the application and interpretation of legislation. Studies prior to the change in composition indicated strong opposition from existing lay tribunal members to the introduction

[169] One advantage of the present system is that it enables clerks who combine this role with part-time private practice to allocate some administration to support staff who also deal with other aspects of their professional practice. If a member of support staff is to be employed, full or part-time, exclusively to deal with tribunal-related work, this may only be viable if one or two members of staff service a number of hearing centres. This could create problems in rural areas.

of legally-qualified chairmen. But recent empirical research has suggested that the role of legally qualified chairmen is now generally accepted by lay tribunal members.[170] The performance of the tribunals is widely regarded as much more satisfactory, although further room for improvement has been identified. (However, the form of SSATs and their jurisdiction are currently under reconsideration following the wide-ranging discussion of appeal procedures on social security matters under the DSS Green Paper *Improving decision making and appeals in Social Security.*[171] This included proposals for certain categories of appeal to be heard by a lay body or lay adjudicator.)

7.92. We do not believe that the small number of further appeals from the Commissioners (or for that matter the Special Commissioners or VAT tribunal) or the proportion of that very small number of decisions overturned on appeal can be taken, of itself, as evidence of satisfaction with their decisions. There is no right of appeal in any event on a question of fact, no matter how unsatisfactory a party believes the decision of the Commissioners to be. An application for judicial review on the grounds that the hearing has not been properly conducted will only succeed in the most blatant of cases. And any further appeal or application involves substantially increased costs, together with the risk of costs being awarded against the loser. In the vast majority of ordinary cases, the possibility of further appeal will be a purely academic one for the taxpayer, and unless there are large sums or a point of principle at stake the Revenue is unlikely to pursue a case further.

7.93. Undoubtedly, lay members have a crucial and continuing role to play in the general tax tribunals, and it is very important that their contribution is not diminished by the appointment of professional chairmen. But the changes in tax administration with the introduction of self-assessment, like the earlier changes in social security law, call into question a system which appears to be already under strain, particularly in contentious cases. It is here that the present lay tribunal system is at its weakest, because of a lack of adequate technical and procedural expertise available to the Commissioners, and the marginal role of the clerk.[172]

7.94. We understand that these problems are already recognised in some divisions, where there is a policy of trying to ensure that a Commissioner who has some technical expertise sits on such cases. However, there may be practical difficulties under the present system in achieving this, and this practice does not apply everywhere. In some cases a suitably qualified Commissioner may not be available. To this extent, the introduction of professional tribunal members might be seen as a formalisation of existing best practice.

7.95. We recognise that in cases where an inspector or a Customs officer is faced with an unrepresented taxpayer his instructions will be to present the case fairly. However there will, realistically, be a limit to the extent to which the inspector or officer can be genuinely impartial. He certainly cannot act as the taxpayer's advocate, or research his case for him. Unlike a presenting officer in an appeal to a social security appeal tribunal[173] he has no formal obligation to the tribunal to present all aspects of the case. It is crucial that the tribunal is not, and is not perceived to be, reliant on the inspector or officer for an explanation of the relevant

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[170] See Baldwin, Wikeley and Young at pp.128-31.
[171] Cm 3328, HMSO, July 1996.
[172] This may, in individual cases, work to the advantage of one side or another. We have come across anecdotal evidence both that this can give the well-represented taxpayer a reasonable chance of success on an objectively very weak case and that, in other circumstances, particularly where the taxpayer is unrepresented or poorly represented, it can give the Revenue an unfair advantage, because the Commissioners rely heavily on the inspector's explanation of the technical issues.
[173] For an account of the theory and practice see Wikeley and Young (1991).

technical issues. And the experience of the VAT and Duties tribunals to date on European law issues suggests that the parties will not always identify these, so that it is particularly important for the tribunal itself to be aware of potential European law implications.

The role of lay tribunal members

7.96. The Committee of the National Association of General Commissioners and a number of other Commissioners have expressed concerns, in varying forms, that the introduction of a paid professional tribunal chairman would diminish the role of lay tribunal members. There is concern that a "mixed" tribunal with a paid chairman and volunteer lay members would not work well, that the importance of the lay members would be diminished, and that the inability of experienced lay members to become chairmen would be demotivating and might even lead to recruitment problems. We take these concerns very seriously.

7.97. VAT and Duties tribunal members have been accustomed to sitting with a qualified professional chairman. For General Commissioners this would be novel. It is also true that VAT and Duties tribunal members are paid quite substantial sums. The General Commissioners, by contrast, are not even entitled to a loss of earnings allowance. Some Commissioners have suggested to us that the principle of paying lay members would be important, because it is tantamount to formal recognition of the contribution made by members, and so puts them on a more equal footing with the chairman. Others have been emphatic that their status as volunteers should be retained, because they see their role as a form of public service, or because it reassures appellant taxpayers of their integrity and independence.

7.98. We do not agree that payment of itself calls into question the independence of tribunal members: if it did, there would be a question-mark over the independence of all senior members of the judiciary! But we agree that it is less than ideal for other members to receive no payment while a chairman is remunerated for his or her time. Other tribunal members may suffer equally from loss of actual or potential earnings as result of the time spent on tribunal duties. This is, however, a matter of principle, and not something which is likely to affect the day-to-day working relationship between the chairmen of tribunals and other members. A tribunal which included paid chairmen and unpaid members would not be novel. There are numerous discrepancies between other forms of tribunal in relation to both the principle of payment and the rates of pay for chairmen and members. But there is no evidence that relations are better between chairmen and other members of tribunals where all are paid, such as the VAT and Duties tribunals, than in tribunals where the members are not remunerated, such as social security appeal tribunals. Nor is there any evidence that unpaid members feel less able to contribute to proceedings than paid members. The present discrepancies between different forms of tribunal would be difficult to defend in policy terms, but any levelling down would probably attract strong opposition, and levelling up would involve substantial expenditure which is unlikely to be seen as a priority. While we believe that rationalisation of the present arrangements should be a long-term goal, we recognise that these discrepancies will persist for some time to come. In this context, we accept that lay members of the general tax tribunals would have to continue to discharge their functions on a voluntary basis, subject to any loss of earnings allowance made available.

7.99. We recognise, and think it essential to accommodate, concerns that professionalising the chairmanship of the general tax tribunals may detract from the role of the lay tribunal

members.[174] A paid professional chairman will not only be selected for his relevant skills and expertise but, for practical reasons, will sit more frequently than the other tribunal members. He will therefore tend to build up experience in dealing with hearings which cannot be matched by the lay members. This should, in itself, strengthen the tribunal as a whole. However, the advantages of the change will be undermined if other tribunal members rely too heavily on the chairman's skill and experience, or feel unable to participate fully in the hearing, or to reach a different decision from the chairman in a case of disagreement. We are aware of arguments that introducing professional chairmen to social security tribunals may have tended to reduce the contribution made by the lay members.[175]

7.100. However, the potential risks should not be blown out of proportion: there is already a risk that an overbearing (lay) chairman may dominate proceedings, or that the close working relationship between the Commissioners and their clerk may result in the Commissioners relying too heavily on the clerk's opinion.[176] We believe that the risks may in fact be reduced by proper training, both for the tribunal chairmen and other tribunal members, and by treating the need for the chairman to work with other tribunal members as a material factor when selecting chairmen. Appropriate training should help ensure members have both the confidence and the practical ability to play a full part in tribunal proceedings, and that chairmen are committed to encouraging this. *All* tribunal members need to recognise the importance of the contribution of the lay members, and that their perspective will be particularly valuable in cases centring on questions of fact or matters of business practice. The relative weight carried by the views of each member of the tribunal, where they differ from one another, should depend on the nature of the case and the cogency of their individual arguments, and not on their title. It is also worth noting that, since tribunal decisions are by majority vote, the two lay members may, in an appropriate case, outvote the chairman.

7.101. Finally, while it is true that the proposals would create difficulties for existing lay chairmen, we would envisage these being eased by a transitional period under which Commissioners who already have adequate experience of chairing hearings could continue to sit, at least on direct tax cases. Given that in many divisions a long period would elapse between the appointment of Commissioners and their first opportunity to chair hearings, and that many Commissioners will not actually do so, we do not believe that the introduction of professional chairmen would of itself have a negative impact on recruitment: there is no evidence of this in the context of other tribunals. What is important, as already noted, is that the role of tribunal members is a worthwhile and credible one: this is in the interests of the members and of tribunal users alike.

Accessibility

7.102. As already noted, the number of divisions of General Commissioners means that genuinely local hearings are available in almost every area. Concern has been expressed that introducing qualified chairmen would tend to result in a smaller network of hearing centres

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[174] These concerns were accepted as overriding in the *Report by the Special Commissioners to the Lord Chancellor on the Working Methods and Organisation of the General Commissioners of Income Tax*. The Report recommended retaining the existing composition of the Commissioners, on the grounds that a system with a legally qualified chairman would make it more difficult to recruit good General Commissioners, because they would have no prospect of chairing meetings and their role might be seen as subsidiary.

[175] See Jackson, Stewart and Bland (1987), Wikeley and Young (1992). The first study made a direct comparison between lay and professional chairmen. However, the sample in this study was relatively small and, as the authors specifically noted, many of the legally qualified chairmen at the time of the study were relatively recent appointees, while the lay chairmen were those whose services had been retained on an exceptional basis because they were considered particularly able.

[176] cf. in the context of court clerks and the lay magistracy, Darbyshire (1980), McLaughlin (1990).

because of pressure to contain costs. On the other hand, there is already a need to alter some of the existing divisions so that individual Commissioners can sit sufficiently frequently. It is also true that a professionalised tribunal in this form would be more likely to have some full-time staff at permanent tribunal centres from which basic information could be obtained. The extent to which the disadvantages and advantages of the new system in this respect would outweigh each other would depend on the detailed arrangements for the new tribunals. But we consider that it would be important to build into the new system a commitment to maintaining an adequate, if reduced, network of local hearing centres. One option might be to adopt a benchmark figure as to the maximum travelling time which could reasonably be expected of the taxpayer. It would also be important to retain the scope to arrange sittings outside normal hearing centres where circumstances justify this, as with VAT and Duties tribunals at present.

Summary

7.103. The General Commissioners have traditionally performed a very important function in holding the balance between the taxpayer and the Inland Revenue. But, perhaps because the bulk of their work in relation to delay appeals has been perceived as routine, their role appears to have been seen by policy-makers as less important than many other forms of tribunal or the lay magistracy. As a result, they have had to continue under a framework which is less rigorous, open and accountable than these other bodies. We believe that the long-standing neglect of this framework is unacceptable.

7.104. We welcome recent initiatives to address the resulting problems, and recognise the significant contribution made by the Commissioners themselves. But it is crucial that the pace of change continues to reflect the urgent need for further modernisation, to ensure that Commissioners are known to be a strong local tribunal capable of dealing competently with the majority of appeals, initially for direct tax and later for other forms of taxation.

7.105. We put forward for further consideration the following proposals for change within the existing structure.

- **The advisory committee system needs to become more open and accountable. To achieve this we would suggest that:**

  – a higher proportion of its members should not themselves be General Commissioners (say, the lesser of 25% or two members) and should be recruited by advertisement or some other method of open recruitment;
  – at least one member of each committee should have some experience of recruitment and selection procedures;
  – some training in such procedures should be made available to all members of each committee following appointment;
  – the method by which General Commissioners sitting on the advisory committees are chosen should be more transparent: one or perhaps two (in the case of large

divisions) Commissioners could be elected from each division covered by the committee;[177]
– the chairman of the committee (if not a Lord Lieutenant) and the chairman of the recruitment sub-committee (in any event) should be elected, although it would be possible for one person to combine both offices;
– a two-tier interview structure for prospective General Commissioners should be adopted, with an in-depth interview by an appointment sub-committee, whose chairman should be elected, followed by a shorter interview with the committee as a whole: training for the chairman of the appointment sub-committee should be a priority;
- a short standardised assessment form should be completed for each candidate, in addition to any specific comments the committee wishes to add: in a case where a recommendation is to be made to the Lord Chancellor for appointment, the form should be forwarded together with the recommendation;

- **New initiatives are required to implement the Lord Chancellor's policy that advisory committees and General Commissioners should broadly reflect the local community, and particularly to improve the representation of women and members of ethnic minorities. Data should be kept which enable the success of their initiatives to be monitored.**

- **In principle it is appropriate that General Commissioners should be eligible for loss of earnings allowances. This might also help with recruitment in some sectors of the community.**

- **A formal training programme for General Commissioners is required and should be arranged through the Judicial Studies Board in consultation with the National Association. Training for new appointees and Commissioners who chair hearings is an urgent priority for which adequate funding needs to be made available.**

- **The procedural rules for the General Commissioners should be amended so that hearings must take place before at least three Commissioners.**

- **For the time being (and subject to transitional arrangements for existing clerks) clerks should be required to have both legal qualifications and tax experience. These requirements could be reviewed following the implementation of a training programme. An open recruitment programme should be used, including the advertising of vacancies, and the Lord Chancellor's Department should be directly involved in the appointment process. A training programme should be instituted for clerks.**

- **New initiatives are required to address the level of assistance and information available to appellants. These could include the production centrally of leaflets and explanatory materials.**

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[177] Because Commissioners in one division may not be known to those in neighbouring divisions, a system of simply electing Commissioners from all divisions covered is not practicable. The presence of at least one Commissioner from each division should also help with the dissemination of information in either direction. At present, although it is understood that Committees generally contain at least one person from each division, there is no requirement for this to be the case.

7.106. In addition, there is a case for the inclusion of a qualified professional chairman sitting with two lay members, in place of the current body of lay Commissioners. The arguments in favour of this approach would be strengthened with the broadening of the general tax tribunal's jurisdiction under a unified appeal system. However, we are aware that this is a controversial proposal, and at this stage are putting it forward as an option for further discussion only. We also recognise that, if pursued, this proposal would need to be implemented in a way which avoids diminishing or devaluing the role of lay tribunal members.

CHAPTER 8. COMPOSITION OF THE TAX TRIBUNALS—THE SPECIAL COMMISSIONERS AND VAT AND DUTIES TRIBUNALS

Introduction

8.1. The Special Commissioners are generally regarded as a strong tribunal whose specialist jurisdiction gives them an important role in the development of tax law. The publication of their decisions following the 1994 procedural rules appears to have been widely welcomed. As with the General Commissioners, it is clearly important that any proposals for change build on their existing strengths. But by contrast with the General Commissioners, the nature of their workload is unlikely to change significantly following self-assessment.

8.2. The VAT and Duties tribunals are also generally well regarded. We see the principle of flexibility in the composition of the VAT and Duties tribunals as one of its strengths. This enables the composition of the tribunal to be tailored to the type of appeal which it is hearing. However, we have come across some criticisms about the quality of their decision-making. These may simply be due to the fact that they deal with a much wider range of cases than the Special Commissioners, both numerically and in terms of the issues involved.

8.3. We believe that in relation to these tribunals steps should be taken to:

- clarify some aspects of the criteria for selection of Special Commissioners and chairmen of the VAT and Duties tribunals;
- review the balance between full and part-time Commissioners and chairmen;
- introduce a more open system for the appointment of lay members to the VAT and Duties tribunals; and
- remove the discrepancies in the rules governing their respective composition.

8.4. These changes would improve the existing provision for appeals at this level and would also pave the way for the creation of a unified tax appeals system.

Special Commissioners and VAT and Duties tribunal chairmen: criteria for selection

8.5. All except two of the Special Commissioners are now VAT and Duties tribunal chairmen, and it is envisaged that wherever possible this arrangement will continue when new appointments are made. However, since there are more VAT and Duties tribunal chairmen than Special Commissioners, the converse does not apply.

8.6. Vacancies for Special Commissioners and VAT and Duties tribunal chairmen are generally advertised. But the procedures followed and the actual criteria for selection[178] have not been widely known. As a result, until very recently there has been some element of mystique about these. Accordingly, we welcome the changes which will take place under the new open competition programme. This will mean that, as from October 1996, full-time

[178] As opposed to the statutory minimum of a seven year legal qualification under VATA 1994 Sched 12 para 6(4) for VAT tribunal Chairmen (except in the case of the Tribunal President: see Sch 12 para 2(2)); or a ten year legal qualification for Special Commissioners under TMA s.4(2)).

appointments will be covered by the new programme of open competition, which will ensure not only advertisement, but recruitment on the basis of job descriptions, statements of criteria, application forms and a sift and interviewing process to be done by a panel including a specially trained lay assessor.[179] However, we think it is unsatisfactory that part-time appointments will not be dealt with on the same footing until April 1998.

The importance of adequate relevant experience

8.7. There also appears to be a lack of clarity on two aspects of appointment policy where we think that specific guidelines should be available. First, there appears to be doubt about whether the Special Commissioners are a specialist tribunal in the sense only that their jurisdiction is confined to tax appeals or whether tax expertise is a pre-condition for selection. Second, there appears to be some uncertainty as to whether former Inland Revenue or Customs officials who meet the legal qualification criteria are considered eligible for appointment (see para 8.12 below).

8.8. The Lord Chancellor's Department has informed us that it regards capacity to judge cases with a tax content as the principal criterion for appointment. Confusingly, it considers that "for this purpose a reasonable level of tax technical expertise is helpful but not essential. Too much expertise may be counter-productive". But it regards the present Special Commissioners and VAT and Duties tribunal chairmen in England and Wales as drawn from lawyers with tax expertise.

8.9. We think that it should be a recognised policy that appointees should have a reasonable level of experience in the practice either of tax or some aspect of fiscally related law. This seems to us to be the whole point of having a specialist tax tribunal.

8.10. While we recognise that the overriding requirement is for appointees of suitable calibre and with the right personal skills and qualities to discharge a judicial appointment effectively, we believe that, given the relatively small numbers involved, it should be possible to identify practitioners who combine these with adequate relevant experience. In some cases this may be a technical knowledge of tax; in others it might be another area of fiscally related law—for example the operation of the Community Customs Code, or of Community law in relation to VAT.

8.11. Such knowledge is important for three reasons. First, it should reduce the time required to argue appeals based on questions of law (and the associated costs), except where these relate to particularly obscure or unusual areas of the tax legislation. Second, it should enable the tribunal to deal more effectively with unrepresented or poorly represented appellants who are unsure of the legal arguments underlying their case. Here, the tribunal will often need to be able to identify for itself any weaknesses in the Revenue or Customs' case, and to assist the appellant in presenting his. Although unrepresented appellants are less common at the Special than the General Commissioners, this is still a real issue, and for VAT and Duties tribunals the number of unrepresented appellants is still relatively high. In the latter context, the implications of EC law of course, may be very important. Finally, the decisions of both these tribunals, unlike those of the General Commissioners, are now published. Their effect often goes far beyond the case immediately decided, and decisions will be cited and

[179] Further details are set out in the Home Affairs Committee report, *Judicial Appointments Procedures*, Appendix 1 para 2.5.8.

relied on by both the revenue authorities and taxpayers unless overruled by the courts. The majority of tax appeals go no further. Even in a test case, the losing party may be unable or unwilling to incur the further costs of going beyond the tribunals to the courts.

8.12. As a result, the decisions of the Special Commissioners and of the VAT and Duties tribunal have a major impact on tax law and practice, and their quality is correspondingly important. At this stage of an appeal, unlike the higher tiers of appeal to the courts, the whole factual matrix will be addressed and a number of separate issues of law may be involved. In further appeals, normally the dispute will have been narrowed to one or two issues of law. We believe that adequate experience of relevant areas of law is valuable in this context to enable the tribunal to judge how the points at issue fit into the wider tax picture, and to take account of possible interactions between different aspects of the statutory code and different taxes.

Appointment of former employees of the Inland Revenue or Customs

8.13. We do not see any problem of principle in former Inland Revenue or Customs' employees being appointed as Special Commissioners or VAT and Duties tribunal chairman, although the requirement for appointees to be legally qualified will restrict the numbers eligible for appointment. We understand that sensitivity in this area has increased in recent years, and the Lord Chancellor's Department has indicated to us that it is an area of concern. Provided that the individuals involved are of suitable calibre, we see no reason why they should not be able to discharge their functions fairly and impartially. The potential problems which may arise at local level where an inspector would be required to deal as clerk or Commissioner with his former colleagues including, possibly, his former line manager, do not arise here. It is accepted that tax practitioners may sit part-time as Commissioners or VAT and Duties tribunal chairmen while they, or their firms, continue to represent clients in disputes with the Revenue or Customs and in tax litigation. It has never been suggested that the judgement of such practitioners is tainted by any potential conflict of interest, or by a professional perspective derived from their experience of advising only taxpayers. It seems to us that there is no greater cause for concern in the case of an individual who is a former Inland Revenue or Customs official.

Scotland and Northern Ireland

8.14. In Scotland and Northern Ireland it is inevitable that, as a practical reflection of the much smaller pool of specialists in these jurisdictions, appointees may have only limited experience of fiscally related law. Although the Special Commissioners and VAT and Duties tribunals cover the whole of the United Kingdom, we recognise that it is essential to make adequate provision for such cases to be heard by a tribunal with adequate knowledge of the law and procedure of the relevant jurisdiction. Scottish and Northern Irish appeals may depend on points of underlying law (such as land law or trust law) specific to these jurisdictions, and differences in the law governing evidence or procedure will frequently be relevant at hearings. Given the broader scope of much legal practice in these jurisdictions, and the overriding requirement for appointees to be of a suitable calibre for judicial appointment, it is inevitable that the requirement for knowledge of fiscal law must be relaxed. However, it is also true that some practitioners in these jurisdictions who would describe themselves as generalists will nevertheless have significant tax experience. And provision in both forms of tribunal for two legally qualified tribunal members to sit together would allow an additional member with greater fiscal experience to be imported where this was considered desirable.

The balance between full and part-timers

8.15. At present, other than the Presiding Special Commissioner and VAT and Duties tribunal President, out of a total of 38 Special Commissioners and VAT and Duties tribunal chairmen, only five are full-time.[180] In many cases, part-timers will have other commitments which will act as a practical constraint on their ability to hear lengthy cases. As a result a disproportionate number of the more complicated and therefore longer cases will be heard by full-time appointees. It is therefore particularly important that they should be of high calibre. However, the Lord Chancellor's Department has indicated to us that while there has been no shortage of strong candidates for part-time appointments, it has at times proved difficult to secure good applicants for full-time appointments.

8.16. Part-timers undoubtedly have a valuable contribution to make to both tribunals, and we have been informed by some tribunal members that experience deriving from the other professional commitments of part-timers may usefully enrich the tribunal as a whole. It has been emphasised to us that, for this reason, it is very important not to take any steps which might jeopardise the recruitment of part-timers of the high calibre of those presently serving. There may also be practical advantages in using part-time tribunal members who are locally based to deal with relatively short cases heard in centres outside London. However, we think that the balance between full and part-timers needs to be addressed. In particular, part-timers should not be used to fill what amounts to a recruitment gap for full-timers as anything other than a bridging measure. Such a policy fails to accommodate the need for enough full-timers suited to dealing with long and complex cases.

8.17. It is considered that the main reason for the disparity in recruitment of full and part-timers is that those available to sit part-time include those past retirement age, who are already entitled to pensions, and those in the final years of successful professional careers, who are able to elect to continue these on a part-time basis. It appears that, by contrast with judicial appointments in some other areas of law, a full-time appointment is not sufficiently attractive to induce enough applications from high-calibre appointees moving towards the peak of their professional careers.

8.18. The reasons why the problem has arisen appear likely to be connected to either or both of the remuneration offered and the future career prospects of those appointed. The levels of remuneration will tend to compare very unfavourably with those received by a successful practitioner of suitable standing. This is, of course, true of many other forms of judicial office. However, unlike appointment as assistant recorder, district judge or stipendiary magistrate, for example, appointment as a Special Commissioner or VAT and Duties tribunal chairman carries with it no real prospect of more senior judicial appointment. By statute, the judicial offices from which a circuit judge may be appointed include office as a Special Commissioner or VAT and Duties tribunal chairman, and an appointment as assistant recorder is also possible, but no such appointment has ever been made. The basis of selection may be regarded as militating directly against any such appointment. The views of serving judges about a candidate are a very important factor. However, they will normally have little or no opportunity to reach an informed view about the strengths and weaknesses of a full-time tax tribunal member. The result is that a full-time appointment as a Special Commissioner or VAT and Duties tribunal

[180] There are two full-time Special Commissioners, two full-time Chairmen of VAT and Duties Tribunals and one full-time appointee who combined both offices.

chairman is seen as an evolutionary cul-de-sac. Although undoubtedly a worthwhile and challenging role, it is inevitable that many able practitioners will find the lack of real prospect of a more senior judicial appointment a significant deterrent.

8.19. We recognise that this is part of a wider problem and that the same comments would also apply in the context of legal appointments to some other forms of tribunal. We would welcome initiatives to tackle this wider problem by establishing better links between tribunal appointment and other forms of judicial appointment. We are seriously concerned about the evidence that, in the context of the tax tribunals, there is an under-supply of high-calibre candidates for full-time appointments.

Appointment of other members of the VAT and Duties tribunals

8.20. The Treasury has, by statute, absolute responsibility for appointing VAT and Duties tribunal members, and the Lord Chancellor's Department has no role in this procedure. We understand that this is a relic from the period when the tribunals were not the responsibility of the Lord Chancellor's Department but of Customs and, through it, the Treasury. It is anomalous for the responsibility for appointment of the tribunal chairmen and members to be split between two separate departments on this basis. It is also out of line with modern practice in relation to most other forms of tribunal.

8.21. We understand that in practice the appointment system operates not unlike that in certain other forms of tribunal where the responsibility for appointing members rests with the tribunal President. Prospective members are interviewed by the tribunal President, who makes recommendations to the Treasury on appointment. We have not encountered any criticisms about the calibre or suitability of members. This is probably because of the small numbers involved, which enable the tribunal President and Vice-Presidents to meet and assess all candidates personally. But there is lack of transparency about the basis on which appointments are made. The process by which candidates are nominated is not well known—for example, vacancies are not advertised, although we understand that the President does consult from time to time with organisations likely to be suitable sources for nominations.

8.22. The present closed system under which members are appointed is also difficult to reconcile with the general moves towards open judicial appointment procedures already referred to. If, following the introduction of open appointment procedures for VAT and Duties tribunal chairmen, a closed system continues to operate for tribunal members, this may give the misleading impression that lay members of tribunals are in some sense second-class members, whose appointment is a matter of less importance than that of legally qualified members.

8.23. We would therefore like to see responsibility for appointment transferred formally to the Lord Chancellor's Department, and the adoption of open appointment procedures more closely analogous to those to be followed for legally qualified tribunal members.

Legally qualified and other tribunal members; composition of the tribunals

8.24. We believe that at this level the arguments in favour of both forms of tribunal including at least one legally qualified member are similar to those which are accepted in the context of a large number of other tribunals and for the courts. While a case could be made for some of the less technical VAT appeals to be dealt with by a tribunal without a legally qualified member, as with similar categories of direct tax appeal—we consider that these would best be addressed as one of the issues surrounding a move to a unified tax tribunal system covering both direct and indirect tax. The majority of appeals heard by the Special Commissioners, and the VAT cases which would correspond to these under a two track system, will centre on points of law, or issues of mixed law and fact, on which there is genuine uncertainty. Such cases are not suited to determination by an exclusively lay body.

Scope to include more than one legally qualified tribunal member

8.25. The Special Commissioners can sit in pairs[181] and this is felt to be useful in specially difficult or sensitive cases. At present it is not possible for a VAT and Duties tribunal to include two legally qualified members, even where the sole issue is a difficult point of law—the chairman must sit alone or with a lay member. But where the outcome of an appeal depends purely on a difficult point of statutory interpretation[182] a lay member is unlikely to be able to make any distinctive contribution. We believe that there are strong arguments in favour of providing for two legally qualified members to sit together in such cases—particularly if the point is one of wider importance, or there are conflicting lines of authority.

The role and allocation of lay members

8.26. It is considered important that members should sit reasonably frequently to develop their experience in a judicial capacity, and it is understood that the number of members of VAT and Duties tribunals at present are at about the right level to achieve this. However, the basis on which members are allocated to individual cases is not very clear to outsiders. As already noted this is done by the Tribunal President or Vice-President following a reading of the papers, but it would be helpful if the working criteria which they use in allocating members were generally available.

8.27. Just as VAT tribunal chairmen under the present structure cannot sit in pairs, the Special Commissioners cannot sit with lay members. This also seems arbitrary. The value of the contribution made by lay members is widely accepted in other forms of tribunal, and has been emphasised to us by VAT and Duties tribunal chairmen. We have already noted that lawyers have no monopoly of wisdom in deciding matters of fact, and members' practical experience (in business or financial matters, for example) may be very useful to the tribunal. They may also help to ensure that the tribunal is accessible to the lay taxpayer, particularly where he is unrepresented. Subject to the point made in the previous paragraph about the criteria for the allocation of members, there would seem to be good arguments for allowing the Special Commissioners also to sit with lay members in appropriate cases.

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[181] Or in threes (as in *Taylor Clark International Ltd* v. *Lewis* [1996] STI 1551), but this will be extremely rare.
[182] *Smith* v. *Schofield* [1993] STC 268, HL would be a good, though unusually extreme, example.

Institution of the special tax tribunal under a unified tribunal system

8.28. The harmonisation of the rules governing the membership of the VAT and Duties tribunals and Special Commissioners along the lines suggested above would tend to ease the transition to a unified system. Under such a system, the requirement for experience in fiscally related areas of law and practice would become still more important. Under the present system, of course, VAT and Duties tribunals decide a substantial number of appeals with little technical content, including most reasonable excuse and mark-up cases. Provided that it is possible to identify in advance the cases within this category, and there is a system under which these can be allocated to chairmen with less specialist knowledge, it may be feasible to build up technical expertise gradually following appointment.

Composition of the special tax tribunal

8.29. We believe that this might also mark the right time to reconsider the categories of lay member, to ensure that it is possible to tailor the composition of the tribunal to the type of issues involved. In particular, because of the different perspective brought by tax practitioners from an accountancy background, it might be helpful to make provision for inclusion of a tax practitioner other than a lawyer when the tribunal is hearing some cases centring on technical issues.

8.30. We also believe that it would be the right time to move to a presumption that the tribunal should generally consist of three members, in line with the practice in the majority of other tribunals. This would, however, be a presumption rather than a rigid rule, to allow flexibility. Cases solely concerned with a complex area of law, for the reasons already discussed, would be suited to hearing by two legally qualified tribunal members. In rare cases (and in interlocutory matters), it might be appropriate for a single legally qualified member to sit. Where a decision was taken that the tribunal was to consist of fewer than three members, the parties would be notified of the decision, and would have the opportunity to require reasons for this. If not satisfied with these, they would be able to make representations as to why additional member(s) should be allocated.

Provision of expert advice

8.31. We have considered carefully the case for and against including tribunal members appointed for their expertise in or experience of specialised businesses or technical subjects which might be relevant to particular categories of appeal (for example, experience of specialised industrial sectors such as insurance, oil exploration or shipping). On the one hand, members with expertise in technical areas may be able to clarify and explain relevant issues for the tribunal as a whole, or equip it to put relevant questions to representatives for either side during the presentation of the case. On the other, it would be difficult to decide which categories of specialist should be included and how individuals should be selected.[183] There is also a risk that the views of such members may have an undue influence on the tribunal's decision in a potentially controversial area, on which one or both sides may have presented

[183] It would be difficult to decide what areas of business, for example, were to be deemed sufficiently esoteric to justify a specialist member. The problems stem from the fact that the role of the specialist member would relate to the context or to the interpretation of or weight to be attached to evidence, and not to the actual (tax) issues for determination. The position is rather different where the core issue on which the tribunal is adjudicating is the subject of the tribunal member's expertise (say, valuation in the context of a Lands Tribunal case heard by a surveyor member, or a person's state of mental health in the context of a mental health review tribunal hearing where one member of the tribunal will be a medical practitioner).

expert evidence. Even if the tribunal member concerned takes great care during the tribunal's deliberations to distinguish matters of (technical) fact from expressions of opinion about expert evidence presented, it will be natural for other members of the tribunal to give substantial weight to his views on matters within his area of expertise. It is, after all, because of this he has been asked to sit on the case in the first place.[184]

8.32. The other difficulty is that any expert evidence given will either have been agreed between the parties or, where presented for one party only, will be known to the other party, who will have an opportunity to dispute the analysis put forward. By contrast, any advice given, or assumptions made by an expert member of the tribunal on the basis of existing knowledge may not be known to the parties and certainly will not be open to examination or question in the same way as expert evidence.

8.33. We believe that the balance of arguments in the tax context is against the appointment of expert members. But we have noted that some other forms of tribunal[185] have the ability to call on an expert to provide advice to the tribunal on technical matters either personally or in the form of a written opinion, effectively as *amicus curiae*. We think that it would be useful for the special tax tribunal to be able to call on a member of a panel of independent advisory experts in this way. This would enable it to obtain independent advice on technical matters, but in a form which would mean that the nature and scope of the advice was open for comment and, where appropriate, dispute by either party.

A potential role for High Court judges sitting as members of the special tax tribunal

8.34. It has from time to time been argued that there should be an extension of the present very limited rights to leapfrog the tax tribunals and proceed direct to the High Court. One of the factors underlying such proposals is concern that there may be some appeals on which the broader experience and authority of a High Court judge would be valuable at first instance. We accept that there are some appeals within this category, but believe that the number is very small. And even for this small group of genuinely exceptional cases, an appeal direct to the High Court would carry some disadvantages. The benefits of the tribunals' specialist tax knowledge and of their relatively flexible and informal procedural rules would be lost, and the waiting times to hearing would normally be longer. In addition, the parties would have to consider the higher professional costs involved and the attendant risk that costs will be awarded against the losing party.

8.35. We would suggest that if it is appropriate to make special provision for this small group of cases, it should be done by providing for one of a group of nominated High Court judges to sit as an *ex officio* member of the relevant tax tribunal, in cases where the tribunal President or Presiding Special Commissioner considers that there is a genuine need for this. Such provision could be made in relation to the VAT tribunals and Special Commissioners under the present system, as well as for the special tax tribunal under a unified system. We would expect this to apply only in very exceptional circumstances. An example might be a particularly lengthy and difficult fraud case. The group of nominated judges would initially be the same as those nominated to deal with tax appeals at High Court level (see Ch [ ], and

[184] This view is supported by the findings of Peay (1989) in her study of mental health review tribunals in relation to the medical member: see pp 88, 111, 114, 123-6, 131, 183-4, 187-8. However it may be argued that no general principles can be based on these because medical opinion, particularly on mental health issues, is a special case.

[185] Including the Social Security Commissioners.

who would therefore have experience of dealing with tax cases, but would also benefit from the technical expertise of a VAT and Duties tribunal chairman or Special Commissioner with whom they would sit. It would follow that any appeal from the decision of the tribunal in such a case would lie to the Court of Appeal and not to the High Court. Again this proposal is put forward as an option for further consideration.

Summary

8.36. VAT tribunal chairmen and Special Commissioners should be required to have experience of areas of law and practice relevant to their jurisdiction, as well as meeting the statutory minimum period of qualification. The moves to open recruitment are to be welcomed, and initiatives should be considered to extend the pool of applicants particularly for full-time appointments, as the calibre of appointees at this level has considerable practical impact on the development of tax law.

8.37. A policy of open recruitment needs to be developed for lay members, and formal responsibility for appointment of VAT tribunal members should be transferred from the Treasury to the Lord Chancellor's Department.

8.38. We see no clear justification for the different rules governing the composition of the VAT and Duties tribunals and Special Commissioners, although the fact that the VAT and Duties tribunal deals with the full range of cases on the taxes within its jurisdiction means that some differences in the way individual cases are dealt with is inevitable until the move is made to a unified tribunal system.

8.39. We would suggest that rules governing the composition of both forms of tribunal should be assimilated. The object should be to provide a flexible structure which will enable both tribunals to accommodate the full range of disputed issues with which they deal. The following principles should apply:

- **both VAT tribunal chairmen and Special Commissioners should be able to sit with one or two lay members, depending on the nature of the case;**
- **in cases centring on difficult issues of law, two legally qualified members should be able to sit together, with an additional lay member if there are other aspects of the case which make this appropriate; and**
- **it would be helpful if the working criteria for the allocation of tribunal members to particular cases were more widely known.**

8.40. The assimilation in the rules for the composition of the two forms of tribunal would ease the transition to a unified tax appeals system. We suggest that the formation of the special tax tribunal for the purposes of a unified system would mark the right time to move to a presumption that the tribunal should generally consist of three members. While there would be cases in which it was appropriate for two members or even, occasionally, one member to sit, the parties would be notified of this decision and would have a right to make representations. We consider that the balance of arguments in the tax context is against making provision for the tribunal to include members appointed on the basis of expertise in specialised business or technical subjects. However, the tribunal could be enabled to draw on specialist expertise by referring questions to an expert for advice or a written opinion.

8.41. Finally, there could be provision for one of a panel of nominated High Court judges to sit as an *ex officio* Special Commissioner or member of the VAT and Duties tribunal or as a member of the special tax tribunal under a unified system. This would arise only at the invitation of the tribunal president, in genuinely exceptional circumstances. This might include very lengthy and difficult fraud cases. It would follow that any appeal from the decision of the tribunal would lie to the Court of Appeal and not to the High Court.

CHAPTER 9. OTHER ISSUES ON APPEALS TO THE TRIBUNALS

Introduction

9.1. Under a unified tribunal system with two tax tribunals, it would be necessary to reconsider the basis for dividing appeals between the tribunals. For taxes administered by the Revenue this issue already arises in relation to the Special and General Commissioners. For forms of tax administered by Customs this would be a new requirement. However, for reasons discussed below, we consider that the present arrangements for Revenue-administered taxes are unsatisfactory, and therefore cannot be used as a model for other forms of tax.

9.2. In addition, it would be necessary to consider afresh the existing discrepancies between the procedural rules for the three tribunals under the present system, before devising rules for the general and special tax tribunal. It would, of course, be possible simply to use the existing General and Special Commissioners' rules as blueprints for the new tribunal if this was considered appropriate.

Jurisdiction on the hearing of appeals at first instance

9.3. As already noted, all appeals under the statutory appeals procedure in relation to taxes administered by Customs lie at first instance to the VAT and Duties tribunal. By contrast, appeals on taxes administered by the Revenue may lie to the General Commissioners, Special Commissioners, Lands Tribunal or the High Court. We have already addressed in Chapter 4 the problems which arise out of the form and location of the rules governing the jurisdiction of these various bodies, and the lack of cross-referencing between them. But even if they were redrafted and reorganised to eliminate these problems, many aspects of the rules would continue to be very difficult to defend in policy terms.

Division of jurisdiction between the Special and General Commissioners

Exclusive jurisdiction

9.4. The issues on which the Special Commissioners have exclusive jurisdiction are set out in a plethora of individual provisions, covering out around 50 different types of appeal[186] (as well as a small number of questions on apportionment).[187] At least, prior to self-assessment, the only question to be asked was whether or not the Special Commissioners had exclusive jurisdiction over an appeal. However, a number of unrelated issues may arise out of a single self-assessment some of which would, in isolation, require an appeal to the Specials, and some of which would not. The Revenue decided to deal with this by providing that the Special Commissioners must decide a similar—but not identical—range of questions even if the appeal as a whole is decided by the General Commissioners. Matters are further complicated by the fact that the range of questions to which this applies differs somewhat, depending on the type of decision or action against which the appeal lies.[188] The effect has been to add additional

[186] Clearly there is scope for debate about what constitutes a "type" of appeal: it has been assumed for present purposes that appeals relating to decisions under different provisions are to be treated as different types of appeal.
[187] See ICTA 1988 s.343(10), 783(9), 102(1) and CAA 1990 s.151.
[188] Broadly, the position may in some categories of case be different depending on whether the appeal is (a) an appeal against an amendment of a self-assessment by an individual or against an amendment of a partnership statement (hence within both TMA s.46B(2) and s.46C(2), or one of

complexity to an already very complicated set of rules. Re-wording the existing rules without changing their substance will not, of itself, solve this problem.

9.5. The actual criteria governing the issues reserved for the Special Commissioners are also questionable. The main factors are, first, whether an assessment is made by, or a claim is made to, the Board and, second, the statutory provision under which the issue arises. But good reasons for an assessment to be made by, or a claim made to, the Board do not always translate into good reasons for an appeal to be heard by the Special Commissioners.[189] And both very technical and relatively non-technical cases may arise under any provision of the tax code. Difficult questions of statutory interpretation may arise in relation to almost any section. Conversely, some appeals which arise out of a fairly esoteric area of the tax legislation may turn on one or two issues of fact.

9.6. Further, variations in the way the policy has been applied or, possibly, the perspective of different policy-makers, have led to numerous anomalies in the way the rules operate. The following are some examples of outcomes which seem difficult to justify in policy terms.

- All inheritance tax appeals must go to the Special Commissioners (or High Court), but the majority of capital gains tax appeals can be heard by the General Commissioners.
- A charity which claims relief from tax under Schedule D under s.505(1) has to appeal against an amendment of the claim to the Special Commissioners (because the claim is to the Board), but if it claims CGT relief on the same basis under s.256 TCGA, it can appeal against an amendment of the claim to the General Commissioners.
- In the types of appeal listed at TMA s.46B(2) (including appeals against amendments of a self-assessment) questions relating, broadly, to the value of unquoted shares in a UK resident company for chargeable gains purposes have to be referred to the Special Commissioners. If the shares are not in UK resident company, or the value is relevant to a computation of trading profits rather than for the purposes of chargeable gains, the General Commissioners can decide the valuation questions.

Examples such as these tend to highlight the fact that decisions appear to have been made on a largely pragmatic basis and without reference to any clear and consistent policy about the proper scope of the General Commissioners' jurisdiction.

Election for the Special Commissioners

9.7. In the majority of cases the appeal will lie to the General Commissioners unless the taxpayer elects for the Special Commissioners. In theory this ensures that the taxpayer has the right to opt for a hearing before a qualified specialist tribunal, whose members will be drawn from outside his local area. But the taxpayer only has 30 days after giving notice of his appeal

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the types of appeal in s.46B(2)(c)-(f), which include appeals against discovery assessments and amendments of claims or elections made outside a return.

[189] A particularly glaring example relates to claims for retirement relief. Most claims for retirement relief do not have to be made to the Board, and so an appeal against refusal lies to the General Commissioners unless an election is made for the Special Commissioners. However, if retirement relief is claimed below the normal age limit on health grounds, the claim must be to the Board (TCGA 1992 Ch 6 para 5(4)), presumably because of concerns about the scope for abuse. So if a claim included in a return is the subject of an amendment following an enquiry because evidence of ill-health (produced pursuant to TCGA Sch 6 para 3(5)) is unsatisfactory, the issue can only be determined by the Special Commissioners (TMA 1970, s.46C(1)). In the result, the validity of a claim to early retirement relief on the grounds of ill-health, for which it might be argued that a sound commonsense approach from a lay tribunal would be particularly valuable must be determined by the Special Commissioners. The lay General Commissioners, on the other hand, are free to determine difficult points of statutory interpretation in relation to the relief, or a case involving elaborate calculations as to the quantum of relief, provided the claim to the relief is made at or after the normal statutory age limits.

to elect for hearing before the Special Commissioners. Otherwise his case will automatically go to the General Commissioners unless the Revenue permits a late election. Once made, an election can be withdrawn only if the Revenue agrees to this.

9.8. It is wholly unrealistic to expect an election to be made this early in the appeal procedure, when frequently neither party will be clear as to what issues will be at the core of the appeal.[190] Further, taxpayers who have no regular tax adviser and who try to deal with matters themselves until it becomes clear that a hearing will be required may well be unaware of the right of election until it is too late.[191] Of course, in individual cases the Revenue may permit a withdrawal or late election, or an application may be made to transfer the appeal. But we do not believe that it should be necessary for the parties and the tribunals to disentangle later a problem which is the direct result of inappropriate statutory provisions. Nor should the taxpayer have to rely on the Revenue's goodwill to mitigate the consequences of these.

The first instance jurisdiction of other bodies

9.9. Although the rules governing the first instance jurisdiction of the other bodies are less complicated and wide-ranging, they are also open to criticism both in general terms and at the level of detail. The type of tax in the context of which the appeal has arisen is one of the main factors determining where it is heard. But it is hard to see why this should be the case: the nature of the issues does not depend to any great extent on the type of tax, and the outcome often appears arbitrary. Why should disputes involving identical issues be decided by the Special Commissioners, General Commissioners or High Court, depending on the type of tax to which they are relevant?[192] Why should all stamp duty cases (even where the only dispute is as to valuation of property, for example), and a limited category of inheritance tax or stamp duty reserve tax cases[193] bypass the tribunals altogether and start in the High Court? And why should the Lands Tribunal have jurisdiction over land valuation issues in the context of certain taxes but not others?[194]

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[190] Under self-assessment, for some types of appeal (e.g. appeals against amendment) an appeal will relate to a single disputed issue the nature of which has been clearly established during an inquiry, so that the taxpayer will be well aware of the factors involved in a choice to elect for the Special Commissioners. But in some cases self-assessment will make the decision whether to elect more difficult. An appeal may relate to two very disparate matters arising out of a single self-assessment—say, the computation of trading profits and a technical issue about indexation for the purposes of capital gains tax. The taxpayer may elect for the Specials because of the second point. But he has no specific right to withdraw the election if this aspect of the case subsequently settles, leaving the first issue outstanding. The same would apply where he elected for the Specials on the basis that one of the outstanding issues (later settled) would have to be referred to the Specials in any event.

[191] Self-assessment will add an extra twist to this, since a taxpayer may find that issues have to be referred to the Special Commissioners even though it is too late to elect for the appeal as a whole to be heard by them.

[192] For example, in a hypothetical dispute with the Inland Revenue about the value of certain unquoted securities transferred in exchange for land, the forum for the first instance hearing of the appeal could be as follows:

- if the dispute was in the context of stamp duty, the High Court;
- if the dispute related to the amount of the consideration for capital gains tax purposes, technically, either the General Commissioners or, at the taxpayer's election, the Special Commissioners, but the substance of the appeal would actually have to be determined by the Special Commissioners—unless the securities were in a company which was not UK resident in which case (see para 9.6 above), the appeal could be disposed of entirely by the General Commissioners;
- if the dispute arose in computing the amount of the profits/loss realised on application of the *Sharkey* v. *Wernher* principle, the General Commissioners or, at the taxpayer's election, the Special Commissioners.

[193] Either the parties must agree on this, or else the High Court must be satisfied that the matters to be decided are likely to be substantially confined to matters of law and give leave. For a somewhat counter-intuitive interpretation of the conditions for the latter, see *Bennett* v. *IRC* [1995] STC 54.

[194] If questions about the valuation of land in the UK need to be referred to the Lands Tribunal where these arise in the context of an inheritance tax appeal, CGT appeal, or SDRT appeal, it is unclear why the same should not apply where the question arises in the context of income tax or corporation tax on trading profits or stamp duty, for example.

Options in relation to rules for allocation of appeals

9.10. The present arrangements for the allocation of direct tax appeals are both complicated and unsatisfactory. The rules governing the allocation of appeals relating to different types of taxes need to be rationalised.

First instance hearing in the High Court

9.11. We have considered carefully the arguments in favour of retaining and extending the present very limited rights of appeal direct to the High Court. This would reduce the number of layers of appeal for some cases likely to progress to the higher court. And the experience and authority of a High Court judge might be better suited than any form of tribunal to determining a very small number of specially difficult and sensitive cases centring on points of law. But we believe that these advantages can be best secured by other means.

9.12. We share the view that there are at present too many tiers of appeal. However, this problem affects many cases which are not confined to points of law. And it is generally accepted that, where the factual as well as legal matrix of a case has to be resolved, the Special Commissioners or VAT and Duties tribunal as a specialist tax tribunal have an important contribution to make, and one which is frequently acknowledged by the higher courts of appeal.[195] We believe that the number of tiers of appeal needs to be reduced for a wider range of cases, and we discuss the solutions to this in Chapter 11.

9.13. As already noted, we believe that if there are a very small number of cases where the involvement of a High Court judge at first instance could be objectively justified this would be best achieved by providing for one of a group of nominated High Court judges to sit as an *ex officio* member of the relevant tax tribunal and not by re-routing appeals to the High Court.

The Lands Tribunal

9.14. The Lands Tribunal is one of the most respected of the tribunals and is clearly better equipped than any tax tribunal to decide difficult valuation issues. However, it will be rare for the sole question at issue in a tax appeal to be a question of pure valuation, and referring one issue in an appeal primarily being decided by the tax tribunal to another body is likely to occasion some extra delay, costs and inconvenience. We suggest that the initial decision whether to refer a valuation question (of its own motion or on application) should be left to the tax tribunal, subject to a right of appeal against its decision, and should apply equally in the context of all forms of tax.

Division of appeals between the General and Special Commissioners or general and special tax tribunals

9.15. The difficulty here is that, although the present system is clearly indefensible, the standard tests used for allocating cases in civil litigation are not well suited to this context.[196] We believe that the only realistic options, at any rate in relation to the main direct taxes, are:

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[195] The same principle is acknowledged in relation to the Lands Tribunal, Social Security Commissioners, Immigration Appeal Tribunal and EAT in their own specialist fields.

[196] The amount in dispute may be wholly uncertain until the principles by which it is to be qualified are settled: if this was to be a determining factor it would also be necessary to take into account such factors as interest, knock-on effects on other aspects of the taxpayer's computations (e.g. additional reliefs available or utilised). As already noted, outside highly specialised forms of tax such as PRT for which there may be a

- to extend the existing rights of election by taxpayers to cover appeals generally; or
- to provide for all requests for listing to be made to the General Commissioners with power for them to transfer appeals in appropriate cases.

9.16. But the practical difference between these two options is less than might at first appear. Even if rights of election are extended to cover all cases, these would have to be subject, as at present, to transfer arrangements. The General Commissioners would have to be able to transfer appeals to the Special Commissioners. Otherwise they could be required to hear obviously inappropriate cases or cases which would present practical difficulties because they require several days' hearing. As a safeguard, there would also have to be provision for the Revenue to apply to the Special Commissioners for the appeal to be transferred.

9.17. Conversely, if there were no initial election, but the General Commissioners had power to transfer the appeal, both parties would have to be entitled to apply for transfer and, if refused, to apply to the Special Commissioners for transfer.

9.18. The only real practical difference between these options is therefore whether the taxpayers should have a unilateral right to choose the Special Commissioners or whether he should, effectively, have to convince one or other tribunal of his case for doing so. We prefer the former, both to reduce costs and delays and because (at least so long as the General Commissioners remain a lay tribunal) the principle should be that the taxpayer is entitled to have his case heard by a body which includes a legally qualified member.

9.19. For similar reasons, on balance we believe that it should not be possible for a contentious case to be transferred from the Special to the General Commissioners without the taxpayer's agreement. The greater formality of the Special Commissioners and the fact that, inevitably, hearings will be less local will mean that the majority of, say, straightforward cases on matters of fact, including reasonable excuse cases, are still dealt with by the General Commissioners.

9.20. It is suggested that all requests for listing should be made to the appropriate division of General Commissioners. Following such a request, the General Commissioners could transfer the case to the Special Commissioners. Otherwise, the taxpayer should receive a letter explaining his right to elect for the Special Commissioners within 30 days. This should be accompanied by a leaflet explaining more about the two forms of tribunal and suggesting where the taxpayer may obtain further advice. The Revenue should be given 30 days to apply for a transfer to the Special Commissioners. At this stage, both parties should normally have a reasonable idea of the issues in dispute. If the Revenue applies for a transfer, and the taxpayer objects, the transfer should not be made without a hearing. Thereafter cases could be transferred either by agreement between the parties, or by the tribunal, to allow for the fact that in some cases new issues may emerge, or the case appears likely to require several days' hearing at a later stage.

9.21. The principles set out here are described in terms of the Special and General Commissioners, but they could be applied directly to the general tax tribunal and special tax

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special case, and which are considered below, neither the type of tax in question, nor the statutory provision under which the issue arises is a good guide to the nature of the issues, but the latter are difficult to categorise formally in any other way.

tribunal under a unified appeals system and would cover VAT cases. Cases in relation to other forms of taxation administered by Customs might be dealt with separately (see below).

Reservation of issues on certain taxes for the Special Commissioners or special tax tribunal

9.22. The arrangements set out above should make adequate provision for the main forms of direct tax and, under a unified appeal system for VAT case as well. However, it may be argued that all appeals relating to the more specialised forms of tax should lie to the Special Commissioners or special tax tribunal. The problem here is whether, particularly if the General Commissioners or general tax tribunal continue as a lay body, it is reasonable to expect them to extend their jurisdiction to all forms of tax. It is true that some appeals in connection with stamp duty, for example, may hinge on a relatively self-contained issue of fact. However, even in such cases it will be necessary to have a grasp of the basic framework of the tax. To achieve this across the full range of types of tax would impose a significant additional burden on the General Commissioners and general tax tribunal. This seems inappropriate, particularly since any given division or tribunal would actually be faced with an appeal in one of these areas very infrequently.

9.23. We therefore think there is a strong case in principle for appeals to lie automatically to the Special Commissioners or special tax tribunal where they relate to a specialised form of taxation for which the majority of appeals involve technical issues or substantial sums and would be referred to the Special Commissioners in any event. The way in which this principle should be translated to specific forms of tax may leave more room for dispute. Petroleum revenue tax (PRT), SDRT, insurance premium tax and landfill tax are obvious candidates. Duties cases, at any rate until the jurisdiction is better established might be added, as might stamp duty. Inheritance tax is probably a borderline case: the balance of argument here would be affected by whether the tribunal involved was a lay tribunal. If it included a chairman with tax experience and expertise there would seem to be no reason why IHT cases should not be treated in the same way as CGT cases, and be subject to the mainstream rules.

Procedural rules

9.24. Detailed points on procedural rules are outside the scope of this document. However, we have noted the following key points.

General form of the VAT and Duties tribunal rules

9.25. Although the procedural rules for the Special and General Commissioners were the subject of a prolonged and extensive consultation exercise, there has never been any similar exercise in relation to the VAT and Duties tribunal rules. The rules currently in force are still substantially in the form made by Customs before the Lord Chancellor's Department took over responsibility for the procedural rules for this tribunal. The view that they are unduly detailed, formal and complicated appears to be fairly common.[197] They are certainly more formal and specific than those for the Special Commissioners, and than the Council on Tribunal's own Model Rules.[198] But given the wider spread of cases (in terms of amounts at stake,

[197] These have in the past been the subject of criticism by the Council on Tribunals: see its Annual Report 1985-6 p.59-60 at para 4.70-73.
[198] Council on Tribunals *Model Rules of Procedure for Tribunals* Cm 1434, London, HMSO, 1991.

sophistication of taxpayers etc.) heard by the VAT and Duties tribunal, it might have been expected that the level of detail and formality of the rules would have been somewhere between that for the Special and that for the General Commissioners. There is some anecdotal evidence that the practical problems which the form of the rules would otherwise create are avoided because these are honoured more in the breach than the observance. We think that the general tenor of the rules should be reviewed.

Specific discrepancies between the Commissioners and VAT and Duties tribunals

9.26. Although it would be possible for appeals in relation to taxes administered by the Revenue and taxes administered by Customs to be dealt with under separate procedural rules even under a unified tribunal system, this would be likely to highlight the numerous specific discrepancies which exist between the present rules for the Commissioners and for the VAT and Duties tribunal. Some of these appear to be the result of different policy decisions on essentially similar questions (e.g. as to the award of costs); others reflect the present differences in the composition of the tribunals (e.g. the preservation of the case stated for the General Commissioners), and others are fairly trivial. We see no justification other than administrative considerations for preserving these discrepancies and believe that under a unified tribunal system the procedural rules should be focused not on the type of tax but on the nature of the case.

The making of appeals

9.27. Appeals against decisions by Customs are made direct to the VAT and Duties tribunals, and trigger the start of a pre-hearing timetable; in Revenue-administered taxes, appeals are made to the Revenue and a considerable amount of time may elapse before a request for listing is made. We think that steps are required to make the taxpayer's right to request listing better known. Although the discrepancy could persist under a unified tribunal system, it is likely that this would increase pressure to reduce the period between appeal and hearing in direct tax cases.

9.28. It also seems likely that making an appeal direct to the tribunal helps to prevent misconceptions about the role of the tribunal and the degree of independence it enjoys. Where the appeal is made to the Revenue, and the Revenue then requests listing, it is easy for this to create the false impression that the tribunal is a body linked to the Revenue which the Revenue has invited to deal with the case.

The award of costs

9.29. The two most controversial issues in the consultation exercise on the Commissioners' rules appeared to be the award of costs and whether hearings should take place in public or private. In both respects there are discrepancies between the position for the VAT and Duties tribunal and the Commissioners. Our consultations suggest that there is still no clear consensus on these issues.

9.30. There has been continuing pressure from some sources for the rules on costs before the Commissioners to follow the rules and practice in VAT and Duties tribunals. The tribunals have a general discretion to award costs, but in practice Customs will only ask for costs in

exceptional circumstances.[199] On the other hand, we understand that Customs is increasingly concerned about the rise in the costs associated with appeals, and that the Revenue would be very reluctant to adopt a similar position in direct tax cases.

9.31. An alternative might be to reduce the very stringent restrictions on the Special Commissioners' powers to award costs, while preserving the "no costs" rule before the General Commissioners. At present costs can only be awarded against a party who has acted "wholly unreasonably in connection with the hearing in question".[200] An award of costs has actually been made against the Revenue under this provision,[201] but the requirements will very rarely be satisfied. It would be possible to broaden their scope, for example, by providing for an award of costs against any party who has acted unreasonably in connection with the appeal.

Hearings in public/private

9.32. The 1994 procedural rules for the Special Commissioners provided that hearings should be in public except where otherwise requested.[202] This arrangement is apparently now widely accepted, and requests for a private hearing have been rare. But it appears that proposals to extend similar arrangements to the General Commissioners would still be controversial

Summary

9.33. The arrangements for allocation of direct tax appeals need to be rationalised. In particular, the rules governing the respective jurisdictions of the General and Special Commissioners should be simpler, clearer and more coherent. We suggest that in relation to the main direct taxes:

- **all appeals should be heard at first instance by either the General or Special Commissioners (and not referred direct to the High Court);**
- **the Commissioners should have power to refer questions relating to the valuation of land to the Lands Tribunal, though a decision not to do so should be subject to appeal;**
- **taxpayers should have a general right to elect for hearing by the Special Commissioners;**
- **this should be exercisable at a time when the issues in dispute will normally be reasonably clear to both parties, and arrangements should be made to ensure taxpayers have some written information about the tax tribunals and the effect of the election; and**
- **the right of election would be subject to transfer provisions fairly similar to the present provisions for transfer of appeals, so that obviously inappropriate or lengthy cases did not have to be heard by the General Commissioners.**

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[199] 24 July 1986, Hansard HC Written Answer Vol 102 col 459-60, also set out as Appendix D to the VAT and Duties Tribunals' Explanatory Leaflet (TRIB 90). Although the statement does provide for a number of exceptions it is understood that in practice it is very rare for Customs to ask for costs.

[200] Special Commissioners (Jurisdiction and Procedure) Regulations 1994/1811 reg. 21(1).

[201] In *Scott v. McDonald* [1996] STC (SCD) 381.

[202] Strictly, on the application of a party other than the Revenue, or on the application of the Revenue if a Special Commissioner so directs : SI 1994/1811 reg 15(1),(2).

Under a unified tax appeals system, the same framework could be applied to the general and special tax tribunals, and would extend to VAT cases as well as the main direct taxes.

9.34. However, in order to keep the General Commissioners' or general tax tribunal's jurisdiction within a manageable compass, separate provision may be required for cases relating to some specialised forms of tax, which are likely in any event to generate a much smaller body of appeals. Such appeals would always lie to the Special Commissioners or special tax tribunal. The case for this approach would be strengthened if the general tax tribunal continues as a lay body. The types of tax to be covered would require further consideration, but should probably include petroleum revenue tax, insurance premium tax, landfill tax and stamp duty reserve tax. Other candidates would be stamp duty, duties and possibly also inheritance tax.

9.35. There is still some dissatisfaction with certain aspects of the existing procedural rules for the tax tribunals. There are also discrepancies between the direct and indirect tax tribunal systems which are difficult to defend except on administrative grounds and some of which are of considerable practical importance.

9.36. We would welcome representations as to the form which the tribunal rules should take, both under the present divided tribunal system and under a unified tribunal system, in the key areas of:

- **the degree of formality and detail in the procedural rules;**
- **the body to which the taxpayer initially appeals;**
- **the rules on the award of costs;**
- **the rules governing whether appeals are heard in public or private.**

CHAPTER 10. APPEALS TO THE COURTS IN ENGLAND AND WALES

Introduction

10.1. The cases which progress beyond the tax tribunals to the courts form a very small proportion of the total number of appeals. However, this small group of cases has a major impact on the tax system as a whole, because the effects of the decisions will normally extend beyond the taxpayers immediately involved. This means that both the quality and the speed of decision-making at this level are extremely important. We believe it is necessary to focus more sharply on the objectives to be achieved at each layer of appeal, and that the keys to improving the tax appeal process in the higher courts in England and Wales are to:

- rationalise the current arrangements in the High Court, under which appeals are allocated between the Chancery Division and Queen's Bench Division;
- return to a system of allocating cases which, like the old Revenue Paper, ensures that tax cases are decided by a group of High Court judges with experience or an interest in tax law and who are enabled to build up their expertise in the field; and
- reduce the number of potential tiers of appeal.

This chapter focuses on the first two points, which are specific to England and Wales. The number of tiers of appeal are dealt with in the next chapter, where we consider also the pattern of appeals in Scotland and Northern Ireland.

Allocation of cases between the Chancery Division and Queen's Bench Division

Appeals from the VAT and Duties tribunals

10.2. Appeals from the VAT and Duties tribunals are governed by the terms of the Tribunals and Enquiries Act 1992 and not by tax legislation. As a result, they lie to the Queen's Bench Division, and form part of the Crown Office List. Appeals from the General and Special Commissioners are instead governed by the specific provisions of the Taxes Management Act 1970, and lie to the Chancery Division.

10.3. It is generally accepted that the Queen's Bench Division is not the right forum for appeals from the VAT and Duties tribunals. The Crown Office list covers a very wide range of cases, including all judicial review applications. This means that normally individual judges will only have to confront VAT issues in a handful of cases during the time in which they sit in the Queen's Bench Division. Few will have much experience of tax at the time of their appointment, and this system makes it very difficult to build up any real measure of expertise in office. While there have in recent years been one or two judges who have successfully overcome these handicaps and whose grasp of VAT law and practice is greatly respected, there is widespread agreement that the present system has an adverse effect on the quality of decision-making at this level.[203]

[203] It is understood that the provisions of RSC Ord 91 rule 6(2), introduced in 1986 following the recommendations of the Keith Committee, and which permit VAT appeals to be heard by a single judge of the Chancery Division with the agreement of the parties, are little known, and almost never used. It appears likely that, as with the provisions for leapfrog from the Special Commissioners and VAT and Duties tribunals to the Court of Appeal discussed in Chapter 11, the requirement for the parties to agree is in practice a stumbling block, because it puts the onus on the parties (or their advisers) to address the issue and request special provision.

10.4. This problem was publicly noted some years ago by the Council on Tribunals, which suggested transferring VAT appeals to the Chancery Division.[204] The Law Commission has proposed instead that a Chancery Division judge should be assigned from time to time to sit as an additional judge in VAT cases, in the same way as Family Division judges are regularly appointed as additional Queen's Bench judges to hear judicial review cases with a family law element.[205] While this would undoubtedly be an improvement on the present system, we feel this falls short of recognising the logic of putting all tax cases into a single division of the High Court. It is true that under Lord Woolf's proposals to bring the administration of the Chancery and Queen's Bench Division closer together, the allocation of cases between the divisions will be of less significance, but we can see no arguments (other than tradition) in favour of retaining VAT and Duties cases in the Queen's Bench. Not only are Chancery Division judges more likely to have had significant exposure to tax issues in practice prior to appointment, but there is also a much closer symbiosis between tax and other areas of the Chancery Division's work than that of the Queen's Bench Division.

10.5. Although the relative length of waiting lists will vary, it is also true that, as Lord Woolf noted in his interim report,[206] at times the pressure of business in the Chancery Division is not as great as in the Queen's Bench Division, so that waiting times are correspondingly shorter.[207] When these factors are taken together, it seems natural to reallocate the appeals rather than to reallocate the judges.

10.6. In relation to the appeals flowing from VAT and Duties' tribunal's more recent jurisdictions in relation to duties, insurance premium tax and, now, landfill tax, the arguments for transfer would be more finely balanced if these were being taken in isolation.[208] However, similarities between the administrative and appeals provisions and those for VAT mean that in other cases there will be obvious advantages in all such appeals being dealt with by the same division. So while there might be doubt about whether the Chancery Division or Queen's Bench Division would be the natural home of such appeals in isolation, there is no case for retaining them in the Queen's Bench Division if VAT appeals are to be heard in the Chancery Division.

10.7. We accordingly propose that all appeals from the VAT and Duties tribunals should lie to the Chancery Division. Our consultations to date suggest that there is widespread support for this proposal. This would also eliminate the present anomaly under which leave is required for a further appeal from the Queen's Bench Division to the Court of Appeal in VAT and Duties cases, but not for a further appeal from the Chancery Division in direct tax cases. All types of case would be subject to the same arrangements.[209]

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[204] Council on Tribunals Annual Report 1992-3 at para 1.66.

[205] Law Commission Report *Administrative Law: Judicial Review and Statutory Appeals* at para. 12.29.

[206] *Access to Justice: Interim Report* Ch 11 para 12.

[207] At present this is not a serious problem: waiting times for VAT cases in the Queen's Bench Division have improved very considerably since the Law Commission pointed out that the average waiting time between the VAT tribunal decision and the decision in the Queen's Bench Division of the High Court was just over two years (Law Com No 226 at p.114 footnote 65). The figures were based on cases for 1993, and the average time elapsed was 24.92 months: see also Appendix C at 3.4-3.5 and the table in Annex 2 to that appendix, showing the comparative figures for different types of outstanding cases in the Crown Office list.

[208] Some such cases will involve highly specialised issues which would not arise in the context of any other form of taxation. From a judicial (rather than economic) perspective, the affinity of cases involving such issues to other tax cases is no greater than to some of the other types of case heard in the Queen's Bench Division.

[209] Under Lord Woolf's proposals, further appeals from the High Court would be with leave only: *Access to Justice: Final Report* at Ch. 14, para 50.

Judicial review cases

10.8. Judicial review cases present a more difficult problem. At present, they are also dealt with in the Queen's Bench Division, and we recognise the difficulty of transferring to the Chancery Division a judicial review jurisdiction and associated procedural rules for one area of law only. We would therefore suggest that, subject to the issues raised in relation to the scope of appeal rights in Chapter 3, similar arrangements should be made to those which already exist in family law cases. This would mean that judicial review cases would continue to be heard in the Queen's Bench Division, but normally before either a Chancery Division judge, or a judge who is appointed to both Divisions. This would accord with Lord Woolf's proposals that judges of the Chancery Division with appropriate experience should generally be able to hear cases in the Queen's Bench Division where this would result in the more efficient disposal of cases.[210] However, we recognise that there may be a small number of cases centring on potentially far-reaching questions of public law which would be more appropriately heard by a judge with a broader experience of judicial review jurisdiction.

A panel of nominated judges in the High Court

10.9. Formerly, tax cases in the Chancery Division were collected together in the Revenue Paper and listed for hearing consecutively by one or two judges. There appears to be a substantial measure of agreement that one unforeseen and undesirable side-effect of the abolition of this arrangement[211] was to dilute Chancery Division judges' experience of tax cases. Some of the judges will have prior experience of tax from practice at the bar, but others do not, and the technical nature of the subject means that adequate experience cannot be gained by involvement in a mere handful of tax cases, whether at practitioner level or following appointment.

10.10. We accept that it is crucial for judges at this level to be able to draw on expertise in other fields of law which affords them a wider perspective when considering issues in a tax case. And knowledge of other fields of law may be of direct application in some cases which hinge on questions of statutory interpretation, or questions of underlying (non-tax) law, for example.

10.11. However, it is equally important that the judge should have a reasonable understanding of the legal framework governing the various taxes. At present, counsel on either side may need to explain some of the building blocks of the tax system which underlie the case before being able to focus on the actual point(s) of law arising. This is time-consuming, and therefore increases costs. The present predicament has been well described by Lord Oliver:

> The fact is that judges on the whole–there are a few honourable exceptions whom it would be invidious to name but amongst whom I certainly do not include myself–know very little about tax as a coherent subject. They are called on from time to time to examine under a microscope isolated points arising under particular sections of taxing statutes but few, if any of them have any comprehensive knowledge or understanding of revenue law. The case of the *Queen* v. *the Attorney General* ex parte *ICI*[212] over which I had the misfortune to preside at the end of 1985 is a case in point. It concerned the petroleum revenue tax. I certainly - and I am tolerably certain, both my colleagues–had never before heard of petroleum revenue tax.

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[210] *Access to Justice: Final Report* at Ch. 18, para 5; Ch. 19, para 6.

[211] The Revenue List still exists, but cases are heard by judges, as available, amongst other forms of litigation; appeals will only come on consecutively where the Clerk of the Lists has been able to arrange this to suit other professional commitments of the parties' legal representatives.

[212] (1987) 1 CMLR 72.

> I am not sure that I understood it then, though *they* may have done; but in any event I have never had to refer to it since; and I hope that I never shall.[213]

While a reading of Lord Oliver's judgment in that very complicated case may cast doubt on his own assessment of his grasp of the relevant issues at the time of delivering it, the underlying point is difficult to dispute. In core areas of the common law, it would be considered unacceptable for hearings at this level to include explanations of basic concepts. It would be unthinkable for the hearing in a breach of trust case to start with an explanation about the function of a trust and the role and duties of trustees, or for a case centring on a contractual dispute to open with a question and answer session about the way in which a binding contract is entered into and about the meaning and scope of terms such as consideration, offer and acceptance. But in a tax case on capital allowances or group relief, for example, similar basic explanations may have to be provided.

10.12. This does nothing to enhance the courts' reputation in the commercial world where these concepts are as familiar as fundamental legal concepts are to the judiciary. It may lead to unfavourable comparisons with the Special Commissioners and VAT and Duties tribunals, where basic principles can be taken for granted. In some cases it may undermine the taxpayer's confidence in the appeal procedure, even where, by the conclusion of the case, the judge is able to demonstrate that he has mastered the relevant technical issues.

10.13. In certain cases, the fact that the judge lacks knowledge of other, related tax issues may make it difficult for him to assess the wider implications of particular arguments put forward by counsel, or to take into account the relationship between different provisions for the purposes of interpreting each of them. In part, no doubt, this problem reflects the complexity of tax legislation, which was the subject of our earlier reports.[214] From the point of view of the judge, this has given rise to what was aptly described by Lord Diplock as:

> the need to refer to and from and back and forth between ever increasing numbers of different statutes in order to discover what a particular provision of any of those statutes means.[215]

However, even under a simplified tax code it will not be possible to ensure that all the functions of each statutory provision within the tax code as a whole are immediately apparent on its face. And in some cases where the judge is starting from a baseline of little or no knowledge about the subject-matter, rather than merely addressing the disputed issues in the context of a framework with which he is already familiar, problems may arise from the sheer bulk of information which he has to digest in order to reach a decision.

10.14. A further problem is the fierce pace of change in tax legislation in recent years, to which we first drew attention in our *Interim Report on Tax Legislation*.[216] One consequence of this, which needs to be borne in mind in the context of proposals for reform in this area, is that tax expertise dates more rapidly than expertise in most other areas of law. This has tended to exacerbate the problems caused by tax cases being spread too thinly among High Court judges.

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213 "Judicial Approaches to Revenue Law " in *Striking the Balance: Tax Administration, Enforcement and Compliance in the 1990s* ed. Gammie, M. and Shipwright. A. IFS March 1996 at p.173-4.

214 Tax Law Review Committee, Interim Report on Tax Legislation and Final Report on Tax Legislation·

215 *IRC* v. *Joiner* 50 TC 449 (c.f. the comment of Sir Raymond Walton at [1980] BTR 282, when explaining the importance of a specialist tribunal that "Judges of the Chancery Division can cope with everything except the minutiae of the tax code, and possibly their relationship, one part with another").

216 At Ch 1, pp. 2-4.

10.15. In some areas of law where the need for specialist expertise has long been acknowledged, this has been met by setting up a dedicated court, such as the Patents Court, or by an indirect mechanism, such as the Employment Appeal Tribunal, where a nominated High Court judge sits with two lay members. We do not think that in tax cases such drastic action is required. We certainly see no need for additional specific procedural provisions. We believe that the right solution would be to nominate a small group of judges appointed to the Chancery Division who have some experience of or interest in tax cases, and to whom all tax appeals would be allocated. Some judges from the Queen's Bench Division might be appointed to the Chancery Division also for this purpose. This would enable the nominated judges to build up relatively quickly both their knowledge of key areas of the tax system and their experience of handling tax cases. It would restore an important practical benefit of the Revenue Paper, without reproducing the problems which it is understood that this caused in listing other types of proceeding. Again, our consultations suggest that this would meet with almost universal support.

10.16. We would hope that, in the longer term, the benefits of this system would feed through to the Court of Appeal. At present, there is a widespread view among practitioners that, for the reasons discussed above, the depth of tax expertise in the Court of Appeal is also insufficient and needs to be increased. We discuss a possible, but relatively radical, longer-term solution to this problem in the following chapter. But in any event, we would hope that the panel system would gradually result in an increase in the number of members of the Court of Appeal with substantial experience of tax cases.

Summary

10.17. The present arrangements for all appeals from decisions of the VAT and Duties tribunals to be heard in the Queen's Bench Division of the High Court are unsatisfactory. There is no natural link between such cases and the other matters heard in the Queen's Bench Division. As a matter of principle it would seem preferable for VAT appeals, as well as direct tax appeals, to be allocated to the Chancery Division.

10.18. The existing provisions also create serious practical problems. The most important is that, because of the size of the Queen's Bench Division and the wide range of cases heard there, individual judges will normally only hear a small number of VAT cases. This makes it very difficult for those without prior relevant experience in practice to acquire an adequate grasp of VAT issues, including the effect of European law. In addition, although wait times will vary at different periods, the pressure of business in the Queen's Bench Division tends to be greater than in the Chancery Division. It seems particularly inappropriate for VAT cases to add to this pressure when other considerations point strongly in favour of hearing in the Chancery Division. The arguments for moving appeals on duties, insurance premium tax and landfill tax to the Chancery Division would, viewed in isolation, be less compelling. But there is a strong case for keeping these with VAT appeals.

10.19. Accordingly our view is that all appeals from the decisions of the VAT and Duties tribunal should lie to the Chancery Division.

10.20. Although concentrating tax cases in the Chancery Division will help to rationalise the existing system, additional measures are required to meet the need for greater specialist expertise on the part of judges who decide tax cases at this level. We propose that all tax appeals should be allocated within the Chancery Division to a panel of nominated judges. The panel might include some judges from the Queen's Bench Division, appointed to the Chancery Division for this purpose. This system would enable the nominated judges to build up relatively quickly their experience in dealing with tax cases, without significantly reducing their ability to undertake a broad spectrum of work or unduly narrowing their perspective.

10.21. Judicial review cases in the tax field should remain within the Queen's Bench Division, but should generally be heard by a Chancery Division judge or a judge appointed to both Divisions.

CHAPTER 11. REDUCING THE TIERS OF APPEAL

Introduction

11.1. One of the main reasons for the delay between first hearing before a tax tribunal and a final decision in cases raising important points of principle is the number of tiers of appeal. Every hearing also increases the costs incurred by the parties—and thereby raises the stakes in any further appeal, since the winner in the final stage of appeal can expect to receive costs. If the hearing is not objectively justifiable, it is also a waste of scarce court time and resources. In many tax cases, considerable sums of public money are at stake, because of the wider effect of individual decisions on points of principle. The amounts involved in claims for repayment as a result of such decisions have, of course, recently been the focus of considerable attention in the context of VAT. In exceptional cases, expedited hearings are available, but as the courts have from time to time acknowledged,[217] uncertainty attending the tax consequences of transactions which may affect a whole business sector is not of itself sufficient. Delay in the resolution of cases is therefore a major problem, not only for the taxpayer, but also for the revenue authorities and, potentially, the Treasury.

11.2. Where an earlier decision is reversed on a further appeal to the High Court or beyond, there is the further problem of how to compensate the individual taxpayer for the real cost of having had to pay tax which is eventually decided not to be due, or the public purse for the effects of not receiving tax which is eventually found to be payable. It is not possible for the rules governing the running of interest exactly to mirror the real costs involved (or, conversely, the advantage of delayed payment), and this is a further reason why it is important to minimise unnecessary delays.

11.3. Wait times of course will reflect general changes in the pressure of business from time to time for each court, but each tier of appeal beyond the tax tribunals adds on average a further 12-18 months' wait time. Even at High Court level, it is commonplace for the assessments, notices or decisions subject to appeal to have been issued four or five years before the hearing. These in turn may relate to periods or events several years previously.[218] Where there is a further appeal beyond the High Court the time lags increase correspondingly. This may affect not only cases which raise significant points of principle but also on occasion cases which are to all intents and purposes confined to their particular facts.[219]

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[217] See e.g. ; *C&E Comrs v. Colour Offset Ltd* [1995] STC 85 at 86.

[218] Sometimes this will simply reflect the nature of the assessment or decision - for example, where there has been underdeclaration of profits or failure to pay tax over a long period. But it also commonly reflects a period of negotiation or discussions between the taxpayer and the revenue authority even before the issue of the relevant decision or document. This may now become more rather than less common in VAT cases, as a result of Customs' practice of issuing a "letter of request" notifying the taxpayer of Customs' intention to issue an appealable decision and inviting a response *before* the decision is actually issued.

[219] *Franklin* v. *Holmes* [1993] STC 720, CA is a good example. This concerned assessments on the grounds of fraud or wilful default against which the taxpayer appealed. The assessments related to profits for the years of assessment from 1979-80 to 1984-5. The Special Commissioners heard the appeal in May 1990 and confirmed the assessments in accordance with an agreement between the taxpayer and the Revenue following a decision in principle. A decision on a further appeal to the High Court was rejected in March 1992. On a further appeal to the Court of Appeal, heard in July 1993, the Court (while rejecting a number of the taxpayer's contentions) found that there had been a procedural irregularity, and that assessments needed to be adjusted to take account of VAT in certain payments. It remitted the case to the Special Commissioners for further findings of fact on three items. So, more than three years after the initial Special Commissioners' case, the matter was still not finally settled, though it required little or no consideration of any wider issues of principle.

The present tiers of appeal

11.4. In England and Wales the tax tribunals constitute a layer of appeal which is in addition to, and not a substitute for, any of the normal tiers of progression through the court hierarchy, starting with the High Court. In the normal case there is a right of appeal from the decisions of all the tribunals to the High Court on a point of law only.[220] There is then a further right of appeal to the Court of Appeal[221] and, with leave, to the House of Lords.[222] This makes four layers of appeal within the English legal system before a decision is reached in the House of Lords. Where a reference to the European Court is required, there is a fifth potential tier of appeal—of considerable practical importance in VAT cases.

11.5. The present arrangements in England and Wales are out of line with those in Scotland and, in direct tax cases only, in Northern Ireland. In Scotland there is an appeal as of right on a point of law direct from any of the three main tax tribunals to the Inner House of the Court of Session.[223] Appeals from the Special and General Commissioners in Northern Irish cases lie direct to the Court of Appeal in Northern Ireland.[224] Normally appeals from a VAT and Duties tribunal in Northern Ireland lie to the High Court.[225]

11.6. A preliminary comparative study of tax appeal procedures in a number of other jurisdictions undertaken for the purposes of this project suggests that the four standard tiers of appeal in England and Wales are also out of line with practice in a number of other comparable jurisdictions. The number of tiers of appeal will be affected by other factors such as the nature of the appellate body and the relationship between specialist courts or tribunals and courts with a general civil jurisdiction. However, as the table in Appendix 1 shows, it appears that of the six other jurisdictions we have considered at this stage, five have three or fewer tiers of appeal. Only New Zealand has four potential tiers of appeal, the last of which is the Privy Council. Even here, therefore, in the vast majority of cases the final decision will be given by the New Zealand Court of Appeal.

Alternative routes and leapfrogs

11.7. As already noted in Chapter 9, there are some circumstances in which appeals relating to Revenue-administered taxes bypass the tax tribunals entirely. All stamp duty appeals lie by way of case stated to the High Court[226] or, in Scotland, Court of Session. In some circumstances, inheritance tax and stamp duty reserve tax appeals can be also be heard at first instance in the High Court or Court of Session.[227]

11.8. Otherwise there are only two sets of provisions under which one of the tiers of appeal may be omitted. Both impose restrictive conditions and are in practice rarely used.

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220 TMA s.56, by way of case stated (General Commissioners); s.56A (Special Commissioners); s.11 (1) Tribunals and Inquiries Act 1992.
221 With leave in the case of appeals from the VAT and Duties tribunals only; s.11(5) Tribunals and Inquiries Act 1992.
222 TMA s. 56(8) and s.56A(7) apply the terms of s.1 Administration of Justice (Appeals) Act 1934 for this purpose.
223 TMA s.56(10) (General Commissioners) and.s.56A(10) (Special Commissioners) provide for appeals to the Court of Session sitting as the Court of Exchequer, a function discharged by the Inner House. In the case of VAT and Duties tribunals, appeals lie to the Court of Session under s.11(7)(b) Tribunals and Inquiries Act 1992 but are heard by the Inner House.
224 TMA s.56(11), s.56A(11), s.58 (General and Special Commissioners)
225 s.11(8) Tribunals and Inquiries Act.
226 Stamp Act 1891 s.13 and 122(2)
227 IHTA s.222(3),(5); SI 1986/1711 reg 8(3)(5).

11.9. Tax appeals may proceed directly from the High Court to the House of Lords where the conditions set out in Part II of the Administration of Justice Act 1969 are met.[228] However, these conditions were designed to apply only to a very small number of genuinely exceptional cases throughout the field of civil litigation. It has not been used in a reported tax case for the last five years. [229]

11.10. There are also specific provisions for appeals direct to the Court of Appeal from the Special Commissioners and VAT and Duties tribunals.[230] Leapfrog is permitted if:

- the parties consent;
- the leave of the Court of Appeal is obtained; and
- a certificate is obtained from the Commissioners or the tribunal that the decision subject to appeal involves a point of law relating wholly or mainly to the construction of an enactment, or of a statutory instrument or of an EC treaty or other instrument which has been fully argued and considered by the Commissioner or tribunal.

11.11. These conditions naturally do not import the "general public importance" test applicable in the context of the House of Lords, and it is difficult to explain why the procedure is used as rarely as in fact it is.[231] In the last five years it has apparently been used only three times.[232] It is understood that this is not because the Court of Appeal turns down much greater numbers of applications for leave. The most likely explanations are that either that this option is simply not considered, or that one or other party refuses consent.[233] What is clear is that while this option may be valuable in a tiny number of cases, it has had no impact on the vast majority of appeals from the decisions of the Special Commissioners or VAT and Duties tribunals which eventually end up in the Court of Appeal.

Appeals from the special tax tribunal to the Court of Appeal

11.12. The Keith Committee proposed eliminating one tier of appeal for cases heard at first instance by the Special Commissioners or the VAT and Duties tribunal, leaving appeals from the General Commissioners in the Chancery Division. The leapfrog provisions were seen as a

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[228] A certificate is needed from the High Court judge that (a) the relevant conditions (see below) are fulfilled, (b) a sufficient case has been made for a leapfrog appeal and (c) all the parties have consented to the grant of the certificate. The "relevant conditions" for the purposes of (a) are, first, that the decision involves a point of law of general public importance and, second, that the point in question either (i) relates wholly or mainly to the construction of statutory material and has been fully argued before him and fully considered in his judgment, or (ii) is one which was fully considered in a previous judgment of the Court of Appeal or House of Lords by which he is bound. (The requirement for a point of law of general public importance applies also to appeals from the Court of Appeal to the House of Lords.) If leave would in any event have been required for a further appeal to the Court of Appeal (as with appeals first heard by the VAT and Duties tribunals at present) the judge must additionally be satisfied that the case is a proper one for granting leave. There is no right of appeal against a refusal to grant a certificate. If a certificate is granted any party may apply within a month to the House of Lords for leave for a leapfrog appeal. (AJA 1969 s.12, 13, 15).

[229] It may be argued that one of the problems is that the conditions are virtually tantamount to requiring the High Court judge to anticipate the decision of the House of Lords. It therefore remains unlikely that the procedure will be used even where the eventual decision of the House of Lords turns out to be as far-reaching as that in *Pepper* v. *Hart* [1992] STC 898, HL, and even where the relevant arguments have been put at High Court level. The latter, of course, will not always apply, as in *Pepper* v. *Hart* itself, either because the point has not been addressed or because, in the light of clear authority from the Court of Appeal or House of Lords on that point, the case was put on a different footing.

[230] TMA s.56A(2); The Value Added Tax Tribunals Appeals Order 1986 SI 1986/2288. Equivalent arrangements in relation to VAT tribunals were only extended to Northern Ireland some eight years later in the Value Added Tax Tribunals Appeals (Northern Ireland) Order 1994 SI 1994/1978.

[231] *C&E Comrs* v. *Le Refifi Ltd* [1995] STC 103 is a good example of a case where the leapfrog procedure might have been expected to be used but in fact was not. Both the tribunal and the High Court upheld the taxpayer's case on the grounds that a previous Court of Appeal decision was binding on them, but the Court of Appeal found in favour of Customs on the basis of a different interpretation of that decision.

[232] *Capcount Trading* v. *Evans* [1993] STC 11 (method of computing losses on foreign currency purchase); *R v. IRC* v. *Willoughby* [1995] STC 143 (which related to the meaning and effect of s.739 and 741 ICTA) among cases reported in *Simon's Tax Cases*. The leapfrog procedure was also used for an appeal direct to the Court of Appeal from the VAT tribunal's decision in *Thorn Material Supply Ltd and Thorn Resources Ltd* LON/94/1996, LON/94/1997. At the time of writing the Court of Appeal's decision in this case had not yet been reported.

[233] Although it may be that, to a lesser extent, the same problems arise as under the general leapfrog provisions: see note [236].

partial solution to the problems the Committee identified but, as already noted, these have had no impact on the vast majority of tax appeals.

11.13. We share the view of the Keith Committee that even under the current system there would be a strong case for appeals from the Special Commissioners and VAT and Duties tribunals to lie direct to the Court of Appeal, as with appeals from certain other forms of tribunal of similar stature and authority in their specialist fields of law. We recognise that the most of other forms of tribunal to which this applies—Employment Appeal Tribunal, Immigration Appeal Tribunal and Social Security Commissioners—are primarily appellate tribunals, with a very limited original jurisdiction. But the Lands Tribunal has a larger original jurisdiction, while the seniority and standing of the Special Commissioners in the tax field, and the impact of their decisions, is very closely analogous to that of the Lands Tribunal and Social Security Commissioners in their respective areas of law. We also note the problems which the present system can cause to the revenue authorities where they are forced to defend a case pursued by a taxpayer through successive tiers of appeal, notwithstanding that this has no real merit in law.[234]

11.14. The existing case for change would be strengthened by the role envisaged for the special tax tribunal under a unified appeals system. At present, it is true that a proportion of the cases heard by the VAT and Duties tribunal might appear unsuited to a further appeal direct to the Court of Appeal. Under a unified tribunal system, the special tax tribunal would discharge the functions allocated in some other jurisdictions to a specialist tax court. We have considered, as an alternative, extending the original jurisdiction of the High Court in tax appeals, and so by-passing the tax tribunals, but this could only be a solution for a small group of cases, predominantly large commercial cases. This would reduce accessibility and might also undermine the objectives behind specialist tribunals.

11.15. We have noted Lord Woolf's general recommendations that in statutory appeal cases, further appeals from a tribunal should be to the Court of Appeal if there have been two stages already, and otherwise to the High Court. However, we think that there would be good reasons for appeals from the special tax tribunal to be treated in the same way as appeals from the lower courts. It has long been accepted that appeals from the County Court should lie direct to the Court of Appeal, and Lord Woolf has recommended that, despite the pressure of work in the Court of Appeal, appeals from final decisions from final orders of both circuit and district judges even in fast track cases should lie, with leave, to the Court of Appeal,[235] subject to power to delegate its jurisdiction.

11.16. We see that there may be a logic in treating appeals from decisions of tribunals under statutory appeal procedures differently from appeals from decisions of the lower courts in cases where the tribunals' function or composition is materially different from that of the lower courts. The role of such tribunals may be to decide mainly issues of fact, their decisions may have a substantial policy content, their procedure may be more analogous to expert arbitration, or a very high proportion of the cases with which they deal may simply be inappropriate for immediate further hearing in the Court of Appeal.

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[234] A good example is *Bjellica* v. *C&E Comrs* [1995] STC 329, CA. This was an attempt to challenge a VAT assessment for a 12.5 year period during which a business had failed to register for VAT purposes on the technical ground that the form of the assessment was incorrect. While the point about the form of the assessment might have been of wider application, it is difficult to feel that the interests of justice were served by the four and a half year period which elapsed between the issue of the assessment in May 1990, and the hearing of the case in Court of Appeal in December 1994, when the taxpayer's contentions were rejected.

[235] *Access to Justice: Final Report* Ch 14 para 21-23.

11.17. But the functions of the special tax tribunal under a unified system (and to some extent the Special Commissioners) would be closely akin to those of a specialist court, such as the Patents Court or Commercial Court. This tribunal would be concerned primarily with the more difficult and complex cases, some of which are likely to require several days' or even weeks' hearing, and in which large amounts of tax may be at stake. Under Lord Woolf's proposals, an appeal in a fast-track contract case, worth £5,000 and decided in a three-hour hearing before a district judge, would proceed direct to the Court of Appeal (although its jurisdiction might be delegated).[236] In this context it would seem to us very difficult to justify a rigid rule which requires both the appellant and revenue authority in cases of the magnitude or complexity of *Ensign Tankers*[237] or with the revenue implications of *Primback*[238] to undergo the extra expense and delay of a High Court hearing before reaching the Court of Appeal.

11.18. Naturally, as in other spheres, a leave requirement would filter out obviously unmeritorious cases and, under Lord Woolf's proposals, provision for the Court of Appeal to delegate its jurisdiction to the High Court would be a useful way of ensuring that appropriate provision could be made for more straightforward cases. As an alternative, some appeals could be referred direct to the High Court at the leave stage.

11.19. Accordingly, we think that, particularly under a unified tax tribunals system, there are good arguments for appeals from the decision of the special tax tribunal to lie, with leave, to the Court of Appeal. However, these have to be weighed against some potential disadvantages to this arrangement, which we discuss in more detail below.

Possible disadvantages of a leapfrog to the Court of Appeal

The role of the High Court – provision for High Court judges to sit on appeals

11.20. The most important of these is that it would remove what some may regard as an intermediate role for the High Court, between the decision of a specialist tribunal and what will in a high proportion of cases be the final appellate decision in the Court of Appeal. A leapfrog to the Court of Appeal, despite its obvious practical advantages in cases which would otherwise have had to progress there via a High Court decision, may put in jeopardy the principles set out in the previous chapter. It may be argued that even in cases which proceed to the Court of Appeal the previous High Court decision clarifies, and provides a valuable analysis of, the legal issues involved, which may at that stage be much narrower than on appeal to the tribunal. And, of course, a substantial number of cases at present settle following a High Court decision. On the other hand, as already noted, the special tax tribunal, like the Special Commissioners at present, will be a body of considerable authority and standing in its own field, delivering reasoned judgments. It is already recognised in other fields of law (see 11.13 above) that in the case of decisions by such a specialist tribunal it is both feasible and appropriate that further appeals should lie direct to the Court of Appeal.

11.21. As noted at 10.16 above, there is concern that in the tax field the Court of Appeal does not have the strength in depth which it possess in many other fields of law. Channelling appeals direct from the special tax tribunal to the Court of Appeal would not address this

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[236] As preceding note.
[237] *Ensign Tankers (Leasing) Ltd* v. *Stokes* [1992] STC 226, HL.
[238] *Primback* v. *C&E Comrs* [1996] STC 757, CA.

problem, because appeals would still be thinly spread among members of the Court. One possible solution would be to provide that when hearing tax appeals (perhaps as part of the arrangements for delegation of cases, or even by way of a specific division) the Court might include one or two High Court judges from a nominated panel.

11.22. If this suggestion were pursued, initially the panel would be those judges to whom tax cases had been allocated while the normal route of appeal lay from tax tribunals to the High Court. The panel system would then continue, ensuring that the group of High Court judges involved remained sufficiently small for those who had little experience of tax in practice to build up relevant background knowledge reasonably quickly.

11.23. We appreciate that this would be a new type of arrangement at Court of Appeal level, and that it may be seen as fairly radical. However, we think it is possible that in tax cases this arrangement would enable the Court to draw on the right balance of specific expertise and broader legal understanding. It would be perfectly appropriate for some cases to be delegated (or even referred) for hearing to a single High Court judge, for the reasons already discussed. But there may be other cases raising wide issues of principle, which properly require to be determined in the Court of Appeal, but where the appeal process would be shortened, and Court would benefit in its deliberations, from the contributions of one or, in some cases, two High Court judges with a broad understanding of tax law. This would enable the Court of Appeal to draw on a similar depth of expertise to that which it is able to take for granted in the mainstream areas of common law or other areas of law which produce a higher proportion of its workload, such as family or property law.

Appeals from the general tax tribunal

11.24. It would, however, be inappropriate for the majority of appeals from the general tax tribunal to proceed direct to the Court of Appeal. A number of such appeals may have some merit, but not be of a nature to justify a leapfrog direct to the Court of Appeal. A small minority of such cases may involve a taxpayer who has not fully understood the nature of the issues, and therefore feels aggrieved by an adverse decision but has no real grounds for an appeal on a point of law.

Appeal to the special tax tribunal

11.25. One possible solution would be for appeals from the general tax tribunal to lie, in the first instance, to the special tax tribunal. It is envisaged that the majority of small cases could be resolved at that level without the need for any further appeal. At present, as we have already noted, an appeal to the High Court is often not a realistic prospect for the taxpayer and, where no point of principle is involved, may not be cost-effective for the revenue departments. Introducing a right of appeal to the special tax tribunal would effectively create a half-way house. A more authoritative ruling could be obtained on a point of tax law, but without the procedural formality of the High Court and, consequently, less pressure on both sides to instruct counsel. Wait times should be considerably shorter than in the High Court and hearings could be available in regional centres.

11.26. We recognise that this would represent a change from the present two-track tribunal system for direct taxes in England and Wales, under which appeals from the decisions of both the General and Special Commissioners lie to the High Court. The main advantage of this

arrangement under the present system is that in cases heard by the General Commissioners, the parties are not faced with a potential fifth tier of appeal. However, this advantage has to be weighed against the problems of access to the High Court already noted and, conversely, the fact that under the present system some appeals with no realistic prospect of success proceed direct to the High Court. This results in a waste of valuable judicial resources, and of costs. As noted at 11.13 above, the expense and delay caused by an obviously unmeritorious further appeal by a taxpayer may be a serious nuisance for the relevant revenue department. And although not all such appeals will originate with the general tax tribunal, a high proportion of small cases in which a taxpayer has not fully grasped the legal issues will naturally tend to be heard here, as with the General Commissioners at present.

11.27. Our initial view is therefore that the balance of arguments would be in favour of adding to the original jurisdiction of the special tax tribunal an appellate jurisdiction to hear appeals from the general tax tribunals. In its appellate role, its function would be closely akin to that of the Social Security Commissioners, Employment Appeal Tribunal, or Immigration Appeal Tribunal. However, there should be provision for either the special tax tribunal or the Court of Appeal to grant leave for an appeal direct to the Court in appropriate cases. This would ensure that the small number of further appeals which are suited to reference direct to the Court of Appeal did not have to traverse an extra layer of hearing.

Grounds of appeal

11.28. A further issue, if this route were adopted, would be the grounds of appeal. At present further appeals from all the tax tribunals are on a point of law only, the determination of the tribunal at first instance on questions of fact being final.[239] There would, however, be two other possibilities: an appeal on a question of either fact or law,[240] or an appeal by way of re-hearing, in the same sense as used in relation to civil appeals to the Court of Appeal.[241]

11.29. The former would require a reconsideration of evidence on primary fact. This might create artificial pressure for cases to be heard in the special tax tribunal at first instance. It might encourage either party to make a second attempt at victory, even when there were no real grounds for dissatisfaction with the original determination. The provision for the same factual issues to be addressed at two levels of appeal would also run counter to the principle that cases should be resolved as quickly and efficiently as possible. This approach could only be justified if there were reason to suppose that bad decisions on matters of fact were a particular problem at local level. But if there is any actual or perceived problem here, extended rights of appeal are not a satisfactory answer. What is required is that the General Commissioners (under the present system) and general tax tribunal (under a unified system) have adequate training and support to enable them to maintain high standards of procedure and decision-making for the full range of cases which they decide. Further, except in the most lengthy and complicated of cases (which would be referred to the special tax tribunal in any event) the general tax tribunals should be as competent as the special tax tribunal to decide questions of pure fact: it is on matters of fiscal law, and not questions of fact that the special tax tribunal's expertise would lie.

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[239] This accords with the position in relation to most other forms of tribunal. Generally there is an appeal on a point of law only, either to an appellate tribunal or, under the Tribunals and Inquiries Act 1992 s.11 or a specific statute, to the High Court.

[240] As was originally recommended in general terms by the Franks Committee (the Committee on Administrative Tribunals and Enquiries; Cmnd 218, 1957). This was one of the more detailed recommendations which was not implemented in the Tribunals and Inquiries Act 1958, and the provisions in the 1958 Act for an appeal on a point of law only have represented the norm ever since.

[241] See RSC Ord 59 r.3(1).

11.30. The balance of arguments in relation to an appeal by way of re-hearing is more difficult to assess. Despite its title, this would not involve a complete rehearing of the case. The special tax tribunal would have power to disturb findings of primary fact by the general tax tribunal, but it would be very rare for this to be exercised. If, for example, the general tax tribunal preferred the evidence of one witness to the conflicting evidence of another witness, in the absence of genuinely exceptional circumstances, this would be accepted on appeal. But the tribunal would be able to re-consider, and if necessary substitute its own conclusions in relation to, inferences drawn from primary facts.[242] It might be argued that this would be helpful in some cases where questions of primary fact, the inferences drawn from these, and the relevant question of law are very closely related. For example, in a dispute as to whether an activity constituted a trade, findings about what the taxpayer actually did (what he bought and sold, and the times at which this took place, for example) will be findings of primary fact. But a conclusion drawn from these that he was, or was not, trading will often involve both factual inferences from these and the application of principles of law about the type of activities which are capable of constituting a trade. Attempts in such circumstances to parcel out specific elements of the tribunal's decision as questions of fact or of law will make for difficulties, and may give rise to uncertainty about which aspects of the decision are actually subject to appeal.[243] It may be argued that a broader approach is to be preferred in such circumstances.

Scotland and Northern Ireland

11.31. If appeals from the decisions of the general tax tribunals in England and Wales were to lie to the special tax tribunals, it would be necessary to consider separately whether this system should be extended to Scotland and Northern Ireland. In England and Wales the actual number of tiers of appeal for cases starting in the general tax tribunal would be the same as for most appeals at present—with the opportunity for an appeal direct from the general tax tribunal to the Court of Appeal in appropriate cases. By contrast, if the same system was adopted in Scotland and Northern Ireland, the effect would actually be to add in an extra, fourth tier of appeal for cases heard by the general tax tribunal, since at present all appeals in Scotland and all appeals from the Commissioners in Northern Ireland proceed to the Court of Session and Court of Appeal respectively.

11.32. Accordingly, it may be that special provision should be made for appeals from the general tax tribunals in these jurisdictions. The numbers of cases involved are relatively small, so that the practical problems noted above in relation to appeals in England and Wales are less of a concern. It may therefore be considered inappropriate to modify the traditional position, which we understand is generally regarded as satisfactory.

Increased workload in the Court of Appeal

11.33. If further appeals from the decisions of the special tax tribunal lay, with leave, to the Court of Appeal, this might result in an increase in the Court's workload in relation to tax

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[242] c.f. RSC Ord. 59 r.10(3). By contrast in an appeal on a point of law, the court can only decide there has been an error of law in relation to an inference from primary facts where, in the frequently cited formulation of Lord Radcliffe in *Edwards* v. *Bairstow and Harrison* 36 TC 207 at 229, "there is no evidence to support the determination or ... the evidence is inconsistent with and contradictory of the determination, or ... the true and only reasonable conclusion contradicts the determination". It cannot simply overturn the inference because it disagrees with the view taken.

[243] It may also be argued that as a result much can turn on the precise phraseology of the decision: one of the complaints about the case stated procedure as it stands is that there may be a tendency for each party to try to manipulate the precise formulation of the decision in its own favour.

cases. We recognise that, given present concerns about pressure of business and wait times in the Court of Appeal,[244] this may seem undesirable. However, the increase would not, viewed as a proportion of the Court's total workload, be very significant. As already noted, the leave requirement and provisions for delegation to the High Court would act as filters. The proposals for inclusion of High Court judges would help further reduce the demands on the Court of Appeal's limited judicial resources.

Summary

11.34. We consider that, as the Keith Committee pointed out, there is a strong case for omission of one of the present tiers of appeal. The delays and uncertainty which result from the existing system for cases which proceed to the higher courts give rise to serious problems both for the revenue departments (and, even, occasionally, the Treasury) and for taxpayers, including taxpayers who are not parties to the case but who will be affected by its outcome, and who may be awaiting this to settle their own outstanding appeals.

11.35. Our present view is that the institution of the special tax tribunal under a unified tribunal system for appeals would mark the right time for change. For appeals first heard in the special tax tribunal, the natural stage to omit would be the High Court because, with a reasoned decision in the special tax tribunal, a distinctive role for the High Court in the appeals process is difficult to define. This is, in essence, a principle recognised in other areas of law involving a specialist appellate tribunal of high standing in its own field of law. Appeals would then lie direct to the Court of Appeal.

11.36. We recognise that this approach does raise some difficult issues. However, we believe that these can and should be resolved, given the problems to which the present system gives rise. The main potential difficulties are to ensure that the Court of Appeal has adequate depth of relevant expertise, to keep any increase in its workload to a minimum and to make separate provision for the large number of cases heard at first instance in the general tax tribunal for which an appeal direct to the Court of Appeal would be appropriate. We have put forward above some suggestions for dealing with these difficulties which we consider merit further consideration and debate. We recognise, however, that they represent a departure from some long-established traditions and that they may, for that reason, be seen as controversial. Broadly, these would involve provision to allow the Court of Appeal when hearing tax appeals to include, where appropriate, one or two High Court judges with experience in deciding tax cases, and for the majority of appeals from the general tax tribunal to be heard by the special tax tribunal. It might also be that such appeals should be by way of re-hearing (in the sense now used in civil appeals to the Court of Appeal) rather than on a point of law.

[244] Forcefully presented by Sir Thomas Bingham MR, the last Master of the Rolls in his Review of the Legal Year for 1994-5.

CHAPTER 12. IMPLEMENTING PROPOSALS FOR REFORM

The proposals for reform

12.1. The main proposals for reform set out in the preceding chapters, in the order in which they have been discussed, relate to:

- the promulgation of an appeals policy which extends across different forms of tax and different areas of the tax legislation;
- the scope of the appeals system in relation to exercises of discretion by the revenue departments;
- provision for internal review of decisions by the revenue departments and the scope for other methods of resolving disputes before they reach the tax tribunals;
- the form of the appeals legislation;
- the creation of a unified appeals system covering all forms of tax, under which all appeals would be heard at first instance by one of two tax tribunals;
- the composition of the tax tribunals under the present system and under a unified appeals system;
- other issues relating to appeals to the tribunals, including the rules governing the allocation of appeals at first instance and some key procedural points;
- the allocation of tax cases in the High Court; and
- the number of tiers of appeal in the present appeals system.

12.2. Clearly such an extensive programme of reform could not be introduced overnight. It would have to be phased in gradually. This needs to take place in such a way that each intervening stage in itself represents a sensible position. We would see the proposals falling into three categories: those which are suitable for rapid implementation; those which will require further evaluation at the level of detail or which form part of a larger project, but on which further work is required as an urgent priority; and those which are medium-term goals, and which may build on one or more of the earlier proposals.

Proposals suitable for rapid implementation

The proposals in relation to the existing tax tribunals

12.3. It should be possible to implement the proposals in relation to the existing tax tribunals in the short term. These do not involve major structural changes and would in many respects represent a continuation and acceleration of a programme of reform which has already begun. With the General Commissioners this can be seen in the formation of the regional and national associations, the increasing provision for training, the publication of the Notes for Guidance both for the General Commissioners and for their Clerks and the issuing by the Lord Chancellor of Notes for Guidance to his advisory committees, with a view to standardising

practice. Our own proposals in relation to the selection, training and organisation of the General Commissioners and their Clerks may be seen as developing and extending these earlier initiatives.

12.4. With the VAT tribunals and Special Commissioners, as already noted, the two tribunals now have strong administrative links as well as a large overlap in their legally qualified members. These members are already included in the open recruitment policy instituted by the Lord Chancellor's Department. Again, our proposals to allow both tribunals greater flexibility of composition can be seen as an extension of the existing links between them.

The allocation of tax cases in the High Court

12.5. Our consultations to date have revealed very widespread support for the proposal that all tax appeals should be heard within the Chancery Division of the High Court, and allocated to a group of nominated judges (including some Queen's Bench Division judges who would sit in the Chancery Division for this purpose). This is a self-contained proposal. If implemented, it should not give rise to any problems either elsewhere in the tax appeals system or for other types of High Court litigation.

12.6. We consider it should be feasible to implement these two sets of proposals in the short term. Even in isolation, they would effect a material improvement in the current tax appeals system. They would also help pave the way for a unified appeals system at a slightly later date.

Proposals for further evaluation

Appeals policy and the form of the appeals legislation

12.7. The proposals relating to appeals policy and the form of the appeals legislation would clearly require a considerable amount of further work. The form of the legislation would eventually be considered by the Revenue as part of its Tax Law Rewrite project in any event. However, for the reasons we have set out previously, changes in the substance of the appeals legislation as well as its form are required. A rewrite of the appeals provisions which preserved their substance, however well drafted and laid out, would not solve many of the present problems. The effect would be to perpetuate a set of rules which are unnecessarily complicated and a number of features of which are difficult to justify in policy terms. We would hope that the need for an appeals policy along the lines we have indicated and the problems with the substance of the existing rules could be addressed together at an early date. The outcome could then be taken into account on the rewrite. We would hope that the tax appeals provisions could be treated as an early priority within the rewrite project.

12.8. Customs LEGIS project has taken appeals as one of its cross-functional themes, so that it will in any event be considering the underlying policy in relation to appeals provisions and the scope for alignment between the different forms of taxation which it administers as well as the way in which the legislation is structured. We would hope that, again, the issues we have raised about appeals policy and the form of the legislation could be addressed at an early stage in this project.

12.9. However, we recognise that it is inevitable that, even if work in this area is treated as a priority, it will be some time before it can actually bear fruit.

Proposals for implementation in the medium term

12.10. In this category would fall proposals for structural change in the appeals system—the creation of a unified tax tribunal system dealing with all forms of tax, related issues about the form of the tax tribunals under this, and their procedure, and moves to eliminate one of the existing tiers of appeal for at least some tax cases.

12.11. Clearly these would involve substantial changes in the traditional arrangements and would require some time to implement, as well as full consultation with all the judicial bodies involved. The proposals could be implemented together as an overall restructuring. Alternatively, it would be possible initially to create a unified tax tribunal system while retaining the existing system of further appeals from both tax tribunals to the High Court, altering the procedure for appeals beyond the tribunals at a later stage. (The reverse would probably not apply, since it would be difficult to put into effect the proposals for omission of one of the tiers of appeal while the VAT and Duties tribunal hears the full range of appeals in relation to taxes administered by Customs: in these circumstances a right of appeal direct to the Court of Appeal in England and Wales would create practical problems.)

12.12. It would also be possible, if a unified tax appeals system were introduced with two forms of tribunal along the lines we have discussed, to provide for appeal direct from the special tax tribunal direct to the Court of Appeal while initially leaving a right of appeal from the general tax tribunal to the High Court, as at present. This would mean proposals for a right of appeal from the general to the special tax tribunal could be considered as a separate matter and, if appropriate, implemented at a later stage.

Summary

12.13. The programme of reform which we have set out in this interim report would have to be phased in gradually. This needs to take place in such a way that each intervening stage in itself will produce workable arrangements for appeals which represent a significant improvement on the foregoing stage. We have outlined the way in which we believe this could be achieved.

CHAPTER 13. SUMMARY OF CONCLUSIONS

Chapter 1

13.1. The advent of self-assessment will be followed by a marked decline in the number of delay appeals, and the burden of the General Commissioners' work will tilt markedly in favour of cases with some contentious element, rather than cases where the taxpayer has appealed against an estimated assessment but failed to provide information in support of his appeal. As a result, the extent to which their function can be regarded as administrative or supervisory rather than adjudicative or judicial will diminish, and a key distinction between their role and that of the VAT and Duties tribunal will disappear. While it is too early to judge the impact of the changes on their overall workload, self-assessment will strengthen the case for a general review of the tax appeals system which had already been accepted by a wide range of commentators over a long period.

Chapter 2

13.2. The appeals system is a key element in maintaining the balance of power between the revenue departments and the taxpayer. It must provide an adequate and timely remedy where there is a dispute on a technical matter or where the taxpayer argues that the revenue departments have exceeded their powers. Conversely, it is essential that the goal of efficient tax administration is not prejudiced by poor quality decision-making within the appeal system, or by delays which may encourage opportunistic challenges by taxpayers trying to postpone payment of amounts legally due. This means that taxpayers and the revenue departments have in many key respects a common interest in the effective and efficient functioning of the appeals system.

13.3. However, there are also some significant differences in their perspectives. In particular, there is at present a potential conflict of interest in the role of the revenue departments as both the instigators of key appeal provisions and the defending party in all individual cases concerning the taxes which they administer. We believe that there needs to be a clear, publicly available policy as to the scope of appeal rights to underpin discussion of individual decisions in relation to the extent of appeal rights or the rules governing the exercise of these. Together with the restructuring of the direct tax appeals legislation, this should help to ensure that decisions about the scope of appeal rights are, and are seen to be, based on legitimate policy considerations rather than being haphazard. By increasing transparency, it would also reduce the scope for fears—however unfounded—that decisions about the extent of appeal rights may on occasion be tainted by the desire to protect administrative decisions from external scrutiny.

13.4. We have also derived from our consideration of the functions of the appeals system six key objectives for the tax appeals system.[245]

(i) **It must be adequate in scope, and all the key rules governing its operation (not merely the procedural rules for the tribunals) should be the subject of a coherent and publicly available policy**. This principle derives from the fact that the value of the appeals system to the taxpayer depends on the extent of his appeal rights and the way in which these can be exercised.

[245] These are in broad accord with those set out in the Introduction to the Deregulation Unit's Model Appeals Mechanism (see 2.3 above), although they are more detailed and particularised.

(ii) **It must ensure a high quality of decision-making.** This entails:
- that each case should be allocated to a suitable level within the appeal system, by reference to the nature and complexity of the issues involved; and
- that decision-makers at all levels of the appeals system, from the tribunals to the higher courts, should have adequate relevant expertise and experience.

(iii) **It must be fair.** The system needs to be:
- even-handed as between the parties to an appeal, normally a taxpayer and the Inland Revenue or Customs;
- even-handed as between different taxpayers.

(iv) **It must be accessible.** This means it must be:
- affordable;
- as simple and easy to understand as possible, so that procedural formality and complexity are kept to a minimum consistent with the achievement of other objectives;
- physically accessible, offering sufficiently local hearings not to deter appellants or cause them unacceptable cost or inconvenience; and
- make adequate provision for information and assistance for taxpayers about the way in which they should prepare an appeal and what will happen at an appeal hearing.

(v) **It must be flexible**, so that there is adequate provision for the full range of tax cases and for taxpayers of widely differing degrees of sophistication.

(vi) **It must resolve cases quickly and efficiently.** This means that:
- successive tiers of appeal should be kept to the necessary minimum;
- cases should be allocated to an appellate level suited to the determination of the issues at stake;
- procedure should be streamlined, and procedural rules should not generally operate to prevent issues arising out of the same or closely related facts being dealt with as part of a single set of proceedings in a single forum.

13.5. It will not be possible for any appeals system to achieve all of these objectives completely. And there will always be room for debate about the point at which the best compromise has been reached between conflicting priorities–for example, the requirements for high-quality decision-making and for affordability. However, we believe that they provide a useful framework for assessing both the existing appeals system and proposals for reform.

Chapter 3

13.6. Further work is required to assess the scope in the UK for pre-adjudication procedures which would help to ensure that only cases founded on real disputes reach the tax tribunals, and facilitate settlement by agreement. The present arrangements for internal reconsideration by both the Revenue and Customs are unsatisfactory, though for rather different reasons. We suggest that a new scheme should be drawn up, with common principles applicable to all forms of tax, and that this should be piloted. Proper evaluation of the pilot results should be completed before a decision is taken as to whether the scheme is extended and the types of case most likely to benefit.

13.7. We also think that there is a need to explore the scope for mediation in tax cases further, although the nature of the procedure and potential time and costs involved are likely to mean that this is useful in only a limited range of cases. Again, a pilot would be required for evaluation. It might even be that a reference to mediation could, in some cases, be dealt with as part of an internal review.

Chapter 4

13.8. We believe that the objectives set out in the Revenue's consultation document *Tax Law Rewrite - The way forward*, would form a useful starting point for the testing and restructuring of appeals provisions for all forms of tax. It would make the appeals system much more transparent, and the fact that it was easier to see how any one provision fitted in to the system as whole would tend to reduce the number of anomalies.

13.9. However, this would not, in isolation, be sufficient to reduce the complexity of the existing appeal provisions in relation to taxes administered by the Revenue—it would simply make this more apparent on the face of the legislation. To address this, the content of the appeals provisions needs to be changed. For direct taxes the rules relating to the jurisdiction of the various appellate bodies at first instance are unacceptably complicated, and if appeals are to continue to be heard by more than one body, these need to be simplified and streamlined.

13.10. For taxes administered by Customs, there would be scope for the issues set out above, and particularly the effect and scope of section 84(10) VATA, to be addressed as part of the LEGIS project. As noted in Chapter 2, while one of the objectives of this project is to simplify the drafting of legislation, it also goes beyond this to underlying policy issues.

Chapter 5

13.11. There are in effect two separate sets of appeal systems arrangements for taxes administered by the Revenue and those administered by Customs. There are also substantial discrepancies between these. Neither the existence of separate arrangements nor these discrepancies appear to reflect objective differences between the taxes in question or the nature of disputes which are likely to arise. Such differences as there are could be better accommodated under a reasonably flexible, unified appeals system, without any of the practical disadvantages to which the existing arrangements give rise.

13.12. We believe that the present artificially fragmented appeals system should be replaced by a unified system covering all forms of taxation administered by the Inland Revenue and Customs. The existing rigid demarcation of appeals makes the system much more complicated to understand and operate, and its main justification appears to be purely historical and administrative. The fundamental role of the appeals system, like that of the Adjudicator, is common to taxes administered by the Revenue and Customs alike. The principle should be that all tax disputes should be dealt with through a unified tax appeals system unless there are clear policy reasons for an exception to the general rule.

13.13. The present arrangements for dealing with the majority of national insurance disputes is not satisfactory. The system of determining section 17 questions through the Office for the Determination of Contribution Questions (ODCQ) has been criticised on the basis that it lacks

objectivity and accountability, and has already been the subject of a number of reviews. While we recognise that there are arguments in favour of dealing with national insurance questions through the social security appeal system, our initial view is that at least those issues where there is an overlap between income tax and NIC matters should be dealt with through the tax tribunals. Any other approach gives rise to the need for two separate sets of appeal proceedings and the risk of inconsistent determinations.

13.14. A unified appeals system for all forms of tax and for at least these aspects of national insurance would also reflect the changes already made at an administrative level—on the one hand, in the joint working programme between the Revenue, Customs and the Contributions Agency and, on the other, in the new arrangements for the Special Commissioners and VAT and Duties tribunal within the Combined Tax Tribunal Centre.

Chapter 6

13.15. Tax appeals range from cases which would, in the civil litigation system, be decided in the small claims court to major commercial cases centring on difficult points of law. It is unrealistic to expect that a single appeal tribunal should be able to deal with the full spectrum of cases. We therefore believe that appeals at first instance need to be divided between two separate tribunals. One of these would hear primarily the more straightforward appeals and smaller cases, with the other deciding the more difficult and technical issues. (More detailed criteria for the division of jurisdiction are discussed in Chapter 9.) The composition of the tribunals, their procedural rules and local organisation should reflect their different roles, to ensure that adequate provision is available for cases at both ends of the spectrum.

13.16. In this report we have referred to the two bodies as the "general tax tribunals" and the "special tax tribunal" respectively. These are labels for convenience only. We would welcome views as to the most appropriate titles for the new bodies.

13.17. The General Commissioners have traditionally performed a very important function in holding the balance between the taxpayer and the Inland Revenue. But, perhaps because the bulk of their work in relation to delay appeals has been perceived as routine, their role appears to have been seen by policy-makers as less important than many other forms of tribunal or the lay magistracy. As a result, they have had to continue under a framework which is less rigorous, open and accountable than these other bodies. We believe that the long-standing neglect of this framework is unacceptable.

13.18. We welcome recent initiatives to address the resulting problems, and recognise the significant contribution made by the Commissioners themselves. But it is crucial that the pace of change continues to reflect the urgent need for further modernisation, to ensure that Commissioners are known to be a strong local tribunal capable of dealing competently with the majority of appeals, initially for direct tax and later for other forms of taxation.

13.19. We put forward for further consideration the following proposals for change within the existing structure.

- The advisory committee system needs to become more open and accountable. To achieve this we would suggest that:

– a higher proportion of its members should not themselves be General Commissioners (say, the lesser of 25% or two members) and should be recruited by advertisement or some other method of open recruitment;
– at least one member of each committee should have some experience of recruitment and selection procedures;
– some training in such procedures should be made available to all members of each committee following appointment;
– the method by which General Commissioners sitting on the advisory committees are chosen should be more transparent: one or perhaps two (in the case of large divisions) Commissioners could be elected from each division covered by the committee;[246]
– the chairman of the committee (if not a Lord Lieutenant) and the chairman of the recruitment sub-committee (in any event) should be elected, although it would be possible for one person to combine both offices;
– a two-tier interview structure for prospective General Commissioners should be adopted, with an in-depth interview by an appointment sub-committee, whose chairman should be elected, followed by a shorter interview with the committee as a whole: training for the chairman of the appointment sub-committee should be a priority;
- a short standardised assessment form should be completed for each candidate, in addition to any specific comments the committee wishes to add: in a case where a recommendation is to be made to the Lord Chancellor for appointment, the form should be forwarded together with the recommendation;

- New initiatives are required to implement the Lord Chancellor's policy that advisory committees and General Commissioners should broadly reflect the local community, and particularly to improve the representation of women and members of ethnic minorities. Data should be kept which enable the success of their initiatives to be monitored.

- In principle it is appropriate that General Commissioners should be eligible for loss of earnings allowances. This might also help with recruitment in some sectors of the community.

- A formal training programme for General Commissioners is required and should be arranged through the Judicial Studies Board in consultation with the National Association. Training for new appointees and Commissioners who chair hearings is an urgent priority for which adequate funding needs to be made available.

- The procedural rules for the General Commissioners should be amended so that hearings must take place before at least three Commissioners.

- For the time being (and subject to transitional arrangements for existing clerks) should be required to have both legal qualifications and tax experience. These requirements could be reviewed following the implementation of a training programme. An open recruitment programme should be used, including the advertising of vacancies, and the Lord Chancellor's Department should be directly involved in the appointment process. A training programme should be instituted for clerks.

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[246] Because Commissioners in one division may not be known to those in neighbouring divisions, a system of simply electing Commissioners from all divisions covered is not practicable. The presence of at least one Commissioner from each division should also help with the dissemination of information in either direction. At present, although it is understood that Committees generally contain at least one person from each division, there is no requirement for this to be the case.

- New initiatives are required to address the level of assistance and information available to appellants. These could include the production centrally of leaflets and explanatory materials.

13.20. In addition, there is a case for the inclusion of a qualified professional chairman sitting with two lay members, in place of the current body of lay Commissioners. The arguments in favour of this approach would be strengthened with the broadening of the general tax tribunal's jurisdiction under a unified appeal system. However, we are aware that this is a controversial proposal, and at this stage are putting it forward as an option for further discussion only. We also recognise that, if pursued, this proposal would need to be implemented in a way which avoids diminishing or devaluing the role of lay tribunal members.

Chapter 8

13.21. VAT tribunal chairmen and Special Commissioners should be required to have experience of areas of law and practice relevant to their jurisdiction, as well as meeting the statutory minimum period of qualification. The moves to open recruitment are to be welcomed, and initiatives should be considered to extend the pool of applicants particularly for full-time appointments, as the calibre of appointees at this level has considerable practical impact on the development of tax law.

13.22. A policy of open recruitment needs to be developed for lay members, and formal responsibility for appointment of VAT tribunal members should be transferred from the Treasury to the Lord Chancellor's Department.

13.23. We see no clear justification for the different rules governing the composition of the VAT and Duties tribunals and Special Commissioners, although the fact that the VAT and Duties tribunal deals with the full range of cases on the taxes within its jurisdiction means that some differences in the way individual cases are dealt with is inevitable until the move is made to a unified tribunal system.

13.24. We would suggest that rules governing the composition of both forms of tribunal should be assimilated. The object should be to provide a flexible structure which will enable both tribunals to accommodate the full range of disputed issues with which they deal. The following principles should apply:

- both VAT tribunal chairmen and Special Commissioners should be able to sit with one or two lay members, depending on the nature of the case;
- in cases centring on difficult issues of law, two legally qualified members should be able to sit together, with an additional lay member if there are other aspects of the case which make this appropriate; and
- it would be helpful if the working criteria for the allocation of tribunal members to particular cases were more widely known.

13.25. The assimilation in the rules for the composition of the two forms of tribunal would ease the transition to a unified tax appeals system. We suggest that the formation of the special tax tribunal for the purposes of a unified system would mark the right time to move to a presumption that the tribunal should generally consist of three members. While there would be

cases in which it was appropriate for two members or even, occasionally, one member to sit, the parties would be notified of this decision and would have a right to make representations. We consider that the balance of arguments in the tax context is against making provision for the tribunal to include members appointed on the basis of expertise in specialised business or technical subjects. However, the tribunal could be enabled to draw on specialist expertise by referring questions to an expert for advice or a written opinion.

13.26. Finally, there could be provision for one of a panel of nominated High Court judges to sit as an *ex officio* Special Commissioner or member of the VAT and Duties tribunal or as a member of the special tax tribunal under a unified system. This would arise only at the invitation of the tribunal president, in genuinely exceptional circumstances. This might include very lengthy and difficult fraud cases. It would follow that any appeal from the decision of the tribunal would lie to the Court of Appeal and not to the High Court.

Chapter 9

13.27. The arrangements for allocation of direct tax appeals need to be rationalised. In particular, the rules governing the respective jurisdictions of the General and Special Commissioners should be simpler, clearer and more coherent. We suggest that in relation to the main direct taxes:

- all appeals should be heard at first instance by either the General or Special Commissioners (and not referred direct to the High Court);
- the Commissioners should have power to refer questions relating to the valuation of land to the Lands Tribunal, though a decision not to do so should be subject to appeal;
- taxpayers should have a general right to elect for hearing by the Special Commissioners;
- this should be exercisable at a time when the issues in dispute will normally be reasonably clear to both parties, and arrangements should be made to ensure taxpayers have some written information about the tax tribunals and the effect of the election; and
- the right of election would be subject to transfer provisions fairly similar to the present provisions for transfer of appeals, so that obviously inappropriate or lengthy cases did not have to be heard by the General Commissioners.

Under a unified tax appeals system, the same framework could be applied to the general and special tax tribunals, and would extend to VAT cases as well as the main direct taxes.

13.28. However, in order to keep the General Commissioners' or general tax tribunal's jurisdiction within a manageable compass, separate provision may be required for cases relating to some specialised forms of tax, which are likely in any event to generate a much smaller body of appeals. Such appeals would always lie to the Special Commissioners or special tax tribunal. The case for this approach would be strengthened if the general tax tribunal continues as a lay body. The types of tax to be covered would require further consideration, but should probably include petroleum revenue tax, insurance premium tax, landfill tax and stamp duty reserve tax. Other candidates would be stamp duty, duties and possibly also inheritance tax.

13.29. There is still some dissatisfaction with certain aspects of the existing procedural rules for the tax tribunals. There are also discrepancies between the direct and indirect tax tribunal

systems which are difficult to defend except on administrative grounds and some of which are of considerable practical importance.

13.30. We would welcome representations as to the form which the tribunal rules should take, both under the present divided tribunal system and under a unified tribunal system, in the key areas of:

- the degree of formality and detail in the procedural rules;
- the body to which the taxpayer initially appeals;
- the rules on the award of costs;
- the rules governing whether appeals are heard in public or private.

Chapter 10

13.31. The present arrangements for all appeals from decisions of the VAT and Duties tribunals to be heard in the Queen's Bench Division of the High Court are unsatisfactory. There is no natural link between such cases and the other matters heard in the Queen's Bench Division. As a matter of principle it would seem preferable for VAT appeals, as well as direct tax appeals, to be allocated to the Chancery Division.

13.32. The existing provisions also create serious practical problems. The most important is that, because of the size of the Queen's Bench Division and the wide range of cases heard there, individual judges will normally only hear a small number of VAT cases. This makes it very difficult for those without prior relevant experience in practice to acquire an adequate grasp of VAT issues, including the effect of European law. In addition, although wait times will vary at different periods, the pressure of business in the Queen's Bench Division tends to be greater than in the Chancery Division. It seems particularly inappropriate for VAT cases to add to this pressure when other considerations point strongly in favour of hearing in the Chancery Division. The arguments for moving appeals on duties, insurance premium tax and landfill tax to the Chancery Division would, viewed in isolation, be less compelling. But there is a strong case for keeping these with VAT appeals.

13.33. Accordingly our view is that all appeals from the decisions of the VAT and Duties tribunal should lie to the Chancery Division.

13.34. Although concentrating tax cases in the Chancery Division will help to rationalise the existing system, additional measures are required to meet the need for greater specialist expertise on the part of judges who decide tax cases at this level. We propose that all tax appeals should be allocated within the Chancery Division to a panel of nominated judges. The panel might include some judges from the Queen's Bench Division, appointed to the Chancery Division for this purpose. This system would enable the nominated judges to build up relatively quickly their experience in dealing with tax cases, without significantly reducing their ability to undertake a broad spectrum of work or unduly narrowing their perspective.

13.35. Judicial review cases in the tax field should remain within the Queen's Bench Division, but should generally be heard by a Chancery Division judge or a judge appointed to both Divisions.

Chapter 11

13.36. We consider that, as the Keith Committee pointed out, there is a strong case for omission of one of the present tiers of appeal. The delays and uncertainty which result from the existing system for cases which proceed to the higher courts give rise to serious problems both for the revenue departments (and, even, occasionally, the Treasury) and for taxpayers, including taxpayers who are not parties to the case but who will be affected by its outcome, and who may be awaiting this to settle their own outstanding appeals.

13.37. Our present view is that the institution of the special tax tribunal under a unified tribunal system for appeals would mark the right time for change. For appeals first heard in the special tax tribunal, the natural stage to omit would be the High Court because, with a reasoned decision in the special tax tribunal, a distinctive role for the High Court in the appeals process is difficult to define. This is, in essence, a principle recognised in other areas of law involving a specialist appellate tribunal of high standing in its own field of law. Appeals would then lie direct to the Court of Appeal.

13.38. We recognise that this approach does raise some difficult issues. However, we believe that these can and should be resolved, given the problems to which the present system gives rise. The main potential difficulties are to ensure that the Court of Appeal has adequate depth of relevant expertise, to keep any increase in its workload to a minimum and to make separate provision for the large number of cases heard at first instance in the general tax tribunal for which an appeal direct to the Court of Appeal would be appropriate. We have put forward above some suggestions for dealing with these difficulties which we consider merit further consideration and debate. We recognise, however, that they represent a departure from some long-established traditions and that they may, for that reason, be seen as controversial. Broadly, these would involve provision to allow the Court of Appeal when hearing tax appeals to include, where appropriate, one or two High Court judges with experience in deciding tax cases, and for the majority of appeals from the general tax tribunal to be heard by the special tax tribunal. It might also be that such appeals should be by way of re-hearing (in the sense now used in civil appeals to the Court of Appeal) rather than on a point of law.

Chapter 12

13.39. The programme of reform which we have set out in this interim report would have to be phased in gradually. This needs to take place in such a way that each intervening stage in itself will produce workable arrangements for appeals which represent a significant improvement on the foregoing stage. We have outlined the way in which we believe this could be achieved.

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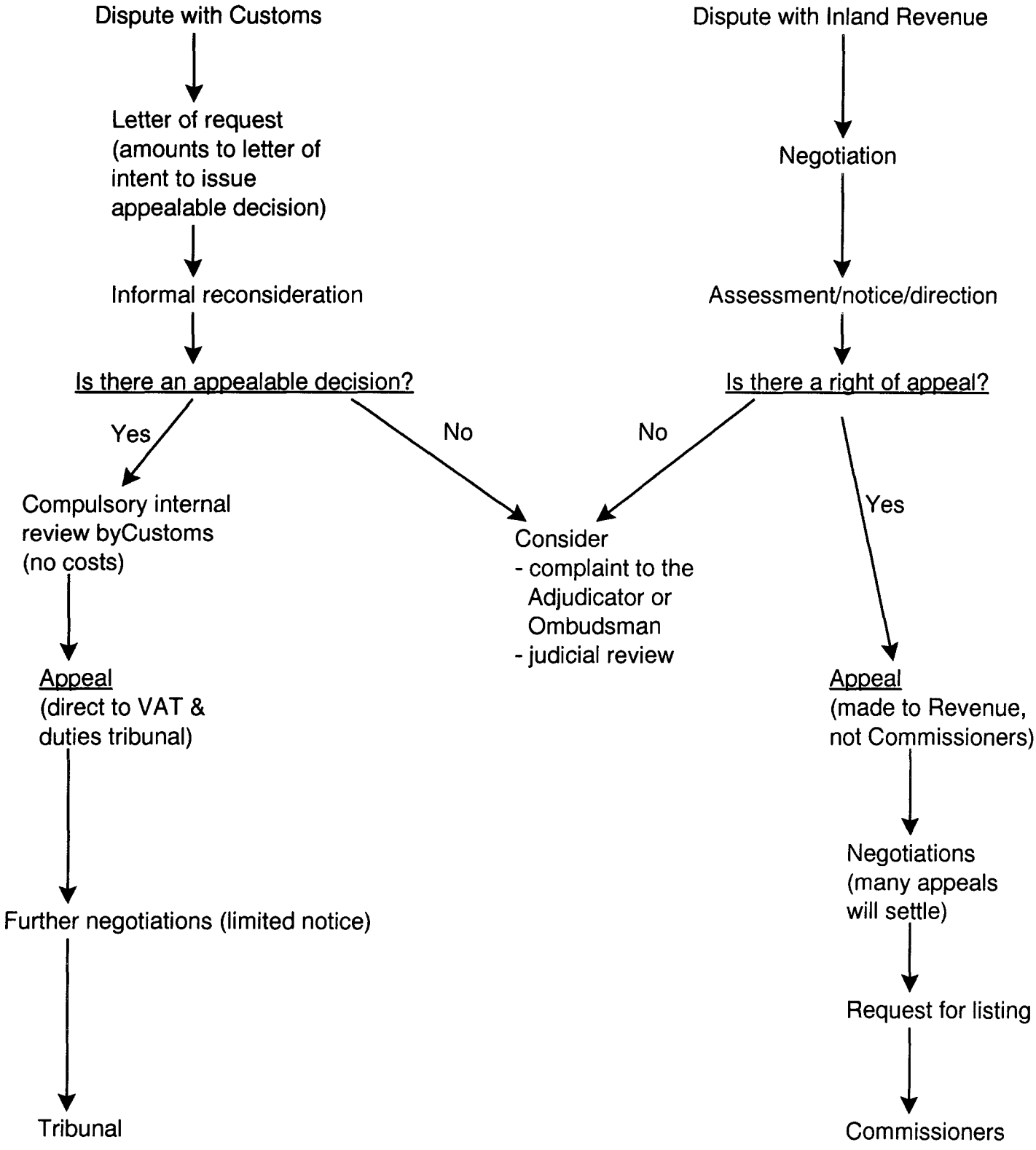
APPENDIX 1 - COMPARISON OF TAX APPEALS SYSTEMS IN OTHER COUNTRIES

Name of Country	State Tax System	Recent or proposed reforms	Self Assessment	Decisions published (either commercially or officially except for small claims cases).	Binding Pre-transaction rulings	Common appeal route for all taxes including social security	Small Claims Procedure	Specialist Tax Courts	Independent Revenue examination before Court Hearing	Cases generally held in public	Non-legal representation and informal legal court procedures	Number of Judicial Tiers	Appeal on question of fact possible	Different judicial appeal options for taxpayer	Lay Judges
New Zealand	No	Yes on pre-court system. Pre-trial conference. Introduced along with independent adjudication, Small claims.	Yes	Yes	Yes - legislative system. Charges made.	Yes apart from child support	Yes (from October 1996)	Yes at lower level in Taxation Review Authority (TRA)	Yes since 1 October compulsory	Yes in High Court. Not in TRA	Yes at lower level in TRA	Up to 4 in TRA, High Court, Court of Appeal, Privy Council.	Yes throughout appeal process but minimum tax at stake specified.	Yes e.g. between TRA and High Court	No
USA	Yes - very diverse state tax systems	Yes - two re-organisations in Appeals Office. Pilot mediation programme established on trial basis.	Yes	Yes in US Tax Court. 3 types of opinion published but only regular opinions published in official USA tax reports are precedential.	Yes - administrative system. Limited charges made.	Yes apart from state taxes and excise taxes although forum shopping.	Yes in modified form for small federal cases in private involving (broadly) $10,000 or less. No right of appeal. Common in state jurisdictions.	Yes in Tax Courts but not in Court of Federal Claims or Federal District Court	Yes - by Appeals Office. Not compulsory but almost always used.	Yes	Yes in Tax Court. Specialist judges in Tax Court but taxpayer may be represented by non-lawyers who have passed exam. District Courts - formal procedures; jury trial; legal repres. required. Federal Claims Court - no jury trial but formal.	Up to 3 for all forum. Tax Court to Court of Appeals to Supreme Court.	Not after 1st tier.	Forum shopping possible. Three possible Courts -of first instance - Tax Court, Federal Claims or Federal District Court.	No
Canada	Yes but provincial tax close to national system	Yes limited reforms in 1991 and further ones considered now by a Committee which reports in 1997.	Yes	Yes published commercially	Yes - administrative, non-statutory system. Consider most advance rulings requests and generally regarded as binding. Charges made.	Yes except for provincial taxes. Separate rules of procedure for social security appeals but heard by Tax Court.	Informal procedure in Tax Court. No appeals except by judicial review.	Yes in Tax Courts. May be specialist tax lawyers or accountants.	Yes - by Appeals Division of Revenue Canada. Generally compulsory	Yes	Only in Tax Court under informal "small cases" procedures`	Up to 3. From Tax Court to Federal Court of Appeal to Supreme Court.	Yes at all levels but only possible from Tax Court if mixed question of fact and law - not a trial de novo.	No except between informal and formal procedures in the Tax Court	Yes in Tax Court may be accountants
Germany	Yes but close to federal system	Limited suggestions in 1992 to speed up court proceedings. Jan 1996 - some changes made at local tax office on administrative level.	No	Limited	Yes - administrative system. No charges.	No different taxes heard by different senats (divisons) in Federal Tax Court and social security handled by different courts	Limited	Yes throughout.	Yes - within the local tax office the case is reviewed by separate division. Compulsory review procedure before going to court unless tax office agrees otherwise or review department does not respond within 6 months.	Yes	Inquisitorial. Taxpayer must be represented by a lawyer/ accountant, tax consultant or himself in local tax court. Formal procedures.	Up to 3. Local Tax Courts to Federal Court to Constitutional Court.	Not from Local Tax Court	No	Yes 5 judges generally hear cases in local tax court of which 2 are lay judges.
Nether-lands	No	Proposal to increase judicial tiers.	Not for direct	Yes but anonymously	Yes - informal administrative system. No charges	Yes except for Social Security taxes	No	Yes at Lower Tax Court. Judge has tax law degree.	No - only the right to have a meeting with local Inspector.	Yes	Yes - in Lower Tax Court	2. Lower Tax Court to Supreme Court.	Not after Lower Tax Court	No	No
Australia	Yes variety of systems to resolve state tax disputes	Limited to small claims.	Limited to compan ies	Yes but anonymously and no precedential value in AAT.	Yes - legislative system. No charges made.	Yes apart from state and customs and excise duties	Plans for it to be introduced shortly.	No	No but internal review procedures for large cases. AAT is itself an administrative review body.	Yes except in AAT	Yes in AAT	Up to 3. Federal Court single judge or AAT then to full bench of Federal Court then to High Court.	Not after 1st instance hearing.	Choice at 1st instance between application to AAT and appeal to Federal Court	Yes in AAT although President must be a Judge

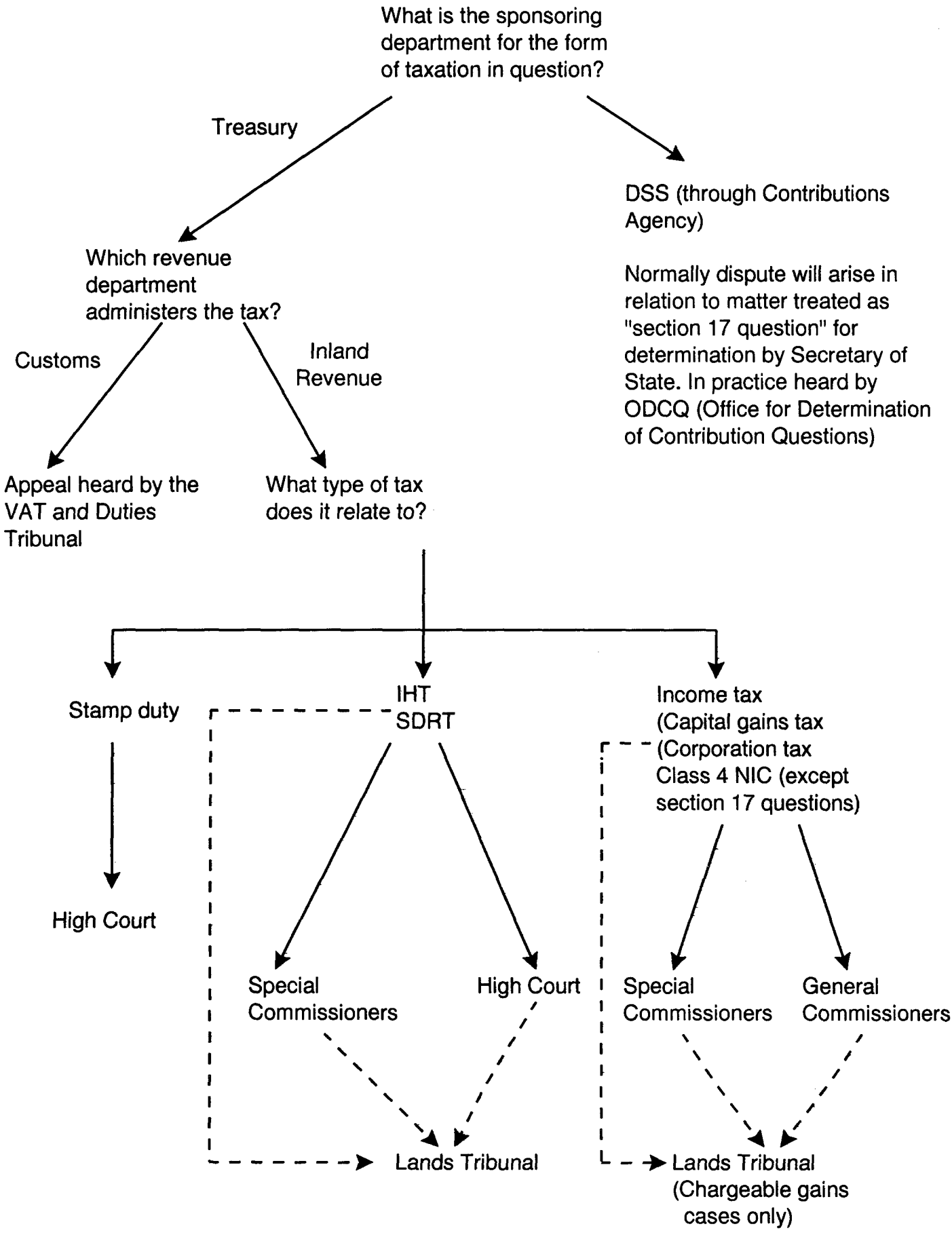
APPENDIX 2

PRE-ADJUDICATION PROCEDURE



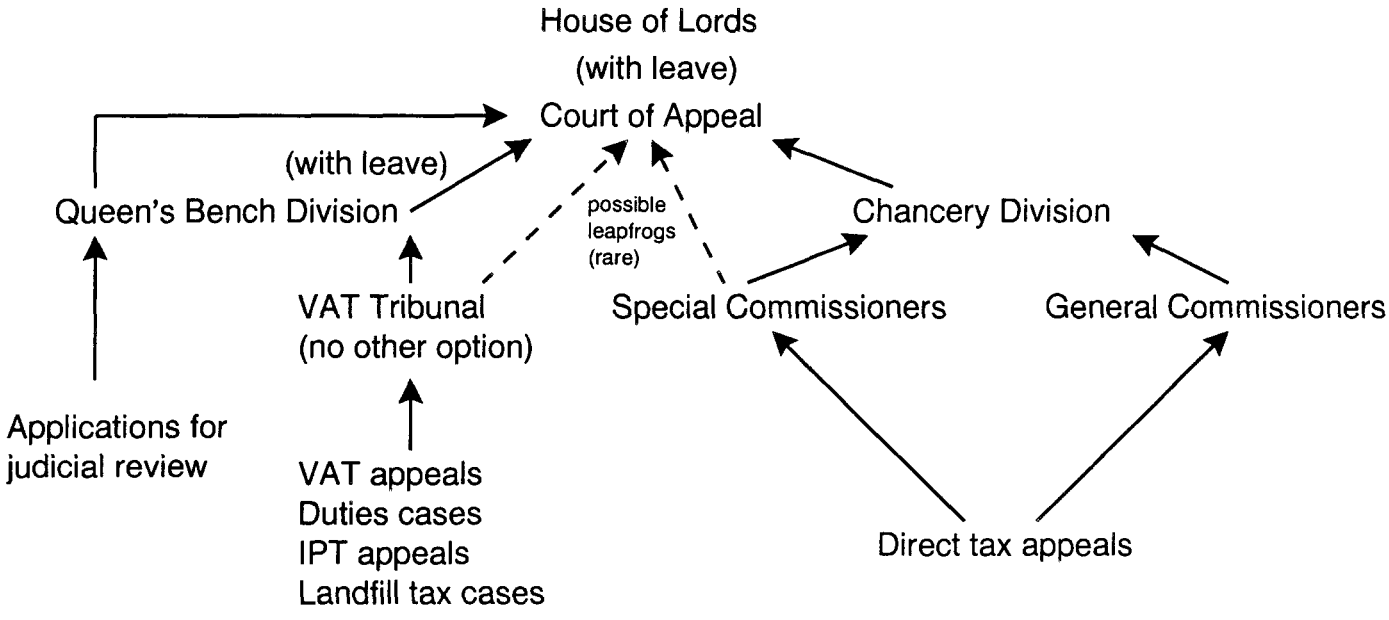
APPENDIX 3

FORUM FOR FIRST HEARING OF TAX RELATED APPEALS

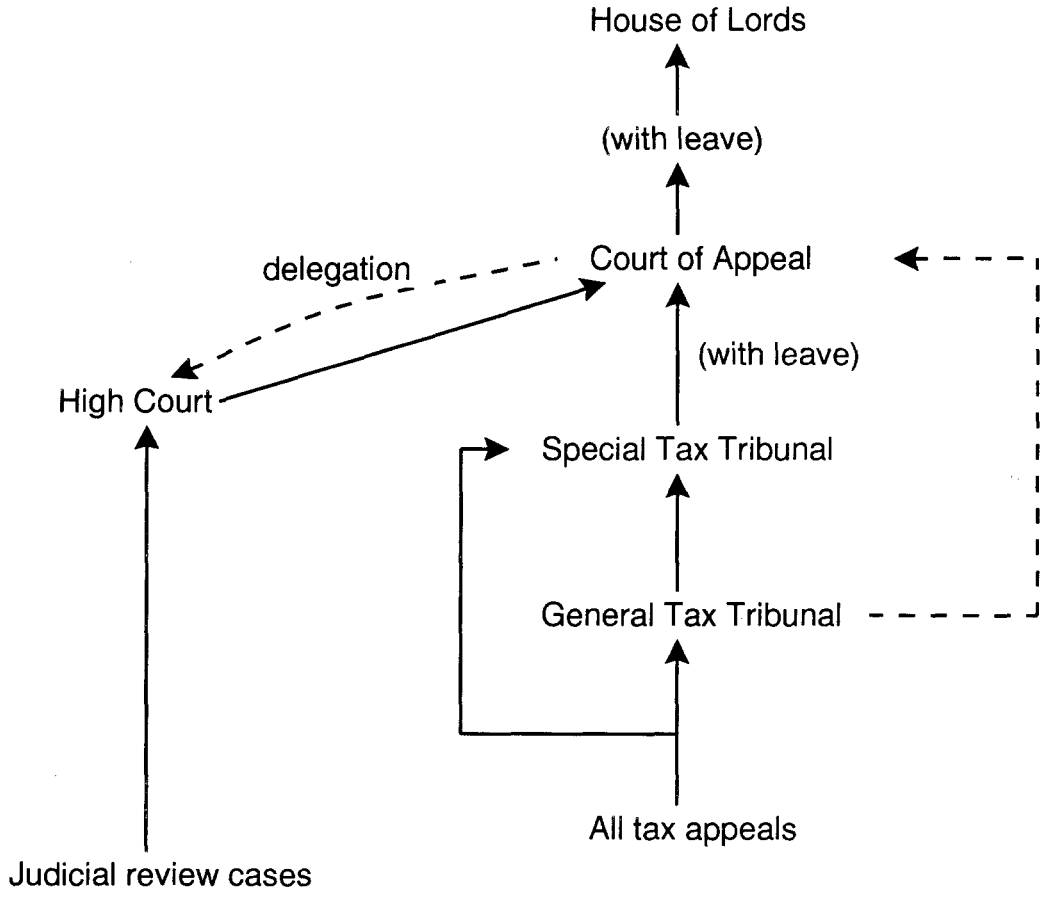


APPENDIX 4

PRESENT TIERS OF APPEAL



POSSIBLE TIERS OF APPEAL



ALTERNATIVE FOR NEW TIERS OF APPEAL