REPRESENTATION BEFORE TRIBUNALS

Introduction

This Section deals with representation of clients before appeals tribunals for tax matters.

As from 1 April 2009, direct and indirect tax appeals are now heard in the First-Tier Tax Tribunal ("FTT") with a right of appeal, with permission, to the Upper Tribunal ("UT"). This has replaced the use of General Commissioners, the Special Commissions and the VAT and duties tribunal.

The FTT is governed by The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) "FTT Rules") and The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) ("UT Rules") apply to the UT.

The FTT is divided into five chambers, one of which is the Tax Chamber. The UT is divided into three chambers; the Finance and Tax Chamber deals with tax appeals.

Appeals

The appeal process is different for direct tax and VAT.

<u>Direct Tax</u>

The taxpayer must give Her Majesty's Revenue & Customs ("HMRC") notice of an appeal in writing within 30 days after HMRC's decision. Any of the following three procedures will then be available:

1. The taxpayer may require HMRC to carry out an internal review of the matter, in which case a previously uninvolved HMRC officer will carry out the review; or

2. HMRC may offer the taxpayer an internal review of the matter to be carried out by a previously uninvolved HMRC officer; or

3. The taxpayer alone may refer the appeal to the FTT.

If HMRC offer a review, and the taxpayer does not accept this offer, the taxpayer must refer the appeal to the tribunal within 30 days of HMRC's offer. If the tax payer does not do so, the appeal is treated as determined by agreement. Similarly, if HMRC carries out the review and states the conclusions of this review, the taxpayer must refer the appeal to the tribunal within 30 days of HMRC's notice of its conclusions.

<u>Indirect Tax</u>

A decision from HMRC must fall into one of the categories of VAT Act 1994 s. 83(i) to be appealable to the Tribunal.

Within 30 days of HMRC's decision a Taxpayer must:

1. Submit a notice of appeal to the FTT; or
2. Request an independent review

If the taxpayer requests a review, HMRC will complete the review and notify the taxpayer of their conclusion usually within 45 days. The taxpayer then has 30 days to appeal the reviewer decision to the Tribunal.

Payment of tax during reviews and appeals

If the decision is about a direct tax matter you can sometimes ask HMRC to postpone part or all of the tax in dispute until the appeal is settled. Interest will continue to accrue on any unpaid tax that is found to be due when the appeal is settled.

If the decision relates to an indirect tax matter (except for Customs matters), HMRC will not collect the disputed tax while HMRC carry out a review of the decision. However, in order to appeal the decision, the disputed amount will have to be paid unless the taxpayer can demonstrate the payment would cause financial hardship.

Case allocation

The FTT will direct whether the case is a:

1. “default paper case” – usually decided on the papers, without a hearing;
2. “basic case” – usually deicide after a hearing, with minimal exchange of documents before the hearing;
3. “standard case” – usually subject to more detailed case management and decided after a hearing; or
4. “complex case” – the case involves an important point of principle or involves a large sum of money. These cases will be decided after a hearing.

The FTT, with the consent of the parties, can direct that complex cases be transferred to the UT.

Costs

The general rule before the FTT is that no award of costs will be made after the hearing. However, the FTT can award costs to the successful party on appeal if the proceedings have been allocated as a complex case unless the taxpayer sent a written request to the Tribunal within 28 days of the case being allocated as complex that the appeal be excluded from costs. The paying party will be entitled to make representations before an award as costs is made.

THE UT may only award costs if the FTT had the power to amend costs. On direct appeals to the UT, the UT may award costs if a party or their representatives has acted unreasonably in bringing, defending or conducting the proceedings. The FTT is also entitled to order wasted costs against either party.

Representation and failure to attend a hearing

A party may appoint a representative (this person does not to have to be a legal representative) to represent that party in proceedings. If a party appoints a representative, that party must send the

Tribunal and each other party written details of the representative's name and address. If a legal representative is appointed then they should do this.

The rules define a legal representative as an authorised advocate or authorised litigator (as defined in s119(1) of the Courts and Legal Services Act 1990(6)) an advocate or solicitor in Scotland, or a barrister or solicitor in Northern Ireland.

The taxpayer may appear in person or be accompanied by another person who, with the permission of the Tribunal, may act as a representative or otherwise assist.

If a hearing is necessary (depending on the classification of the case) and a party fails to attend, the Tribunal may proceed with the hearing if the Tribunal is satisfied that the party has been notified of the hearing or that all reasonable steps have been taken to notify the party of the hearing and considers that it is in the interest of justice to proceed.

What happens after the FTT hearing?

An appeal on a point of law can be made to the UT in respect of an adverse decision by the FTT. Similarly, an appeal against a UT decision can be made to the Court of Appeal and, if deemed necessary, an appeal against a Court of Appeal decision can be made to the Supreme Court (formerly the House of Lords). At each stage permission is needed for the appeal to proceed. This means the old right of appeal to the High court has been lost.

In addition, both the FTT and the UT can be asked to review their own decisions if there was an error of law in the decision.

A person seeking permission to appeal a FTT decision must make a written application to the FTT for permission to appeal.

An application must be sent to the FTT so that it is received no later than 56 days after the latest of the dates the Tribunal sends to the person making the application either:

1. full written reasons for the decision;

2. notification of amended reasons for, or correction of, the decision following a review; or

3. notification of an application for the decision to be set aside has been unsuccessful.

It is possible to apply to the Tribunal for an extension of time, but a good reason will be required.

The UT

The rules regarding representation in the UT are the same as in the FTT (see above).

Direct Appeal to the UT

A person may apply to the UT for permission to appeal against the decision of the FTT if they have made an application for permission to appeal to the FTT and that application has been refused or has not been admitted.

If an appeal is granted, the party that applied must provide a notice of appeal to the UT so that it is received within one month after the permission was granted.

The UT also deals with judicial review proceedings. A person seeking permission to bring judicial review proceedings before the UT must make a written application to the UT promptly and must be sent or delivered to the UT so it is received within 3 months (unless any act specifies shorter time limits). A court may also transfer judicial review proceedings to the UT.

The UT may make any decision without a hearing but must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any hearing. If a hearing is held, each party is entitled to attend subject to certain situations where the UT can exclude people, such as any person who is disrupting or may disrupt a hearing.

Further Guidance for Members Representing Clients at Tribunals

A member should not undertake professional work which he is not himself competent to perform unless and until he has obtained appropriate advice and assistance to enable him to undertake a particular assignment. That principle is particularly important where the member is planning to represent a client before a Tribunal. In particular, the member should be satisfied that he is familiar with:

1. the way in which appeals have to be initiated;
2. the way in which hearings are conducted;
3. the order of proceedings;
4. the formalities which must be observed;
5. the desirability of submitting an agreed statement of facts;
6. the procedure for expressing dissatisfaction with the Tribunal's decision;
7. other alternatives that may be available, including alternative dispute resolution, review, and the strict time limits that may apply to those alternatives;
8. the relevant procedural statutory instruments;
9. a good working knowledge of what evidence is and what is not accepted, including the hearsay rule, and who is competent to give that evidence;
10. the circumstances in which a Tribunal may impose a penalty under any relevant provision in the Taxes Management Act 1970, VAT Act 1994 or other relevant statute;
11. the distinction between a review and an appeal; and
12. the circumstances in which ex parte applications may be made.

Where it appears likely that there will be an appeal, by either side, to the Court of Appeal or Court of Session, a member should consider carefully whether counsel or a solicitor with a High Court advocacy certificate should be briefed, even for the hearing before the FTT or UT.

Similarly, briefing counsel or a solicitor with an appropriate advocacy certificate (High Court or criminal) should also be considered where tax evasion may be involved.

The FTT is the final arbiter on questions of fact. Thus, the importance of ensuring that all facts are well presented cannot be over-emphasised, no matter how self-evident or trivial those facts may, at first sight, appear to be. In some cases it may be desirable to provide the FTT with an agreed statement of facts, which has been settled with the relevant Revenue or Customs representative. That agreed statement should contain as much detail as possible; it is an opportunity for the taxpayer to take the initiative in the way in which relevant facts are presented. However, it should be recognised that the FTT, may ask supplementary questions.

The decision on whether to make an appeal should be made by the client, albeit the member will probably have to make a recommendation. In considering what to recommend, the member will have to consider a number of factors, including:

1. the costs to the taxpayer, both in terms of time and money, particularly if the appeal is later taken to the UT, or to higher courts;
2. the amount of tax at stake;
3. the strength of the client's case; and
4. publicity and the consequences thereof for the client and/or his business.

5. In principle, the onus of proof generally rests with the taxpayer.

It will normally be advisable for the appellant or his representative to attend every hearing before the FTT or UT, even if only to request an adjournment. If an adjournment is sought, the taxpayer's representative should be prepared to give to the tribunal adequate reasons to support the request.

If an adjournment is refused by the Tribunal and the assessment is confirmed, there are limited procedures available whereby the matter may be reopened. These include an application for review under rules 38 and 41 FTT Rules or Rule 28 UT Rules. Members should recognise that a taxpayer might have grounds for a claim in negligence against an adviser who had failed to attend the hearing, or (in appropriate cases) had permitted the taxpayer to pay the tax without exploring the possibility of mitigation.

Members are advised to operate an adequate system for ensuring that all notices from Tribunals are logged, for noting the date of hearing of each appeal and of each adjournment, and for ensuring that every appeal hearing is attended by a person of suitable experience who is sufficiently informed to be able to deal adequately with the matter, unless they have written confirmation that attendance at the hearing will not be required.

A member should be able to advise which case track the appeal should be allocated to and whether an application should be made for a complex case to be transferral to the UT.

A member should understand how appeals may be settled by agreement and the effect thereof (TMA s54 and VATA s 85).

A member should be familiar with the various provisions in the two statutory instruments governing procedures before the Tribunals, in particular:

1. the procedures for listing appeals and the notification thereof;
2. the need, where appropriate, to arrange for witness summonses (;
3. pre-hearing direction mechanisms and their uses;
4. the legal effects of agreed documents;
5. the mechanism whereby two or more proceedings before the tribunal may be heard together or consecutively by the same tribunal;
6. the rules with regard to the joiner of additional parties;
7. the powers of the Tribunals to obtain information and the penalties for failure to comply;
8. how to obtain postponements and adjournments;
9. the requirements with regard to the submission of expert evidence;
10. the constitution of the tribunal at the initial and any adjourned hearings;
11. whether the proceedings are public or private, and if the former how in appropriate cases to change to the latter, together with those entitled to be present;
12. the way in which hearings are conducted, the order of proceedings and the mechanisms of giving evidence;
13. a good working knowledge of what evidence is, and what is not, acceptable, including the hearsay rule, and who is competent to give the evidence;
14. the mechanisms for the giving of the tribunal's decision and how such decisions may be reviewed and whether published;
15. whether and in what circumstances costs may be awarded against a party to the proceedings, what costs are for this purpose, and the procedure for having those costs taxed (i.e. vetted and possibly reduced as part of the judicial function in the county court) by the paying party;

16. the case stated procedure for appeals against decisions of the FTT=;
17. the appeal mechanism from decisions of the UT;
18. penalties for failure to comply with the directions of Tribunals;
19. how notices are to be given and served, including substituted service ; and
20. the need to ensure that clients are aware that the [Tribunals] have the power to publish reports of their decisions and how to take steps to ensure anonymity in appropriate circumstances.

Members should understand how appeals may be instigated against the summary determination of penalties or in appropriate cases how applications for judicial review of the decision may be made and rule 28 UT Rules , and the time limits involved in each case.

CIOT & ATT ADVOCATES:
GUIDANCE NOTES AND ETHICAL PRINCIPLES

Introduction

From time to time a member of the Institute may represent a client in a tax appeal heard by the FTT and UT. In this Appendix the expression 'CIOT advocate' is used to refer to a member acting in that capacity. The Appendix gives guidance and prescribes ethical standards which a CIOT advocate should observe. 'The tribunal' means the FTT or UT, as the case may be.

General Principles

A CIOT advocate has fundamental duties and responsibilities towards (i) the tribunal (ii) his client and (iii) the profession of which he is a member.

As regards (i), a CIOT advocate has a high and overriding ethical duty to the Tribunal to ensure in the public interest that the proper and efficient administration of the law is promoted. He must assist the Tribunal in the administration of the law and must not deceive or knowingly or recklessly mislead the Tribunal.

As regards (ii), a CIOT advocate has a duty to his client to promote and protect fearlessly his client's best interests by all proper and lawful means (but only by means which are proper and lawful). He must promote and protect his client's best interests without regard to his own interests or to any consequences for himself or any other person.
As regards (iii) a CIOT advocate must not engage in conduct which is dishonest or discreditable or which might bring into disrepute the tax profession of which he is a member. He must not compromise his professional standards in order to please his client or a third party.

A CIOT advocate is expected to exercise discretion and judgement with a view to complying with the foregoing fundamental duties and responsibilities. He should at all times keep in mind that his overriding duty and responsibility is that owed to the tribunal, as described in 2.2 above.

Before the Appeal Hearing

A CIOT advocate should not accept instructions to represent a client upon an appeal:

1. if he lacks sufficient experience or competence to represent the client adequately;

2. if having regard to his other commitments he will not have adequate time and opportunity to prepare for the appeal and to present his client's case in a satisfactory manner;

3. if the matter is one in which there is a risk of a disclosure of confidential information learned by him from or in connection with another client or where the knowledge which he possesses of the affairs of another client would give an undue advantage to the client who currently wishes to instruct him.

If a CIOT advocate considers that for him to accept instructions to represent a client on an appeal will or may give rise to a conflict of interest of some description he should consider the guidance in [5] below before deciding whether or not to proceed in the case.

Contact with witnesses

If the appeal will involve the giving of evidence by the client or by other witnesses called on his behalf it is acceptable and desirable for the CIOT advocate or a professional colleague to meet the witnesses before the hearing. Guidance as to such meetings is given below.

Nevertheless a CIOT advocate or a professional colleague must not outside the Tribunal:

1. place a witness under any pressure to provide other than a truthful account of his evidence;

2. rehearse, practise or coach a witness in relation to his evidence.

Subject to the principles stated above, the purpose of prior meetings with witnesses is (i) for the CIOT advocate to be informed of the evidence which the witnesses can give and (ii) to assist in securing that the witnesses will give their evidence efficiently, clearly, economically and relevantly.

It is good practice in any case where a witness's evidence is of any substance for the advocate or his colleague, having discussed the matter with the witness and listened to his account, to prepare in draft a statement of the evidence. The witness is then requested to read the draft statement, to amend it to the extent that he considers appropriate, and then to sign it as his evidence.

In some cases the tribunal may, either of its own motion or on application from the CIOT advocate, direct that the witness's signed statement will stand as his evidence in chief, in which case the witness's evidence given orally will consist primarily of his cross-examination by the advocate for the other party. Where such a direction has been given or the CIOT advocate intends to ask for one:

1. the responsibility resting on the CIOT advocate to ensure that the statement is drafted conscientiously is all the greater, and

2. he should supply a copy to the advocate for the other party at a reasonable time before the hearing.

The CIOT advocate as a witness

If a CIOT advocate is instructed to act as advocate in an appeal in which he will or may also give evidence (including evidence relating to the client's accounts) he should consider the guidance in [6] before deciding whether to accept the instructions.

At the Appeal Hearing

A CIOT advocate when conducting an appeal before a Tribunal:

1. must be courteous at all times;

2. is personally responsible for the conduct and presentation of his case and must exercise personal judgement upon the substance and purpose of statements made and questions asked;

3. should present his case in the form of submissions and should not (unless invited to do so by the tribunal) assert a personal opinion of the facts or the law;

4. (subject to the guidance below) must ensure that the tribunal is informed of all relevant decisions and legislative provisions of which he is aware even if the effect is unfavourable to the client's case;

5. must not devise facts which will assist in advancing the client's case;

6. must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify, insult or annoy a witness or some other person;

7. must not, in the case of a witness for the other party whom he has had the opportunity to cross-examine, impugn the witness's evidence (for example by inviting the tribunal to reject the evidence as false) unless in cross-examination he has given the witness the opportunity to answer the allegation.

The duty to ensure that relevant decisions and legislative provisions are drawn to the attention of the tribunal should be exercised with judgement and professionally-informed restraint. A CIOT advocate is not required to refer to decisions or provisions which are in his opinion, if relevant at all, only marginally so. He is entitled to take into account (if, as will be usual, it is the case) that the other party is HMRC and would be unlikely to have overlooked a relevant decision or provision, particularly if it supported its case. Nevertheless, if it appears to the CIOT advocate that the other party's advocate has overlooked a point which is plainly relevant, it would be wrong for the CIOT advocate to do nothing about it. It is always possible, and in many cases would be sensible, for him to mention the point to the advocate for the other party and hear his views upon it, before finally deciding whether his own duty impels him to draw it to the attention of the Tribunal.

Conflicts of Interest

It is not realistic to formulate precise rules by reference to which a CIOT advocate must determine whether a conflict of interest precludes him from representing a client on an appeal. When a CIOT advocate considers that a conflict might arise he should consider the following observations, which are deliberately and inevitably expressed in general terms.

Cases sometimes arise in which two or more taxpayers have been parties to a particular transaction or arrangement, where the tax treatment is controversial, and where the treatment which is favourable to one party (A) is unfavourable to another party (B). If a CIOT advocate is requested to represent A on an appeal, but the advocate or his firm also acts for B, there is a clear conflict and the advocate should decline to represent either A or B.

Cases arise where a CIOT advocate or his firm has two clients who are both affected by a point of law. It is essentially the same point but arises in the context of two completely separate transactions. Client C contends for interpretation X to be applied to his transaction. Client D contends for interpretation Y to be applied to his transaction. If the CIOT advocate is instructed to represent client C on an appeal he will know that, if his (the advocate's) submissions in support of interpretation X are successful, the result, though beneficial to client C, will be detrimental to client D. This is not the form of conflict which requires the CIOT advocate to decline to accept instructions from client C. He may choose not to accept the instructions, but that is a matter of choice, not of professional obligation.

Between the situations described there is a spectrum of cases within which the CIOT advocate should exercise his professional skill and judgement in determining (i) whether there is a conflict of any description and if so (ii) whether it is one which precludes him from representing a client on an appeal, or (iii) it is one which, while not precluding him from representing the client, nevertheless leads him to conclude that he will choose not to represent the client.

If a CIOT advocate perceives the possibility of a conflict it is possible for him (within the limits of preserving client confidentiality) to discuss the matter with both clients. Client A who could be adversely affected by the possible conflict might, after full disclosure by the advocate, be prepared to confirm that he has no objection to the advocate representing the other client, client B. This does not mean that client A has a right of veto over the CIOT advocate representing client B. The advocate could decide to go ahead and represent client B even if client A says that he would prefer the advocate not to. But any professional anxieties which the advocate may feel over accepting client B's instructions would be dispelled if client A states that he has no objection.

If a CIOT advocate feels unable to resolve a difficulty he may seek guidance from the Standards Committee of the Institute. Full particulars should be supplied to the Secretary-General, who will arrange for the matter to be referred to the Chairman of the Committee.

The CIOT Advocate as a Witness

Advice which the CIOT advocate should take into account in deciding whether or not to accept the instructions is given below. Guidance is also given which a CIOT advocate is expected to observe if he does accept the instructions and acts as both advocate and witness in the same appeal.

In litigation generally it is better for the same person not to be both the advocate and a witness. For example the Code of Conduct of the Bar of England and Wales provides that a barrister must not accept any brief or instructions if the matter is one in which he has reason to believe that he is likely to be a witness. The CIOT does not consider it realistic to prescribe a similar mandatory rule for CIOT advocates. Nevertheless the CIOT recommends that in any appeal where the member expects to be a witness and is also requested by the client to act as advocate, he should consider the position carefully before deciding whether to agree to the request. Hearings in which the same person is both advocate and a witness can progress untidily, and procedural difficulties arise from confusions between the two capacities.

However, the CIOT recognises that, principally on grounds of minimising expense to the client and endeavouring to shorten hearings, there will continue to be cases in which a CIOT member will consider it right to act as advocate even though he expects that some of the things that he will say will be in the nature of evidence. This may particularly be so where the member expects that his evidence will be short and wholly or largely uncontroversial. These guidelines lay down no rules on this matter, but leave it to the professional judgement of the member.

Where a CIOT advocate, as well as acting as advocate before a tribunal, also gives evidence he should assist the Tribunal and the advocate for the other party in the following:

1. he should explain to the tribunal the two capacities in which he is acting;

2. he should keep them distinct in his own mind and seek to ensure that at all times it is clear to the tribunal and to the advocate for the other party whether what he is currently saying is argument of an advocate or evidence of a witness;

3. he should endeavour to give all his evidence consecutively and in one piece, and should avoid delivering to the tribunal an address in which argument and evidence are jumbled together;

4. at the point when he is about to make his statements which are evidence he should ask the tribunal to direct whether he should be placed on oath; and

5. when he has completed the part of his address which he considers to be evidence he should say so and should tender himself for cross-examination.