

## TaxZone Newthwire

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### Introduction

In 1972 what was believed to be a simple little sales tax was introduced by the government of the day. Almost 25 years later it is recognised that VAT is a complicated monolith, with numerous provisions and complications.

This is reflected by publications on the subject. *Tolley's VAT Annual* is quickly catching up in size with the *Income Tax Annual*. A peculiarity of VAT is that numerous cases are heard by the VAT Tribunals, yet much fewer proceed to the UK and European courts. Accordingly *Tolley's VAT Cases* book has become an enormous tome, rivalling *Tolley's Tax Cases* in size.

In this wire I will concentrate on VAT appeals, a subject that is important to accountants, lawyers and trading individuals, partnerships and companies.

### 1. Access and information

Appeals regarding VAT matters are made initially to the VAT and Duties Tribunals, which deal with appeals regarding VAT, Customs Duties, Excise, Landfill Tax and other matters. The address from which the tribunals operate is 15-19, Bedford Avenue, London WC1B 3AS. Tel: 0202 7612 9700, Fax: 0202 7436 4150.

The tribunals' website can be accessed at <http://www.financeandtaxtribunals.gov.uk> and contains explanatory leaflets about VAT appeals. Appeal forms can be downloaded on pdf. files, or requested from the address above.

The secondary legislation on VAT appeals is contained in the VAT and Duties Tribunal Rules, Statutory Instrument No. 590 of 1986, as amended.

### **Planning Point**

**Accountants should note the name and address of the VAT and Duties Tribunal.**

## **2. The right to appeal**

Section 83, VATA 1994 sets out the circumstances in which a VAT appeal may be made. These are as follows:

Category 1 – Against the 100% penalty for civil evasion of VAT under section 60, VATA 1994 or section 61 if the penalty was imposed on a company director.

Category 2 – Against other penalties such as the 15% penalty for innocent errors and for late registration, as well as the default surcharge for late submission of a VAT return and for mitigation of (rather than an appeal against) a civil evasion penalty.

Category 3 – All other appeals.

Where HMRC have imposed a penalty for dishonesty, the department must prove that dishonesty. Therefore, their representative commences the appeal and has the final say after the response from the appellant. Normally the appellant commences the appeal, HMRC responds and the appellant has the final say.

When the appellant is contending reasonable excuse or asking for mitigation of a Category 2 appeal, the basis of the excuse must be put forward. Where mitigation is claimed, the reasons for that claim should be quoted in the appeal.

Examples of situations where an appeal cannot be put forward are:

# Against interest imposed on an assessment.

# Hypothetical situations. For instance if the taxpayer intends to make a new source of supply, a test sale might have to be made in order to obtain an HMRC ruling, and possible appeal against that ruling.

### **Planning Point**

**Practitioners should be aware of the issues which can give rise to a VAT appeal, and those where no appeal is possible.**

## **3. Timing of the appeal**

There is a fundamental difference between the appeal to a VAT Tribunal and a direct tax appeal. This difference concerns costs. Whereas the Special Commissioners are only able to award costs in very specialised circumstances, the 'winning side' in a VAT appeal can claim and are usually awarded costs.

This goes with a corollary. Costs may be awarded from the time that the appeal is lodged. No costs award can be made for discussions or negotiations with HMRC *before* the appeal is actually lodged. For this reason appellants and their advisers should lodge an appeal as soon as a disputed assessment is made or another issue of conflict arises.

The only exception to this is when the technical issues at stake are so weak that the Tribunal is likely to find against the taxpayer anyway, and there is more chance of some relief from a 'local concession'.

The normal time limit for appealing against an assessment is 30 days. Where the taxpayer has asked for a review by HMRC, an appeal should be made within 21 days of the review.

However, if the appeal is submitted late, the Tribunal has the power to request HMRC to accept it, provided it is late in terms of weeks and months, but not years.

### **Planning Point**

**Accountants should note that VAT appeals should be made as early as possible, in order to protect the costs position. The normal time limits should also be noted.**

## **4. Representation**

Normally it is the supplier of the goods or services who makes the VAT appeal. However, there are instances when the customer, not necessarily a registered person, has an interest in the VAT situation. An example of this is building work. The builder may charge VAT output tax in order to be safe, to which the customer objects and refuses to pay. The customer therefore has an interest in making the appeal. If the customer had paid the VAT without query, the builder would have no interest in pursuing an appeal.

Any VAT registered trader can represent themselves at the VAT Tribunal. In the case of a limited company, this includes a director, executive or company secretary. Whether this is wise or not is debatable. Some traders who have represented themselves have been successful. Others have made a mess of the appeal, and this includes some accountants and lawyers.

In straightforward cases not involving technical points such as an appeal against a default surcharge or a penalty, and where the trader cannot afford the potential costs, he or she may wish to conduct the appeal personally. However, HMRC may be represented by one of their staff or a solicitor. In cases where there is any legal complexity, HMRC will be represented by counsel. Accountancy practitioners will have to decide whether to engage a VAT specialist or brief counsel when an appeal regarding one of their clients is contemplated.

Even when counsel is instructed, the practitioner can do much to assist and reduce costs by providing succinct information and facts and dealing with background work. This could well reduce overall costs. Practitioners should remember the possibility of using a barrister through the Direct Access schemes.

### **Planning Point**

**Accountants should be aware of who can make a VAT appeal, and consider carefully who should represent the client, when an actual appeal takes place.**

## **5. Making the appeal**

A VAT appeal is made direct to the VAT Tribunal, not to HMRC. The official form for making an appeal can be downloaded from the Tribunals' website mentioned above, or a hard copy can be requested by writing to the Bedford Row office.

The appeal must include:

# The grounds of the appeal, such as the legal provisions under dispute or factual matters which the taxpayer considers HMRC have misunderstood. These grounds must be presented in a way so that HMRC are aware of the issues at stake. As space on the form is limited, it may be better to attach a separate document showing 'grounds of appeal' in several paragraphs.

# Attached to the appeal form must be a copy of the assessment or decision letter against which the appeal is being made.

The appeal form and attachments must be sent to the tribunal office covering the area of the VAT registration address. This will be London, Manchester, Edinburgh or Belfast. Further details of the offices can be obtained from the website or explanatory leaflet sent by post.

The VAT Tribunal will not hear the appeal if the trader is not up to date with VAT returns and payments. In addition, VAT assessed, even if under dispute, should be paid before the appeal is heard. This does not apply to default surcharges or penalties.

If the trader is unable to pay the VAT at stake, interest will accrue that is not an allowable expense for direct tax purposes and which is, of course, much higher than interest receivable from HMRC. In cases of financial hardship application can be made to HMRC for the appeal to be heard without payment of the disputed VAT. Evidence of financial hardship will have to be provided if this course of action is taken.

### **Planning Point**

**Accountants should be aware of VAT appeals procedure, the requirement for VAT returns and payments to be up to date, and the necessity for the disputed tax to be paid before the appeal is heard.**

## **6. Preliminary procedure**

Following submission of the appeal the following sequence of events occurs:

# The Tribunal Centre will acknowledge receipt of the appeal and forward a copy to HMRC.

# HMRC then has 30 days to submit a Statement of Case in response to the appeal, justifying the department's original assessment or decision. The Tribunal Centre will forward a copy of this to the taxpayer. Severe delay in HMRC submitting a Statement of Case has led to the appeal being upheld in some past cases.

HMRC should submit a list of documents relied on by the department with the Statement of Case. In the case of a dishonesty appeal, they should list all the documents they hold that are of any relevance to the matter. This will include visit reports and the transcript of any formal interview.

# If the appeal is against a dishonesty penalty, the taxpayer must then submit a defence.

# The appellant must provide HMRC with a list of documents on which he or she will rely on as evidence.

# The Tribunal Centre will ask both parties for dates when they are not available during the next few months, and how many days they estimate the Tribunal will last. They will also be asked for the estimated number of witnesses to be called. This is not binding, as the decision to call a witness can be made up to and including the tribunal hearing. Typically, notification of the appeal dates is given six-eight weeks ahead.

# The Tribunal Centre will ask if the client and adviser would prefer the hearing to be at a closer location. If an early hearing is desired, it may be wise to accept the hearing at the tribunal centre that is handling the matter.

### **Planning Points**

**Accountants should be aware of the sequence of events following the making of an appeal.**

## **7. The time factor**

Despite the published regulations, HMRC rarely produce their Statement of Case on time, and accountants and their clients must be prepared for 'the long haul'. It could be up to 12 months before the matter actually goes before the Tribunal.

It may be possible to expedite matters by speaking to the person in HMRC solicitors' department who is actually handling the appeal. HMRC often use counsel to take an appeal for them, and this means that the case may not be looked at until shortly before the actual hearing. This accounts for the fact that HMRC sometimes concede the case just before the proposed hearing.

The Tribunal has the power to arrange Directions Hearings, particularly where the parties to the appeal seem not to be making any headway, and in order to progress matters.

At the end of the hearing the decision of the tribunal members will usually be reserved. The issue of the decision will then follow after a minimum period of two weeks and sometimes two months or more.

### **Planning Point**

**Accountants should stress to their clients that the progress of an appeal is likely to take a long time - months rather than weeks.**

## **8. Preparation**

It cannot be emphasised too much that the winning or losing of an appeal, either direct tax or VAT, depends on exhaustive preparation. The appellant has to show that the assessment or ruling is based on incorrect law and/or incorrect facts. Preparation for the appeal will include:

# Facts upon which the case depends. The Tribunal will not admit 'hearsay' evidence.

# Evidence of the facts. Except in the case of a dishonesty penalty, it is the appellant trader who has to demolish HMRC's case. The Tribunal may take a pragmatic view and reduce rather than extinguish an assessment. In cases of supposed under declaration of takings the Tribunal will take a balanced view and, in cases of doubt, is likely to find for the appellant – but only where solid facts have been presented.

# Relevant documentation such as annual accounts, invoices. These will demonstrate actual evidence, as will contracts, customer brochures etc.

# Arranging for the attendance of witnesses who will help the trader's case. Where an expert witness is engaged, their report should be sent to HMRC, who will have the opportunity to present their own expert witness.

### Planning point

**Careful preparation for a VAT appeal is essential and will demand substantial time of the accountant and his or her staff.**

## 9. Lists of documents

Each side must produce to the other a list of the documents on which it will rely. In theory this should be done within 30 days of the Tribunal Centre acknowledging the appeal, but this time limit is often ignored. This list extends to copies of documents to be quoted at the appeal, but does not necessarily include letters between the trader and HMRC. However, it includes copies of items to be used in documentary evidence such as accounts, contracts and brochures.

All documents should be produced to 'the other side' as soon as possible. If a document is produced for the first time at the actual hearing, the other side is entitled to ask for an adjournment to consider it.

Examples of the type of documents that should be produced are:

- # Correspondence with HMRC and third parties.
- # A copy of the 'Without Prejudice' offer, if such an offer has been made by HMRC.
- # Accounting records, including sales and purchase invoices.
- # Contracts relating to the supplies in dispute.
- # Marketing material giving details about the product or service.
- # In property cases, planning permission and photographs of the site before and after the project.

### Planning point

**It will be the accountant's job to collate all necessary documents, and if he or she is taking the case at the appeal, obtaining documents from HMRC. This is a very important part of the procedure.**

## 10. Formal witness statements

Sometimes a formal witness statement is supplied by a witness who is unable to attend the hearing. This might be produced by either side. However, such statements can be objected to because the witness is not available for cross examination.

On the other hand what is known legally as 'proof of evidence' i.e. a written statement of evidence by a witness, can be useful, provided the witness will be present and can be cross examined by HMRC. Use of such proof of evidence can speed up the proceedings.

### Planning point

**Written statements by attending witnesses can be useful, and will speed up the proceedings.**

## 11. Agreed bundle of documents

It is helpful to the Tribunal if a bundle of documents is provided at the hearing. Both parties should co-operate over this and make sure that there is no duplication. It is also necessary to provide enough copies to serve the tribunal members, the client, witnesses and each party. This means that, perhaps, seven or more copies will be required.

Bundles should commence with the assessment or decision in dispute with relevant supporting papers, followed by correspondence in date order, earliest date first. All pages should be numbered sequentially, and an index at the front of the bundle will help to identify each page.

If any items such as original documents are wanted back, these should be collected from the Tribunal Centre within six weeks of publication of the decision.

### Planning Point

**Documents required for the VAT hearing should be carefully collated and indexed, so that easy reference to them during the hearing assists the case.**

## 12. Prior agreements

It may be possible to agree a Statement of Facts with HMRC before the hearing, as well as the legal points in dispute. One has to make sure that legal issues are only identified in outline. This procedure may be difficult to achieve if named individuals have not been appointed by HMRC to deal with pre-hearing issues.

### Planning Point

**The accountant will have to decide whether an agreement of facts and legal cases with HMRC will help the client's case.**

## 13. Cases to quote

The appellant should provide HMRC and the Tribunal with a list of cases from which he or she intends to quote. HMRC should observe the same procedure, and failure to do so could render the case liable to adjournment.

It is best to supply copies of the cases to HMRC and the Tribunal, as different sources tend to have different page numbers.

It is tempting to quote only from cases that support the appellant's case. But it is more sensible to quote cases which demonstrate both points of view, while emphasising how the client's case differs from unfavourable decisions.

A previous tribunal decision can be persuasive to the Tribunal, but is not binding. Cases that have been decided in the High Court and above, as well as by the ECJ, are binding on the Tribunal as regards points of law.

### Planning point

**Selecting cases is part of the preparation for the hearing, which the accountant, VAT specialist or counsel will have to deal with.**

## 14. The skeleton argument

The representative for the appellant needs to prepare a skeleton argument, with the same number of copies required as for the bundle of documents. In this document the key facts on which documentary evidence is being produced are set out, cross referenced to the bundle of documents. It also sets out the legislation on which the appellant relies.

The skeleton argument should not be a word for word copy of the opening speech that is to be made on behalf of the client. A summary allows extra points to be added at the last minute, and gives the speaker some latitude to expand on matters in an interesting way so that the tribunal members remain focused.

### Planning point

**Care needs to be put into the preparation of the skeleton argument, as it will be distributed to the tribunal members, HMRC and the client.**

## 15. The hearing

Hearings are in public, and there will be a legally qualified Chairman. In some case there will also be a lay member who is not a lawyer but also professionally qualified. A tribunal hearing is relatively informal, but evidence is given on oath or by affirmation. The sequence of events is:

# The representative of the appellant presents the appeal, and calls the appellant's witnesses. They can be cross-examined by HMRC.

# HMRC present their case and call their witnesses, who can also be cross-examined by the appellant's representative.

# The appellant's representative has the final say.

In cases where dishonesty is contended HMRC commence the proceedings and have the last word.

It is advisable for the appellant to appear as a witness so that the 'full story' can be told. Human rights legislation can impact on a case, but the appellant is unlikely to win on those grounds alone.

The Tribunal Chairman or a tribunal member can ask a question at any point in the proceedings.

## 16. Costs

It is important to ask for costs if the taxpayer succeeds in the appeal. HMRC rarely ask for costs unless the case is a major one involving counsel on both sides, it is a dishonesty case, or the department considers the appeal to be frivolous.

The original appeal should not be withdrawn until the costs issue has been settled. The claim is for 'reasonable costs' from the time that the appeal was lodged. Costs include the time of a professional adviser, which should be recorded diligently, plus travel and witnesses expenses etc.

In some cases the Tribunal awards partial costs to the losing side or restricts costs awarded to the winner. In the latter case this will be because procedures such as production of documentary evidence have not been fulfilled.

In the event of a dispute about costs, the matter can always be referred to a Taxing Master at the High Court, but this is rarely required. Negotiation with HMRC will often produce an informal offer.

### Planning Point

**It is up to the successful appellant's representative to ask for costs. They should refrain from withdrawing the appeal until this matter has been settled, otherwise the costs claim could be lost.**

## 17. The decision

In minor straightforward cases, the decision is given on the day. In more complex cases the decision will be reserved, and the decision will not be published until a period of say four weeks minimum to three months maximum, and occasionally even six months. The decision is released to both parties at a date when the Chairman signs it.

The losing party has 56 days in which to make a further appeal to the High Court, which can only be on a point of law or as a result of finding of fact that is so extraordinary that no reasonable Tribunal would have reached.

Where there is an important issue of law, a further appeal can be made direct to the Court of Appeal.

## 18. Conclusion

This wire demonstrates just how important the procedures of a VAT appeal are, and that accountants need to be 'up to speed' regarding all aspects if they are to advise relevant clients.

### Planning Point

If your clients are likely to be appealing to the VAT Tribunal, then accountants need to be aware of the whole complicated appeals procedure.

## Ask a question

Readers with a current case should post their query in Any Answers.

**JOHN T NEWTH**

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