Tribunal fees – a tax on justice

Management of taxes | Tax voice

21 January 2016

Hui Ling McCarthy reviews the government's proposals to introduce fees in the Tax Tribunals

Editor's note: the government response was published on the 17th December 2015 and the author has kindly agreed to prepare a commentary on the revised proposals in the next issue of MOT Voice.

As many readers will be aware, the Ministry of Justice (MoJ) is consulting on the introduction of fees to be paid by users of the First-tier and Upper Tribunals (FTT and UT) in tax appeals. Or, to put it more accurately, the MoJ's current thinking is that fees should be paid by approximately half of all users because, as anyone who has read the consultation will be aware, it does not include plans for HMRC to pay fees (at least not in the FTT).

The proposals

The MoJ published the following proposals in July 2015:

- A fee of £50 to notify a paper or basic case to the FTT and £200 to notify a standard or complex case.
- Proposed hearing fees of: basic £200, standard £500 and complex £1,000.

- A fee of £100 to seek permission to appeal to the UT, £200 for a permission hearing and £2,000 for a substantive appeal hearing.

Individuals of limited means may qualify for fee remission. The MoJ's hope is that these fees will generate a cost recovery percentage of about 26% out of the £8.7m or so that it costs to run the tax tribunals each year.

The problems

It seems to me that the proposals are flawed in a number of material respects.

First, few individuals are going to be willing to pay £700 (the cost of a standard appeal with a hearing) to challenge an assessment of (say) £1,500 where it is not at all apparent that the £700 will be recoverable if the appeal is successful. Fewer still would pay £250 on that basis for a Basic appeal to challenge a £100 penalty. Yet appeals against penalties and other tax assessments of £10,000 or less currently represent a substantial proportion of the FTT's annual caseload. Lower value, but no less meritorious, appeals would go unheard if fees of this level are introduced. Where, then, is the impetus on HMRC to ensure that it collects only the *right* amount of tax (as opposed to the *highest* amount of tax) if these smaller assessments are unlikely to come under independent scrutiny?

Second, the scale of the fees will inevitably have the greatest impact on vulnerable taxpayers or those on lower incomes because they are more likely to have lower value appeals. In contrast, a fee of £1,200 (the maximum for notifying and hearing a complex case) is loose change to a multinational with a transfer pricing dispute (say) or to users of a marketed tax avoidance scheme. Yet the actual cost to the tribunal of case managing, hearing and determining such disputes are significantly higher than any fee the tribunal could reasonably expect to charge.

Third, the projected 26% cost recovery is overambitious. It assumes that the number of appeals remains constant following the introduction of fees. Yet it is well known that Employment Tribunal claims fell by around 80% after fees were imposed. If a similar reduction in the number of tax appeals occurs, the government is unlikely to meet its 26% target (unless, of course, it is planning wholesale reductions of the number of judges and administrative staff, termination of leases on buildings and so on in order to reduce costs by a similar proportion).

Fourth, it is striking that HMRC will, apparently, not be required to pay any fees before the FTT at all, even for ex parte applications (an application for an approval of a Sch 36 information notice being the most obvious example). While requiring HMRC to pay fees would move the cost to HMRC's budget, budgetary constraints on HMRC may well have the beneficial effect of encouraging officers to engage properly in disputes, settling cases more willingly where their arguments are weak. There is also a more general point to be made about inequality of arms and a lack of even-handedness in a world where taxpayers will have to pay one arm of the government in order to (in a taxpayer's eyes) rectify an error made by another.

Fifth, the manner in which fees are to be charged leads to a number of practical problems. For example:

- The amount of the notification fee depends on the category to which a case is allocated. Yet the fee must be paid on notification – i.e. at a time when the taxpayer does not yet know the category.
- Fees will need to be paid for notifying protective appeals to the FTT, even if these are duly settled with no further tribunal involvement.
- There is little practical difference in the case management of a basic case compared to that of a standard case (it is, after all, still possible to apply for more detailed directions in a basic case if required). Similarly, for a taxpayer wishing to opt out of the costs regime, little is to be gained from complex categorisation instead of standard. Yet the marked difference in proposed fee levels could lead to more disputes about categorisation in lower value cases, adding to the overall cost of tribunal administration.
- The HM Courts and Tribunal Service (HMCTS) fee remission scheme, with its 31-page application form and guidance notes, is an overly complicated procedure both for the applicant to comply with and the tribunal service to administer, especially if the amounts at stake are small (e.g. an application for the remission of a £50 fee in a £100 penalty appeal).

Some solutions

If charging arbitrary fees based on case categorisation is not the answer what, then, can be done to reduce the overall cost to the public purse?

HMCTS needs to take a long, hard look at the current administration of the tax tribunals. It is difficult to justify the imposition of fees at a time when there are

numerous complaints about poor administration and inefficiency (in particular concerning the FTT). It is frequently the case that telephone calls go unreturned, hearing dates remain unconfirmed and there are significant delays in responding to correspondence and emails. All of which cause parties and their representatives to write / telephone / email repeatedly, exacerbating the problem and increasing costs, including those of the tribunal. A more streamlined and effective service would cut wasted administrative expenses.

In addition, HMRC needs to make more effort to resolve disputes without recourse to the tribunal – for example, through statutory review or by using Alternative Dispute Resolution (ADR). The evidence to date is that ADR is capable of materially reducing the number of disputes that reach a tribunal hearing. In 2013, HMRC's ADR Project Evaluation Report recorded that 58% of all cases selected for ADR were fully resolved without recourse to the tribunal. A further 8% were partially resolved. There are also potentially significant time and cost savings when HMRC and taxpayers are willing to engage constructively. In 2011, HMRC's ADR SME Pilot Evaluation Report recorded that disputes taken to litigation took nearly 100 working hours for an HMRC litigator and their support as well as the decision maker and manager (excluding the time and financial costs to the tribunal service). Through ADR, HMRC working time was (on average) 14 hours to reach a settlement.

If fees are to be introduced, a fairer system might be for the tribunal to impose fees for "unreasonable behaviour" where it makes an unreasonable behaviour or wasted costs award. Those who seek to abuse the tribunal system can be penalised proportionately and there is an added incentive for parties not to do so.

Overall, the proposals betray a limited understanding of the tax tribunal system and of tax disputes more generally. It also appears that minimal research has been carried out into the impact that a fee charging regime might have. Further, whilst current level of fees proposed may not be great, once introduced there is nothing to prevent them from rising sharply. For example, since March 2015 it costs £10,000 to issue a civil claim valued at £200,000; it previously cost just £1,515. Along with many other professional bodies, the CIOT opposed the MOJ's proposals in its response to the consultation. It remains to be seen whether this opposition will go unheard.