TAX LAW REVIEW COMMITTEE

A UNIFIED TAX TRIBUNALS SYSTEM

A Second Report on the Reform of the Tax Appeals System

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TAX LAW REVIEW COMMITTEE
SECOND REPORT ON THE TAX APPEALS SYSTEM

Summary of Recommendations

1. We consider that our recommendations represent a balanced realisation of the objectives for the tax appeals system, which we set out in our first Report. We believe that the Government should now act upon our recommendations to develop a coherent and integrated appeals policy.

2. We recommend that the Lord Chancellor's Department should commence work on legislation and on procedural rules to implement our recommendations without delay. The annual Finance Bill provides an early Parliamentary opportunity to enact the legislation. We think that it should be the Department's aim, by 2002, to have enacted legislation and to have tabled new procedural rules.

3. We recommend that the General and Special Commissioners and the VAT & Duties Tribunals be reconstituted as a unified body, to be known as "The Tax Tribunals", and to comprise a local tribunal (the "General Tax Tribunal") and a central tribunal (the "Special Tax Tribunal").

4. We recommend that the individual appointed in overall charge of the Tax Tribunals should be known as the "President of the Tax Tribunals". Individuals appointed to the Special Tax Tribunal would be known simply as members or Chairmen of the Special Tax Tribunal. Individuals appointed solely to the General Tax Tribunal would be known as members or Chairmen of the General Tax Tribunal.

5. We consider that the Government should now address the concerns that we expressed in our first Report regarding the appointment procedure for General Commissioners. We envisage that the Lord Chancellor (or his counterparts in Scotland and in Northern Ireland) would be responsible for appointing members and Chairmen of the General Tax Tribunal as part of an open process that deals with those concerns.

6. We recommend that the original jurisdiction in all appeals in tax matters—both direct and indirect and in National Insurance and related matters—lie with the Tax

Tribunals. We recommend that both the General and the Special Tax Tribunals should have a full original jurisdiction in relation to all taxes.

7. We believe that the General Tax Tribunal should serve as a quick, informal, local and low cost forum for resolving tax disputes. As such, we see the General Tax Tribunal as essentially a 'lay' tribunal, drawing its membership from a wide variety of backgrounds. Appeals should be allocated to the General Tax Tribunal as are appropriate for determination by a local tribunal of that character and the panel of members would be constituted so as to deal best with the type of issues coming before it.

8. We recommend that–

(1) The General Tax Tribunal should be chaired by a 'qualified' Chairman (see 10 below)

(2) The role under the current system of the Clerk to the General Commissioners should cease

(3) A 'lay' clerk acting in an administrative capacity only should serve both the General and the Special Tax Tribunals.

9. We recommend that the General Tax Tribunal should normally comprise three members. We think, however, that rules should permit a tribunal to comprise a 'qualified' chairman and one other member, or a single 'qualified' Chairman, in the case of specified pre-hearing procedural issues and to hear cases where both parties agree to the use of a tribunal of less than three members.

10. We think it unnecessary that every Chairman of the General Tax Tribunal be legally qualified. Individuals would be eligible for appointment as qualified Chairmen once they had attended a training programme devised for that specific purpose and had achieved an appropriate level of assessment under that programme. Such an individual would not be required to have specific tax experience. The qualification programme should be designed to qualify them to adjudicate upon the issues that they are likely to encounter in the ordinary course of the General Tax Tribunal's work.

11. We recommend that the Lord Chancellor's Department initiates immediately training and qualification arrangements for the General Tax Tribunal to enable the new appeal structure to take effect once the necessary legislation and procedural rules are in place in 2002.

12. We recommend that—

(1) Chairmen of the Special Tax Tribunal should be entitled to sit alone or with one or two members of the Special Tax Tribunal (including another Chairman), and

(2) The Lord Chancellor (or his counterparts in Scotland and in Northern Ireland) appoints members and Chairmen of the Special Tax Tribunal.

13. We recommend that the requirements for appointment as a Chairman of the Special Tax Tribunal should be based on 10 years' legal qualification. A Chairman of the Special Tax Tribunals should have gained 'relevant tax experience' prior to appointment as a Chairman. We prefer, however, to leave the formulation of the requirement relatively imprecise. There will be few individuals who have gained experience in every tax that falls within the jurisdiction of the Tax Tribunals.

14. As regards the initial appeal process, we recommend the following arrangements—

(1) Every assessment, decision or notice issued by the Revenue Departments against which the taxpayer has a right of appeal to the Tax Tribunals should state clearly that there is a right of appeal and the time within which the taxpayer must exercise his right of appeal.

(2) Every such assessment, decision or notice should be accompanied by an explanatory leaflet on the procedure for, and the hearing of, appeals.

(3) Notice of appeal in every case should be given directly to the Tax Tribunals and not to the Revenue Department concerned.

(4) The taxpayer need not, when making an appeal or within any particular time of appealing, specify whether he wishes the Special Tax Tribunal or the General Tax Tribunal to hear the appeal.

15. With regard to recommendation 14(3), there should be appropriate arrangements to allow the Revenue Departments to defer collection of tax in appropriate cases. The Lord Chancellor's Department should explore this issue with the Revenue Departments to arrive at a satisfactory arrangement.

16. The overriding principle should be that cases are always allocated to the Tribunal most suited for the issue under appeal. Accordingly, neither party to the appeal should be entitled, as of right, to choose whether the local or the central tribunal will hear the appeal. We recommend that the Tax Tribunals have the power in all cases to determine whether the central tribunal or the local tribunal hears a case, and to transfer a case allocated to the Special Tax Tribunal to the General Tax Tribunal, and vice versa.

17. Those responsible for allocating the matter to the central or local tribunal, and for determining the composition of the Tribunal, must know something of what the appeal involves before the hearing day arrives. To facilitate this, we recommend that, following the giving of a notice of appeal, the Revenue Department should be required to send to the Tribunal, with a copy to the taxpayer, a "Statement of Issues", as an executive summary of the issues involved in the dispute. The Statement's main purpose is to inform the Tribunal of the issues involved in the appeal.

18. The Revenue Department should have three months to serve the Statement of Issues. The Revenue Department would be able to apply to the Tribunal for an extension of this time limit. The taxpayer would be entitled to object to an extension.

19. This three month (or extended) period provides time for the Revenue Department concerned to conduct an internal review of the dispute. It also offers the opportunity for further negotiation with the taxpayer to resolve the dispute without an appeal hearing.

20. Consistent with our recommendation 16, there should be no more differences in the powers and the procedure of the local and the central tribunals than is absolutely

necessary, having regard to their different composition and character. Uniform procedural rules should apply to the General and the Special Tax Tribunals.

21. As regards whether hearings should be in public or in private, we recommend that the presumption should be that hearings before both the local and the central tribunals are in public. Either party would have the right to request that the appeal be heard in private. It would remain within the Tribunal's discretion whether it granted his request but we would expect the General Tax Tribunal normally agree to a request by the taxpayer for privacy.

22. We think that the power to award costs is one aspect of the rules where there may have to be an unavoidable difference between the central and local tribunals. We recommend that—

(1) The Special Tax Tribunal should have an unlimited power to award costs, as is currently the case for the VAT and Duties Tribunal

(2) The General Tax Tribunal should have the power to award costs against a party to its proceedings only if it is of the opinion that the party has acted wholly unreasonably in connection with the proceedings in question.

23. In relation to the Special Tax Tribunal, we recommend that the Inland Revenue adopt the same policy as that currently adopted by the Commissioners of Customs & Excise in the VAT and Duties Tribunals. Thus, neither Revenue Department would ordinarily seek an order for costs against the taxpayer when the Department is successful in an appeal in the Special Tax Tribunal.

24. We recommend that, in contrast to the present position for General Commissioners, members and Chairmen of the General Tax Tribunal should be remunerated for the time spent on local tribunal matters. We express no view as to the basis of payment.

25. We recommend that the form of decision—that is, a written decision with reasons—should be the same for both the local and the central tribunals. There would be power to dispense with a formal written decision with the agreement of the parties

to the appeal. We anticipate that this would be the normal situation for cases heard by the General Tax Tribunal.

CHAPTER 1. Introduction

The scope of this Report and further work on tax appeals

1.1 In this, our second Report on tax appeals, we present our recommendations for the reform of the tax appeals system. We have arrived at these recommendations after taking careful note of the responses to our first Report, and we wish to thank those who responded. We list the respondents in Appendix 1. Appendix 2 summarises the proposals that we put forward in our first Report for consultation and the comments that we received on those proposals.

1.2 The majority of respondents concentrated their comments on issues affecting the first stage appeal tribunals—the General and Special Commissioners of Income Tax and the VAT and Duties Tribunals. Our recommendations relate solely to basic tax appeals policy and to these first stage appeal tribunals. A third Report on appeals will deal with the difficult issues of the scope of powers of the Tax Tribunals to review the exercise by the Revenue Departments of discretion and of the Tax Tribunals' ability to take note in their decisions of the Revenue Departments' practice and published interpretation of tax legislation.

1.3 We will in the context of that third Report comment as necessary on the stages of appeal that lie beyond the Tax Tribunals. We also intend to review our work to date on the Scottish aspects of the tax appeals system, on the subjects of alternative dispute resolution and mediation and on the procedural rules for tax appeals. If we consider it appropriate to do so, we will publish separate secretariat or Committee papers on these topics.

1.4 We dealt in our first Report with appeals in respect of National Insurance matters. This also formed the subject of a separate Report that we published in February 1998.[1] Since then, new arrangements for decisions and appeals in National Insurance and certain related matters have been introduced, to coincide with the transfer of the Contributions Agency to the Inland Revenue from 1st April 1999. We do not deal separately with these matters in this Report. Now that they are the responsibility of the Inland Revenue, we regard them as automatically subsumed within the proposals that we make for direct tax appeals.

The objectives and policy of the tax appeals system

1.5 In our first Report, we considered in some detail what should be the function of an appeals system. From that consideration, we derived six key objectives for the tax appeals system. We set out those objectives in full in Appendix 2.[2] They bear repeating here, as it is against these objectives that we wish people to judge our recommendations. In summary, they are as follows–

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[1] *National Insurance Contributions Disputes, A Report by the Tax Law Review Committee*, The Institute for Fiscal Studies, February 1998.

[2] See Appendix 2, paragraph 2.5.

(i) The appeals system 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.

(ii) The appeals system must ensure a high quality of decision-making. This entails:

- that each case should be allocated to a suitable level within the appeals 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) The appeals system must be fair.

(iv) The appeals system must be accessible.

(v) The appeals system 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) The appeals system must resolve cases quickly and efficiently.

1.6 We record in Appendix 2 the comments that we received on these objectives. There was no disagreement among respondents with our proposal for a coherent and integrated appeals policy and there was broad support for the other objectives. If there were different views on the objectives, the differences reflected that no appeals system can realise all these objectives completely. There is always room for debate on what is the best compromise between conflicting priorities.

1.7 We consider that our recommendations represent a balanced realisation of the objectives set out above. Distinguished commentators have debated reform of the tax appeals system for some years and we believe that the Government should now act upon our recommendations and take the necessary steps to develop a coherent and integrated appeals policy. Our recommendations will involve the re-writing of the legislation for direct tax appeals and some modification of the legislation governing the VAT and Duties Tribunals. There would also be a detailed review of the procedural rules for the Tax Tribunals.

1.8 **We recommend therefore that the Lord Chancellor's Department should commence work on legislation and on procedural rules without delay.** The annual Finance Bill provides an early Parliamentary opportunity to enact the legislation. It should be the Department's aim, by 2002, to have enacted legislation and to have tabled new procedural rules. Within that time frame, we envisage that appropriate training arrangements should have been developed and tested to allow the constitution of the Tax Tribunals on the basis that we propose.

The impact of self-assessment

1.9 The introduction of self-assessment for personal taxes provided the impetus for our first Report. Respondents shared our view that it represented the right occasion to consider the system of appeals in taxation matters. In general, respondents agreed with us that the General Commissioners was the body most likely to be affected by this change in the administration of the tax system. But while many respondents believed that self-assessment would have an impact, most were uncertain as to the scope and nature of the impact. Several respondents were on those grounds against implementing reforms before more was known of the impact of self-assessment on appeals. The Chartered Institute of Taxation regretted that we had been unable to conduct any detailed research into the current functioning of the tax appeals system and the likely impact of self-assessment.

1.10 We accept this limitation on our consideration of the issues. We noted in our first Report that no one has conducted detailed research into the functioning of the tax appeals system. This is a lacuna that we, as a voluntarily funded body, have limited capacity to correct. Responsibility for undertaking or commissioning further research into the functioning of the tax appeals system must, we think, lie with the Lord Chancellor's Department in the context of its own anticipated consultation on the issues. For the time being, we base our recommendations on the collective experience of members of the Committee—which we think should not be under-estimated—and on the responses to our consultation and on the other informal contacts and discussions over the time that our work on this subject has been in progress.

1.11 We were also struck by the response that we received from the Special Commissioners. They thought it important that the government should move sooner rather later to put in place an appropriate appeals structure for dealing with self-assessment. They were concerned that otherwise practices would develop under the new system and become entrenched, inhibiting changes that would otherwise be desirable.

1.12 An argument against early action is that allowing practical (if not ideal) responses to the operation of self-assessment to develop might be better than implementing well intentioned but incorrectly directed reforms. Nevertheless, self-assessment has been in operation for two years and we do not envisage that it will be possible to implement our recommendations at a stroke. We anticipate that they would be implemented over a period, which leaves room to adapt the detail to take account of experience. Essentially, we envisage a reform of the tax appeals system on clear-cut lines with clear objectives, but implemented over a period that allows for modification as experience of the self-assessment system grows.

CHAPTER 2. The Structure and Jurisdiction of the Tax Tribunals

The title of the Tax Tribunals

2.1 We recommend that the General and Special Commissioners and the VAT & Duties Tribunals be reconstituted as a unified body, to be known as "The Tax Tribunals",[3] and to comprise a local and a central tribunal. We refer to the local tribunal as "The General Tax Tribunal" and to the central tribunal as "The Special Tax Tribunal". The words "General" and "Special" are not, in our view, ideal descriptive terms. We see the Tax Tribunals as a unified body within which appeals are allocated to whichever Tribunal is better suited to hear and deal with the matter in issue. As such, we think that there is nothing 'general' or 'special' about the jurisdiction of either the local or the central tribunal. We accept, however, that history should play a part in the choice of terminology and that the nomenclature of each tribunal should convey what is familiar to many taxpayers, tax advisers and tax inspectors.[4]

The title given to members of the Tax Tribunals

2.2 We consider that the title "Commissioners" should cease to be used to describe those responsible for adjudicating tax appeals. There appears to be widespread agreement that taxpayers either do, or are likely to, confuse the terms "General Commissioners" and "Special Commissioners" with the Commissioners of Inland Revenue.[5] We think it a point of overriding importance that the Tax Tribunals and those who serve as members of the Tax Tribunals should be, and should be seen to be, absolutely independent of the Revenue Departments. **We recommend, therefore, that the individual appointed in overall charge of the Tax Tribunals should be known as the "President of the Tax Tribunals". Individuals appointed to the Special Tax Tribunal would be known simply as members or Chairmen of the Special Tax Tribunal. Individuals appointed solely to the General Tax Tribunal would be known as members or Chairmen of the General Tax Tribunal.**

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[3] Some respondents continue to prefer the title "Tax Appeals Tribunals" and we would be equally content with that title.

[4] If the Government decided to move away from the familiar titles, an alternative based on our proposed structure would be "the Central Tax Appeal Tribunal" and "the Local Tax Appeal Tribunal".

[5] It would be more confusing still if Tribunal members retained the title "Commissioner" under our proposals. The respondent to direct tax appeals is usually the inspector rather than the Commissioners of Inland Revenue. The Commissioners of Customs & Excise are the respondents to appeals on VAT and duties matters.

The appointment of members of the Tax Tribunals

2.3 We noted in our first Report the unsatisfactory nature of the current process for appointing General Commissioners.[6] We make no recommendations in this Report as to how the appointments procedure should be changed.[7] We consider, however, that the Government should now address the concerns that we expressed in our first Report.

2.4 We envisage that the Lord Chancellor (or his counterparts in Scotland and in Northern Ireland) would be responsible for appointing members and Chairmen of the General Tax Tribunal as part of an open process, similar to that adopted for the Special Tax Tribunal. The difference between the two appointment procedures would lie in the steps taken to identify potential appointees and to ascertain their suitability, given the different nature of the work of the central and local tax tribunals, and the need to maintain the local nature of the General Tax Tribunal.

The jurisdiction of the Tax Tribunals

2.5 We recommend that the original jurisdiction in all appeals in tax matters—both direct and indirect and in National Insurance and related matters—lie with the Tax Tribunals. This includes, for example, appeals in stamp duty and inheritance tax matters that presently lie direct to the High Court. The tribunal constituted under s. 706 of the Taxes Act (transactions in securities) would be subsumed in these arrangements.[8] For the time being, we accept that tax disputes that proceed by way of judicial review should fall outside the jurisdiction of the Tax Tribunals and should continue to be dealt with by the High Court. We will deal with this issue in a third Report.

2.6 Our proposals amalgamate the General and Special Commissioners with the VAT and Duties Tribunal. They envisage the adoption of procedures that are more closely aligned to those currently used by the VAT and Duties Tribunal than those used by the Commissioners. This means that the General Tax Tribunal will acquire jurisdiction in VAT and duties matters. This raises the question, however, whether the local tribunal's jurisdiction should be co-extensive with that of the central tribunal's jurisdiction, or limited in some way.

2.7 We think it inevitable that the Special Tax Tribunal will invariably deal with some issues, such as stamp duty appeals that involve questions as to the legal effect of documents. Nevertheless, given the procedure we envisage for allocating cases between the General and the Special Tax Tribunal, we think that it will generally be easy to identify those taxes and those issues that are likely to fall within the exclusive ambit of the Special Tax Tribunal. Furthermore, if the circumstances of the dispute are

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[6] See paragraphs 7.14 to 7.32.

[7] See Appendix 2, paragraph 7.3 for a summary of the suggestions that we made in our first Report.

[8] We leave open whether any special procedure should apply under a statutory general anti-avoidance rule, see *A General Anti-Avoidance Rule for Direct Taxes, A Response to the Inland Revenue's Consultative Document*, by the Tax Law Review Committee, Institute for Fiscal Studies, February 1999, paragraph 5.6.

relatively straightforward and involve questions of fact rather than a dispute on the law, we see no reason why the General Tax Tribunal should not be allocated the case just because the tax involved is, for example, Petroleum Revenue Tax or Insurance Premium Tax. **We therefore recommend that both the General and the Special Tax Tribunals should have a full original jurisdiction in relation to all taxes.**

CHAPTER 3. The General Tax Tribunal

The nature of the General Tax Tribunal

3.1 We believe that the General Tax Tribunal should serve as a quick, informal, local and low cost forum for resolving tax disputes. As such, we see the General Tax Tribunal as essentially a 'lay' tribunal, drawing its membership from a wide variety of backgrounds. None of these objectives should, however, involve a lowering of procedural requirements or of technical tax skills, so as to compromise a satisfactory and fair resolution of disputes arising between taxpayers and the Revenue Departments. Thus, appeals should be allocated to the General Tax Tribunal as are appropriate for determination by a local tribunal of that character and the panel of members would be constituted so as to deal best with the type of issues coming before it.[9]

The composition of the General Tax Tribunal

3.2 In our first Report, we suggested that a qualified Chairman should chair the General Tax Tribunal. The General Commissioners who responded to our Report without exception rejected this idea. Many acknowledged the valuable role played by the Clerk to the General Commissioners and expressed a desire that this arrangement—a lay tribunal advised by its qualified Clerk—should continue.

3.3 We accept the point made by the Council on Tribunals, and by others, that there is little point in requiring both that a qualified Chairman should chair the General Tax Tribunal and that the Tribunal should be served by, and benefit from the advice of a qualified Clerk. But despite the strength of opinion among the General Commissioners, we have not been convinced that the current arrangement—of an unqualified Chairman and a qualified Clerk—should continue.

3.4 We think that it should be within the competence of the local tribunal to reach a decision on matters central to the resolution of the dispute between the taxpayer and the Revenue Department without the need to rely upon the advice and guidance of an individual who is not a member of the Tribunal itself. In addition, we envisage that a 'lay' staff would administer both the local and the central tribunal, in the same way as the VAT and Duties Tribunals are currently staffed. We think that it would be inappropriate if, within a unified appeal body, the central tax tribunal were administered and staffed in one way and the local tax tribunals in another. A uniform and consistent structure is needed.

3.5 **We therefore recommend that–**

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[9] Thus, for example, the City of London General Commissioners may continue as an expert local tribunal dealing with specialist issues related to the City's financial markets. Alternatively, such issues may be heard by the Special Tax Tribunal with the Chairman benefiting from the assistance of 'wing-men' expert in financial issues.

(1) The General Tax Tribunal should be chaired by a 'qualified' Chairman (We elaborate below what we mean by 'qualified' in this context.)

(2) The role under the current system of the Clerk to the General Commissioners should cease

(3) A 'lay' clerk acting in an administrative capacity only should serve both the General and the Special Tax Tribunals.

3.6 **We also recommend that the General Tax Tribunal should normally comprise three members.** To secure a degree of flexibility, we think that the rules should permit a tribunal to comprise a 'qualified' chairman and one other member, or a single 'qualified' Chairman. We think, however, that the use of a smaller local tribunal should be limited to specified pre-hearing procedural issues within the competence of such a tribunal and to hearing cases where both parties agree to the use of a tribunal of less than three members.

The nature of the Chairman's 'qualification'

3.7 A Chairman of the Special Tax Tribunal would be eligible to sit as a Chairman of the General Tax Tribunal. We envisage, however, the appointment of a separate category of individual qualified to sit as Chairman of the General Tax Tribunal, without necessarily also being qualified as a Chairman or as a member of the Special Tax Tribunal.

3.8 As it is the local tribunal's duty to adjudicate upon the legal rights and liabilities of taxpayers, we think it important that every Chairman of the General Tax Tribunal should have received the basic training necessary to conduct the proceedings in the appropriate manner. We do not, however, think that this requires that every Chairman be legally qualified. Individuals would be eligible for appointment as Chairmen of the General Tax Tribunal once they had attended a training programme devised for that specific purpose, and achieved an appropriate level of assessment under that programme. Candidates could include existing General Commissioners, especially those who have sat regularly as chairmen. It could also include Clerks to the General Commissioners.

3.9 We have considered whether it would be appropriate also to require an individual to have specific tax experience—a 'pre-qualification' requirement of some sort—before being eligible for appointment as a Chairman of the General Tax Tribunal. While such experience would be ideal, we think that it should not be a pre-requisite that Chairmen should be drawn from the ranks of those who can demonstrate previous experience in the field of taxation. The qualification programme should be designed to qualify them to adjudicate upon the issues that they are likely to encounter in the ordinary course of the General Tax Tribunal's work. It would be additional to the training that every person would receive as a member of the General Tax Tribunal.

3.10 Individuals with an appropriate professional qualification would be eligible for appointment as Chairmen of the General Tax Tribunal without attending the qualification course, or would have a reduced qualification requirement.

Training for Members of the General Tax Tribunal

3.11 The only way to secure our objectives for the General Tax Tribunal is, in our view, if there is a proper training programme for its members. We think that the Lord Chancellor's Department should organise this without further delay and without awaiting implementation of our other recommendations. No respondent disagreed with our assessment that the resources currently available for training General Commissioners are lamentable. The General Commissioners who responded were clear that they would like to see a proper training programme instituted. As we noted in our first Report, there is at present no formal training programme for Commissioners' Clerks.

3.12 **We therefore recommend that the Lord Chancellor's Department put in hand immediately arrangements for training General Commissioners or, as we envisage matters under our proposals, members of the General Tax Tribunal.** The programme should be available as a matter of priority to those General Commissioners and their Clerks who wish to seek appointment as members or Chairmen of the General Tax Tribunal.

3.13 In our view, to maintain the absolute independence of the Tax Tribunals, the training programme ought not to be instituted and run by the Revenue Departments. We think it important that members of the Revenue Departments should participate in the training. We also think it likely that the professional bodies engaged in taxation work would be prepared to contribute to the establishment and running of the programme. They have a great deal of experience in training their own members in taxation and this experience could appropriately be tapped.

Timetable for implementation

3.14 We think that it will not be possible to 'phase in' this change in the arrangements for General Commissioners. For the time being, therefore, we envisage that the current system of a lay tribunal of General Commissioners and a professionally qualified Clerk should continue. This would be until the necessary training and qualification arrangements allow for the creation of the General Tax Tribunal, as we recommend. We are concerned, however, that this should not result in an indefinite postponement of the new arrangements.

3.15 **We therefore recommend that the Lord Chancellor's Department initiates immediately training and qualification arrangements to enable the new appeal structure to take effect as soon as the necessary legislation and procedural rules are in place in 2002.** We see no difficulty in these arrangements anticipating the legislation and the new rules. The training and qualification programmes fit equally well the current framework of appeals to the General Commissioners.

A local Tribunal

3.16 In our first Report, we acknowledged that the principle of genuinely local hearings was fundamental to the operation of the General Commissioners. The General Commissioners who responded attached importance to their position as a local tribunal. The possibility of a local hearing is one important criterion of

accessibility. It is important that taxpayers are not deterred from exercising their appeal rights because they believe that any appeal will be heard at a remote location and will involve them in further time and cost in attending the hearing. We would wish the General Tax Tribunal to retain the local character and informality that is currently a feature of General Commissioners' hearings.

3.17 Local sittings of the General Tax Tribunal do not, in our view, prevent the administration of those Tribunals leading up to an appeal hearing from being dealt with centrally. We think it preferable, therefore, that the local and central tribunals are administered together, which will inevitably be at relatively few centres. But so far as possible and depending upon the demand for hearings, the General Tax Tribunals would continue to sit in localities based upon the current Divisions, or some consolidation of the current Divisions, of General Commissioners, and should comprise members based in that locality.

3.18 We believe that the achievement of this objective is likely to be dictated by the demand for hearings by the General Tax Tribunal. Training must be complemented by practical experience at hearings and this is also necessary to ensure value for the resources committed to training. Thus, there must be a balance between the number of individuals who receive training as members and Chairmen of the General Tax Tribunal and the number required to attend hearings—and therefore the extent to which hearings can be held locally and comprise local members. We think that this is one aspect of the new arrangements that will have to be judged as experience of the number and nature of appeal hearings under self-assessment develops. We consider that this should be possible given the time needed to develop and put in place the necessary training programme.

CHAPTER 4. The Special Tax Tribunal

The nature and composition of the Special Tax Tribunal

4.1 We envisage that the Special Tax Tribunal would serve in particular as a forum for those tax disputes that raise complex technical issues involving substantive questions of law. We refer to the Special Tax Tribunal as the 'central' tribunal in the sense that it will hear cases in fewer locations. We see no reason, however, why the Special Tax Tribunal should not be peripatetic. The scope to hear cases outside a few regional centres is likely to depend upon the number of cases that are waiting to be heard in a particular locality, and how long the Tribunal and the parties to the dispute are prepared to postpone matters until a local hearing by the Special Tax Tribunal becomes possible.

4.2 Similarly, we do not envisage that hearings of the central tribunal should necessarily be more formal than those of the local tribunal. The relative formality and informality of proceedings before either tribunal should depend in part upon the nature of the dispute and of the taxpayer involved, and whether he and the officer of the Revenue Department appear in person or are represented at the hearing.

4.3 We consider below the nature of a person's qualification to serve as a Chairman of the Special Tax Tribunal. We think that a Chairman of the Special Tax Tribunal should be entitled to sit alone to hear a case, or to hear a case with another Chairman. We also favour the extension to direct tax appeals of the current arrangements for VAT and Duties appeals. This would enable a Chairman to sit with one or two other persons drawn from a panel of individuals appointed on a similar basis to members of the VAT and Duties Tribunals. We believe that a Chairman may be substantially assisted in the proper resolution of many cases with the benefit of input from such individuals, who may possess specialist knowledge appropriate to the subject matter of the appeal.

4.4 **Accordingly, we recommend that—**

(1) Chairmen of the Special Tax Tribunal should be entitled to sit alone or with one or two members of the Special Tax Tribunal (including another Chairman), and

(2) The Lord Chancellor (or his counterparts in Scotland and in Northern Ireland) appoints members and Chairmen of the Special Tax Tribunal.

Chairmen of the Special Tax Tribunal

4.5 We consider that an individual, to be eligible for appointment as a Chairman of the Tax Tribunals, should be legally qualified and have relevant tax experience. At present, the legal qualification needed for appointment as a Chairman of the VAT and Duties Tribunals and for appointment as a Special Commissioner differ. The former

must have held an appropriate legal qualification for seven years, the latter for 10 years.[10] **We recommend that these requirements should be standardised, based on the current requirement for Special Commissioners and for the President of the VAT Tribunals, i.e. 10 years' legal qualification.**

4.6 We think it important that a Chairman of the Special Tax Tribunals should have gained 'relevant tax experience' prior to appointment as a Chairman. It may be difficult, however, to find an adequate definition of the level of experience needed for appointment. We prefer, therefore, to leave the formulation of the requirement relatively imprecise. There will be few individuals who have gained experience in every tax that falls within the jurisdiction of the Tax Tribunals and there is likely to be a need to appoint individuals for their specialist knowledge or experience with particular taxes. Indeed, some individuals may not have worked primarily in the taxation field but may have worked in another field—for example, land or insurance law—where they have been able to acquire specialist knowledge of a particular tax that makes them suitable for appointment, most likely on a part-time basis.

[10] The President of the VAT Tribunals must also have held a legal qualification for 10 years.

CHAPTER 5. Allocation of cases and procedure before the Tax Tribunals

Two general principles

5.1 In our first Report, we suggested that an appeal might lie from the decision of the General Tax Tribunal initially to the Special Tax Tribunal. No respondent supported this idea and the Council on Tribunals rejected it, as adding a further unwanted layer of appeal. We accept that this route of appeal from the General Tax Tribunals is not appropriate for a unified tribunal system. A solution, as it seems to us, lies at the outset of the appeal process, namely in ensuring so far as is possible that cases are always allocated to the Tribunal most suited for the issue under appeal. This is the first principle that underlies our recommendations. We hope that coincidentally the correct allocation of cases will ensure that they are disposed of in the most suitable, expeditious and cost efficient manner, according to the character of the dispute, the taxpayer involved and the composition of the Tribunal that deals with the matter.

5.2 For the right allocation invariably to be made, we think that two requirements must be met. First, neither party to an appeal should be entitled, as of right, to choose whether the local or the central tribunal will hear the appeal. Second, those responsible for allocating the matter to the central or local tribunal, and for determining the composition of the Tribunal, must know something of what the appeal involves before the hearing day arrives. A proactive case management role for the Tax Tribunals in the preparation for an appeal is consistent with the thinking that underlies the new Civil Procedure Rules.

5.3 Our second principle is that there should be no more differences in the powers and the procedure of the local and the central tribunals than is absolutely necessary, having regard to their different composition and character. This follows from our first principle. It requires that the parties can no longer dictate which tribunal hears the case. The nature of the dispute and the issues it raises determines the choice of tribunal. Neither party should feel that they will be prejudiced by peripheral' matters—whether the hearing is in private or in public, the degree of formality involved in the hearing or costs—that flow from the choice of tribunal.

5.4 With those principles in mind, we think that the procedure for appealing and allocating cases between the central and local tribunals should be as set out below.

Appealing

5.5 **As regards the initial appeal, we recommend the following arrangements—**

> **(1) Every assessment, decision or notice issued by the Revenue Departments against which the taxpayer has a right of appeal to the Tax Tribunals should state clearly that there is a right of appeal and the time within which the taxpayer must exercise his right of appeal.**

(2) **Every such assessment, decision or notice should be accompanied by a leaflet on appeals.** This leaflet should explain to the taxpayer in plain English what he must do to exercise his right of appeal, the nature of the body that will hear his appeal, the steps that will follow the giving of a notice of appeal and what will be involved in an appeal hearing.

(3) **Notice of appeal in every case should be given directly to the Tax Tribunals and not to the Revenue Department concerned.** The Tax Tribunals will acknowledge receipt of the notice of appeal and will notify the Revenue Department of the appeal. Initially this may be by sending it a copy of the appeal notice but we envisage that the Tax Tribunals may in due course be in electronic communication with the Revenue Departments. In acknowledging receipt of the notice of appeal, the Tax Tribunal would also draw the taxpayer's attention to his right at any time after three months of appeal to seek to list the case for hearing.

(4) **The taxpayer need not, when making an appeal or within any particular time of appealing, specify whether he wishes the Special Tax Tribunal or the General Tax Tribunal to hear the appeal.**

5.6 We attach particular importance to point (3). There was widespread support from respondents for adopting this course. Once the Revenue Department has come to a decision against which the taxpayer may appeal, the taxpayer should know that there is an independent body to which he can turn if he is dissatisfied with the way in which the Revenue Department is conducting the appeal process. The taxpayer should, for example, know that he is entitled to seek directions from the Tax Tribunal requiring the Revenue Department to deal with preparatory matters in the appeal in the time set by the Tribunal.

5.7 At present, in direct tax appeals, we believe that the Commissioners are insufficiently involved in the process leading to a hearing to offer this assurance to taxpayers. We can understand this situation, given the historical development of the Commissioners and the need for the Inland Revenue to resort to estimated assessments as a method of extracting basic information from taxpayers. We see no justification under self-assessment for the continuation of the current appeal arrangements in direct tax matters.

5.8 In making this recommendation, however, we wish to acknowledge two issues that require consideration. First, if the taxpayer sends the notice of appeal direct to the Tax Tribunals, appropriate arrangements will have to be made to allow the Revenue Departments to defer collection of tax in appropriate cases. In the age of electronic communication, we believe that it should be possible to arrange for the Tax Tribunals to notify the Revenue Departments immediately of the appeal, enabling the Departments to amend their collection arrangements in appropriate cases. The Lord Chancellor's Department should, however, further explore this aspect with the Revenue Departments to arrive at a satisfactory arrangement.

5.9 Second, we think it important that the procedure we recommend should not discourage either party from settling the dispute, if that is possible, or make it more likely that the parties will resort to a hearing before the Tax Tribunals that could otherwise have been avoided. We address these issues further below.

Allocation of cases

5.10 Following the giving of a notice of appeal, we think that the next step lies with the Revenue Department. It should be required to send to the Tribunal, with a copy to the taxpayer, a "Statement of Issues", as an executive summary of the issues involved in the dispute. We wish to emphasise that the Statement of Issues is a Revenue Department document. It will have no status at the hearing of the appeal beyond that. It is the complement to the grounds of appeal given by taxpayers when they appeal. Its main purpose, so far as concerns the Tax Tribunals, is to inform the Tax Tribunals of the issues involved in the appeal, enabling the Tribunals to allocate the case to the local or central tribunal, and to an appropriately constituted tribunal.

5.11 When it serves the Statement of Issues, we envisage that the Revenue Department would indicate to the Tax Tribunals whether, in the Department's view, the nature of the dispute is such that the local or the central tribunal should hear it. We think that this indication should be based upon guidelines published by the President of the Tax Tribunals. These guidelines would be drawn up in consultation with the Revenue Departments and representatives of the tax professions. The guidelines would be regularly reviewed in the light of case experience.

5.12 Following service of the Revenue Department's Statement, the Tax Tribunals would notify the taxpayer of the Department's view of the appropriate tribunal and ask whether the taxpayer agrees with the Department's view. If he does not agree, he would have the opportunity to make representations (which would usually be in writing), giving reasons for his disagreement. A Chairman of the Special Tax Tribunal would determine the matter in the light of the representations made by both parties.[11]

Preparation of the Statement of Issues

5.13 At present, the VAT Tribunal Rules require that the Commissioners of Customs & Excise serve a statement of case within 30 days of notification of the appeal. This might be the time allowed in straightforward cases but we think that it is too short a period to cater for every appeal within the jurisdiction of the Tax Tribunals. This is especially so in direct tax cases, where matters may still be subject to discussion between the parties and more than one issue may be involved. We suggest, therefore, that a longer period, of up to three months, should be allowed for the Revenue Department to serve its Statement of Issues. The Revenue Department would be able to apply to the Tribunal for an extension of this time limit and the taxpayer could always object to the granting of an extension.[12]

5.14 We do not propose a system of compulsory internal review by the Revenue Department before the taxpayer can exercise his right of appeal. We believe, however, that the three month (or longer) period, during which the Revenue Department must

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[11] See also paragraph 5.17 below.

[12] The objection could be to the grant of any extension, or to the length of the extension sought. Experience suggests that these arrangements work quite satisfactorily at present with the VAT and Duties Tribunal.

produced its executive summary of the issues, provides the time for an internal review of the dispute.

5.15 Similarly, we do not envisage that the Statement of Issues should be 'negotiated' between the parties. In practice, there is no reason why solely the Revenue Department, without comment or input from the taxpayer, need generate the Statement of Issues in every case. In complex cases especially, we would expect that the Revenue Department would show the taxpayer a draft of the Statement before serving it on the Tax Tribunals. Whether or not the Revenue department follows this course, however, the process of generating the Statement of Issues offers the opportunity for further negotiation with the taxpayer to resolve the dispute without an appeal hearing. At the same time, the process has a clear time frame to ensure that matters do not drag on indefinitely.

Listing the appeal

5.16 If the Revenue Department unduly delays serving the Statement of Issues, it is always open to the taxpayer after three months to seek to list the appeal for hearing. An application to list the matter would allow the taxpayer to state whether he wishes the appeal to be heard by the local or the central tribunal. The Revenue Department concerned would be entitled to object to the taxpayer's choice when serving the Statement of Issues, in which case a Chairman of the Tax Tribunals would determine the matter in the light of representations by both parties.

5.17 We think that it would be appropriate when a taxpayer seeks to list his appeal or responds to the Revenue Department's Statement of Issues, for the taxpayer to indicate whether he will be represented at the hearing.[13] This can then be taken into account as one factor in deciding which tribunal should hear the appeal.

The choice of Tribunal

5.18 These arrangements should, in our view, give neither party the right to dictate the forum of appeal. Their agreement will normally determine whether it is the local or the central tribunal that hears the case. But, in the end, we think that it should be the Tax Tribunals that settle the matter. This means that an unrepresented taxpayer has no guarantee of a hearing at his local tribunal. He could find that the central tribunal deals with his appeal, at a greater distance and possibly with some degree of greater formality.

5.19 We think that this situation is unavoidable if the guiding principle is to secure that it is the issue in dispute that dictates the forum, rather than the identity or wishes of the taxpayer (or those of the Revenue Department). As we think that that is the correct principle, **we recommend that the Tax Tribunals should have the power in all cases to determine whether the central or the local tax tribunal hears a case,**

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[13] This would not prevent an unrepresented taxpayer from seeking professional representation at any time prior to the hearing, although he might be required to notify the Tribunal and the Revenue Department of the change.

and to transfer a case allocated to the Special Tax Tribunal to the General Tax Tribunal, and vice versa.

5.20 We accept that there is a degree of formality about these arrangements, which may seem undesirable for unrepresented taxpayers. They may hope to have their appeal dealt with relatively quickly and informally by the local tribunal. Nevertheless, in our view, the procedure should not inhibit taxpayers from appealing. The procedure offers them from the outset a clear indication of their right to appeal and what it involves. They are put in immediate contact with the independent body, and its staff, that will deal with their appeal. They will receive from the Revenue Department a document spelling out the issues that they must answer at the hearing and in most cases we think that it will be clear whether it should be the local or the central tribunal that should hear the appeal. Finally, the procedure allows time for both internal review and the possibility of settling the dispute.

Procedural rules

5.21 For the reasons that we give in paragraph 5.3 above, we think that uniform procedural rules should apply to the local and central tax tribunals. Any differences should be justified solely by the different nature of cases commonly heard by each Tribunal, as the VAT Tribunal Rules currently distinguish between evasion penalty appeals, reasonable excuse and mitigation appeals and ordinary appeals. We would not wish to see a growth in variations in the standard rules purportedly dealing with the variety of different decisions against which an appeal lies. The rules should incorporate sufficient flexibility for the Tribunal to vary, by direction at or before the hearing, the procedure to be followed in a particular case, where the nature of the issue or the identity of the taxpayer involved suggests that this would be beneficial to the proper disposal of the matter.

Public or private hearings

5.22 There is a divergence between the current tribunals on whether appeals are heard in public or in private.[14] In this respect there are two related questions: whether the same rule should apply for both local and central tribunals; and, if so, whether that the presumption should be in favour of a public or a private hearing.

5.23 As regards the first of these, we think that there should be a uniform rule for the Tax Tribunals. We consider this important because, under our proposals, the taxpayer can no longer dictate whether the local or the central tribunal will hear his case. The choice of forum—based on the nature of the dispute—should not also determine whether his case is in public or in private. And as the final choice is not his, there is no trade-off for a taxpayer between a private hearing with no possibility to recover costs, and a public hearing in which he may claim his costs.

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[14] Cases before the General Commissioners are always heard in private. Cases before the Special Commissioners may be heard in public but the taxpayer may demand that they are heard in private. Cases before the VAT and Duties Tribunal are heard in public but the Tribunal, on the application of either party, may direct that the hearing (or any part of it) shall be held in private.

5.24 Should a uniform rule be in favour of a public or a private hearing? In deciding this question, we have had to balance the public interest in knowing the outcome and seeing that justice is done by a competent tribunal acting in accordance with clearly established procedures, and the undoubted interest of individuals in tax matters that their affairs be kept private. **We recommend that the presumption should be that hearings before both the central and the local tax tribunals are in public. We would allow either party the right to request that the appeal be heard in private. It would remain within the tribunal's discretion (without right of appeal) whether it granted the request.** We think, however, that there would be few cases before the local tax tribunal where the public interest would demand that the case be heard in public. We expect, therefore, that most cases before the General Tax Tribunal will be heard in private, if the taxpayer so requests.

Costs

5.25 The current tribunals also diverge in respect of their power to award costs.[15] We think it unfortunate that recovery of costs should depend upon the forum of the appeal, especially when neither party has the final choice on the forum. Nevertheless, we think that this is one aspect of the rules in which there may have to be an unavoidable difference. We see no reason why the power of the central tribunal to award costs should differ, according to whether it is dealing with a direct or an indirect tax matter. **We therefore recommend that the Special Tax Tribunal should have an unlimited power to award costs, as is currently the case for the VAT and Duties Tribunals. We further recommend that the Inland Revenue adopt the same policy to that currently adopted by the Commissioners of Customs & Excise in the VAT and Duties Tribunals.**[16] Thus, neither Revenue Department would ordinarily seek an order for costs against the taxpayer when the Department is successful in an appeal before the Special Tax Tribunal.

5.26 While it is undesirable that the outcome on costs should differ depending upon whether the taxpayer finds his case allocated to the local or the central tribunal, we are not convinced that the local tribunal should have the same power to award costs as the central tribunal. None of the General Commissioners who responded to our first report asked for the power to award costs. Some thought that their scope for 'doing justice' in the type of cases coming before them sufficed to outweigh whatever disadvantages attached to their lacking this power. If the procedure for allocating cases works correctly, the General Tax Tribunal should be dealing quickly and expeditiously at a local level with relatively straightforward cases, centring in particular upon factual disputes where the law involved is clear.

5.27 Nevertheless, we feel that it is wrong that a successful taxpayer should have no ability to recover costs because his case is allocated to the General Tax Tribunal. The

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[15] The General Commissioners have no power to award costs. The Special Commissioners have a limited power to award costs in cases where a party has been guilty of acting wholly unreasonably. The VAT and Duties Tribunal has an unlimited power to award costs.

[16] See Hansard, Vol. 102, 25th July 1986, col. 459. The Commissioners may seek an order for costs in limited categories of case, e.g. where the sums or complexity involved makes the matter comparable to a High Court case, in frivolous or vexatious cases or where the taxpayer fails to appear or be represented at a pre-arranged hearing.

anticipated costs could provide a basis for the taxpayer seeking to have the matter dealt with by the Special Tax Tribunal. Nevertheless, we think that this factor ought not to weigh too heavily in the allocation process if other factors suggest that the case is an appropriate one for the local tribunal.

5.28 We considered whether the local tribunal should have the power, following a decision in favour of the taxpayer, to refer the case to the central tribunal for the central tribunal to consider an award of costs. We think that it would be difficult, however, for a tribunal that has not heard the case to make appropriate decisions about costs. **We therefore recommend that the local tax tribunal should have power to award costs against a party to its proceedings only if it is of the opinion that the party has acted wholly unreasonably in connection with the proceedings in question.**[17] The qualification programme for Chairmen of the General Tax Tribunal would include training for dealing with applications for costs.

Payment of members of the General Tax Tribunal

5.29 Members of the current tribunals are also treated differently in respect whether they are paid for their time.[18] The abolition of Clerks to the General Commissioners represents a saving, while the implementation of training and of new administrative arrangements represent additional costs. We think that it would serve the public interest if members were drawn from younger and more varied ranks than is presently the case. This objective is unlikely to be achieved unless such individuals receive some monetary compensation for the employment, business, professional or other commitments that they give up to serve as members or Chairmen of the General Tax Tribunal. **We therefore recommend that members and Chairmen of the General Tax Tribunal receive some payment for the time spent on local tribunal matters.** We express no view as to what basis of payment should be adopted.

Form of decision

5.30 **We recommend that the form of decision—that is, a written decision with reasons—should be the same for both local and central tax tribunals. We think that there should be power to dispense with a formal written decision with the agreement of the parties to the appeal.**[19] We anticipate that this power of dispensation would be exercised for the majority of cases before the General Tax Tribunal.

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[17] This corresponds to the power to award costs currently available to the Special Commissioners. We are aware that some Respondents to our first Report would like to see the current rule modified by deleting word "wholly". We express no view on this.

[18] General Commissioners are unpaid. Special Commissioners, members of the s.706 tribunal and members and Chairmen of the VAT and Duties Tribunal are paid.

[19] We leave open whether this should apply in every case or in specified matters only, as for example is the case for mitigation and reasonable excuse appeals before the VAT and Duties Tribunals.

Pre-adjudication procedures and mediation

5.31 We have set out in the Appendix the responses to our conclusions on pre-adjudication procedures and mediation.[20] We have felt it unnecessary in the context of this Report to make recommendations on this subject. We commented previously on the inclusion of internal review and further settlement negotiations as part of the appeal procedure.[21] We do not think it necessary that the Revenue Departments adopt uniform pre-adjudication procedures. These may differ according to the nature of the matters with which they are dealing and their own internal organisation.

5.32 In making this point, we are not departing from the comments in our first Report on the current pre-adjudication arrangements. It is important that each Revenue Department adopts satisfactory procedures to ensure that the issues coming to appeal merit the time and the attention of the Tribunals, and that the taxpayer's appeal rights are not unduly delayed or frustrated by whatever internal procedures the Department adopts.

5.33 We are aware of the use by the US tax court of mediation to resolve disputes. We think that the existence of a local tax tribunal of the type we envisage in this Report lessens the need for alternative methods of dispute resolution or mediation in UK tax disputes. Nevertheless, we are not opposed to consideration being given, in the context of new procedural rules, to the possibility of a Chairman of the General Tax Tribunal acting at the request of both parties as mediator on issues of fact.

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[20] See Appendix 2, section 3.

[21] See paragraphs 5.14 and 5.15 above.

APPENDIX 1: RESPONDENTS TO THE INTERIM REPORT

Altrincham Division of General Commissioners
Association of Clerks to Commissioners of Taxes for Great Britain
Barton Regis Division of General Commissioners
Brentford Division of General Commissioners
Cambridge City and University Division of General Commissioners
Central and South Manchester Division of General Commissioners
Chartered Institute of Taxation
Chatham Division of General Commissioners
Council on Tribunals
Croydon Division of General Commissioners
Dartford Division of General Commissioners
Drayton Division of General Commissioners
Frome Division of General Commissioners
Godalming Division of General Commissioners
Gravesend Division of General Commissioners
Greater London Association of General Commissioners
Greater Manchester Advisory Committee on General Commissioners of Income Tax
Institute of Chartered Accountants in England and Wales
Institute of Chartered Accountants of Scotland
Institute of Directors
KPMG
Law Society of England and Wales
Law Society of Scotland
National Association of General Commissioners
North West Wiltshire Division of General Commissioners
Nottingham and Derby Association of General Commissioners
Portsmouth Division of General Commissioners
Presiding Special Commissioner and President of the VAT and Duties Tribunals, the Special Commissioners and Chairmen of the VAT and Duties Tribunals
St Ives Division of General Commissioners
B E V Sabine (General Commissioner)
Salford and Manchester North Division of General Commissioners
South Birmingham Division of General Commissioners
South Cambridge Division of General Commissioners
Southampton Division of General Commissioners
Stourbridge Division of General Commissioners
Wallington Division of General Commissioners
Walthamstow Division of General Commissioners
West Wessex Association of General Commissioners
D H Wilkins (General Commissioner)

APPENDIX 2: SUMMARY OF RESPONDENTS' COMMENTS ON OUR INTERIM REPORT ON THE TAX APPEALS SYSTEM

1. Introduction

Conclusions of our first Report

1.1 We concluded, as an introductory matter to our first Report, that the time was ripe for a general review of the system of tax appeals. We felt that this was particularly true for the initial stage of appeals on direct tax issues. In particular, we thought it likely that self-assessment of direct taxes would result in a marked decline in the number of essentially administrative 'delay' appeals coming before the General Commissioners. As a result, the burden of their work would tilt markedly towards cases with a contentious element.

1.2 The General Commissioners would cease to deal with cases where the taxpayer had appealed against an estimated assessment but had failed to provide information in support of his appeal. The emphasis of their work would become adjudicative or judicial, rather than administrative. In the future they would concentrate on their key roles of deciding issues of fact and of overseeing the exercise by inspectors of their powers. We thought that such developments would remove a key distinction between the role of the Commissioners and that of the VAT and Duties tribunal.

Respondents' comments

1.3 Respondents to our first Report accepted the case for a general review. There was also little disagreement with our introductory conclusions. Several respondents explicitly supported our view that self-assessment for direct taxes would have an impact on the current system of tax appeals at the Commissioners' level. The responses confirmed, however, the uncertainty that prevailed as to the nature and importance of that impact.

1.4 The Special Commissioners thought that the role of the General Commissioners was bound to change following self-assessment. They agreed that delay sessions would become a thing of the past. They believed it possible that there could be a significant number of contentious appeals but they acknowledged that it would be difficult to predict the flow of work after self-assessment. They noted that there were bound to be difficult points of law and sensitive issues—such as penalties and whether an enquiry has gone for too long—that would still have to be dealt with at local level.

1.5 The Law Society of Scotland was particular concerned that the role of the General Commissioners should be addressed in the light of the introduction of self-assessment. The Society's view was that in their present form, the General Commissioners might not be ideal to deal with some of the technical issues that could arise for decision. The St Ives Division of General Commissioners, in contrast, thought that the advent of self-assessment would produce more contentious cases,

which the General Commissioners would relish because it would allow them to use the full range of their talents.

1.6 The Institute of Chartered Accountants of Scotland ("ICAS") agreed that this was the time to review the system. The Institute thought that our Report had identified weaknesses in the system but thought that we had not made a case for major change. The Institute accepted that self-assessment would bring major changes in the Commissioners' workload. But ICAS thought it wrong to assume nat tax appeals would become more complex with a greater emphasis upon technicalities. Nor did ICAS think it correct to assume that the General Commissioners would cease to be the most suitable tribunal to deal with the more contentious cases. The Institute thought that the Commissioners would retain an important role and authority in dealing with matters of fact.

1.7 Those General Commissioners who responded to our first Report agreed that self-assessment would alter their pattern of work. They did not think, however, that this would necessarily reduce the time involved in their work, nor their suitability for the task. Most of them accepted the need for review but many were concerned that this should not result in reform for reform's sake. Some thought that our first Report had failed to highlight any real failures in the existing system. They were concerned, therefore, that change need not be a necessary outcome of a review. A review should identify the faults in the system but should be able to acknowledge that the system worked well in practice if that was indeed the case. Change should be contemplated only if it guaranteed improvement.

1.8 For its part, the Chartered Institute of Taxation ("CIOT") agreed with our general conclusion but felt that we ought to attempt more empirical research into the current operation of the tax appeals system and the effects of self-assessment. We agree that further research would be ideal but would inevitably delay implementation of any reforms. The Special Commissioners, on the other hand, thought it important that an appropriate appeals structure should be in place sooner rather than later, ready to deal with the impact of self-assessment. Their concern was that if, for example, five years elapsed before a new structure were contemplated, practices would have become entrenched and it could be more difficult to make the necessary changes.

2. The Functions of the Appeals System

Conclusions of our first Report

2.1 We considered that taxpayers and the Revenue Departments had a common interest in seeing that the appeals system functioned effectively and efficiently. For taxpayers, the appeals system is a key element in maintaining the balance of power between Government and the private citizen in matters of taxation. The appeals system should provide an adequate and timely remedy where there was a dispute on a technical matter or where the taxpayer considered that the Revenue Departments have exceeded their powers.

2.2 For the Revenue Departments it was essential that deficiencies in the appeals system should not prejudice efficient tax administration. Poor quality decision-making or delays on appeal should not allow taxpayers to make opportunistic challenges to

their tax liabilities.[1] Nor should such factors generate such uncertainty of outcome that they discouraged taxpayers from pursuing legitimate issues.

2.3 We recognised, however, that there were significant differences in the perspective of taxpayers and that of the Revenue Departments. We identified four features of the current system of appeals that underlie these different perspectives.

(1) First, we noted that a taxpayer's right to appeal might only vest once he had complied with certain preliminary administrative requirements, such as the filing of a tax return or the payment of the tax claimed to be due. Failure to comply with or fully to understand those requirements (or their significance for an appeal) might allow the Revenue Department to collect tax without having to justify the amount claimed. The taxpayer's only remedy would be to rely upon the exercise by the Revenue Department of its administrative discretion to correct the position.[2]

(2) In addition, the rules of tax litigation were dealt with as a facet of tax administration. We thought that there was clear potential for a conflict of interest in the present roles of the Revenue Departments as defendants in all appeals concerning the taxes that they administer and as originators of the key rules governing appeal rights and the exercise of appeal rights. In our view, the ability of the system to ensure that the Revenue Departments collected tax only in accordance with the law depended upon the scope of appeal rights, the way in which those rights had to be exercised and the body to which an appeal lay. It seemed to us, however, that decisions on these three factors were taken on an ad hoc basis, frequently as an incident of a change in the substantive tax law. What we thought was lacking, was a clear, publicly available policy as to the scope of appeal rights. This could then underpin discussion in particular cases of the extent of appeal rights or of the rules governing their exercise.

(3) We noted that the Revenue Departments gained certain advantages over taxpayers from their position as "repeat players" in tax litigation. We thought that the risks of litigation to taxpayers were higher and the incentive to settle correspondingly greater.

(4) Finally, we considered that the costs of an appeal represented a greater limitation to taxpayers than they were to the Revenue Departments.

2.4 Taken with our suggestions for the restructuring of direct tax appeals legislation (see 4 below), we believed that a clear, publicly available policy should ensure that decisions by Government on the scope of appeal rights are, and are seen to be, based on legitimate policy considerations rather than being haphazard. By increasing transparency, we thought that it would also reduce the scope for fears—

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[1] Several respondents thought that the existing interest provisions adequately defended the Inland Revenue's position against the risk of opportunistic attempts to delay payment of tax.

[2] Our first Report at paragraph 2.14 referred to the equitable liability concept that is available by concession. The National Association of General Commissioners thought that public knowledge of this concession was limited and expressed the view that the Inland Revenue did not do enough to draw it to taxpayers' attention, preferring to ignore its existence.

however unfounded—that decisions about the extent of appeal rights might be tainted on occasion by the desire to protect administrative decisions from external scrutiny.

2.5 From our consideration of the function of an appeals system, we derived six key objectives for the system. We stated these as follows–

(i) The appeals system 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 derived from the fact that the value of the appeals system to taxpayers depended on the extent of their appeal rights and the way in which they could exercise these.

(ii) It must ensure a high quality of decision-making. This entailed:

- that each case should be allocated to a suitable level within the appeals 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 needed to be:

- even-handed as between the parties to an appeal, normally a taxpayer and the Inland Revenue or HM Customs & Excise;
- even-handed as between different taxpayers.

(iv) It must be accessible. This meant that it must:

- be affordable;
- be as simple and easy to understand as possible, so that procedural formality and complexity were kept to a minimum consistent with the achievement of other objectives;
- be 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 meant 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.

2.6 We recognised that it would be impossible for any appeals system to achieve all these objectives completely. And there would always be room for debate on what was the best compromise between conflicting priorities—for example, the requirements for high quality decision-making and for affordability.

Respondents' comments

A policy for tax appeals

2.7 There was no disagreement among respondents with our proposal for a coherent and integrated appeals policy. In particular, a number of General Commissioners expressed the view that there should be a clear policy on the scope and nature of appeal rights, details of which should be published in a form that could be readily understood by any lay appellant. The Council on Tribunals in this respect noted the work currently being undertaken within HM Customs & Excise as part of the LEGIS project. The Council suggested that, as part of the exercise of formulating a coherent policy, appeal decisions should be analysed to see it there are general lessons to be learned in respect of first-instance decision making.

Scope of appeal rights

2.8 The Institute of Chartered Accountants in England and Wales ("ICAEW") considered that as a matter of principle there should be a right of appeal on all issues (see 2.10(a) below). Several General Commissioners expressed the same view. The Council on Tribunals preferred not to offer detailed comment on the scope of appeal rights. It thought it clear that some decisions—such as an assessment of tax due or the imposition of a penalty—ought to be subject to a right of appeal but there were other decisions made by the Revenue Departments that might not be. The Council noted that consideration of this issue was tied in with the future work we had proposed on alternative dispute resolution and on judicial review. It also thought that it would be necessary to preserve the distinction between adjudication, which would be for the appeal tribunals, and maladministration—which would be for the Adjudicator or Ombudsman.

The six key objectives of the tax appeals system

2.9 There was broad support for our conclusions on the function of the appeals system and for our six key objectives. It was also widely accepted by respondents that the independence of the tax tribunals was of paramount importance and that the independence of the tax tribunals should be plainly evident to taxpayers.

2.10 ICAEW suggested two further key objectives–

(1) The appeal system should be comprehensive. The taxpayer should have a right to appeal against any decision of the tax authorities. The Institute noted that whilst this applied in most—but not all—direct tax matters, the right of appeal in VAT matters was limited in many areas. Even when the government considered that the tax treatment of a transaction ought to depend upon the exercise of discretion by the tax authorities, ICAEW thought that the appeals tribunal should be entitled to review the exercise of that discretion (see also the Law Society's comments at 5.10 below). In extreme cases, the Tribunal ought to be able to substitute its own view for that of the tax authorities. The Institute thought that it was wrong that in many areas the taxpayers only remedy was that of judicial review.

(2) It ought to be possible for a taxpayer to have his appeal heard quickly where he considered this appropriate.

2.11 ICAS considered that the transparency of the system was a vital objective. Justice should be seen to be done at all stages in the appeals process. Several other respondents made this point. But ICAS also emphasised that in its view an appeals system should be efficient in terms of the public purse. It did not want a tax appeals system that was costly and bureaucratic. It thought that there would be merit in costing the current system and any proposed changes to help evaluate the proposals in a value for money context. And ICAS in particular felt that, measured against these objectives of transparency and cost efficiency, the existing General Commissioners provided an effective and fair first stage "tribunal" at a relatively low cost.

Fairness of the system

2.12 ICAEW expressed the view that the system must be fair but must be seen to be fair. CIOT commented in this respect the advantage enjoyed by the Inland Revenue as 'repeat players'. ICAS also thought that there was a conflict of interest for the Inland Revenue in its role as instigator of appeals legislation and as the defending party in cases. It noted that there was a similar conflict for the Crown Office (in Scotland) in non-tax cases. However, ICAS found it difficult to imagine how to avoid this situation and was in general content to accept the situation.

2.13 In relation to the perception of fairness, however, there were several comments that the role of the Inland Revenue as a party to an appeal should be clear. Respondents thought it inappropriate that the Revenue should be involved in the appeals procedure. The National Association of General Commissioners ("NAGC") accepted, however, that the current system offered a practical way for the Inland Revenue to weed out those appeals with which they agreed and which did not need to go to the Commissioners. The NAGC nevertheless made various suggestions for improving the notification to taxpayers of their rights of appeal (see 2.17 below).

2.14 ICAEW commented that in direct tax matters, the Commissioners frequently used the Inland Revenue as a go-between to notify taxpayers of dates of a hearing or of the procedures they wished to adopt. The Institute thought that it would be better if such communications came from the Clerk to the Commissioners. It felt that using the Inland Revenue as intermediary could suggest to the taxpayer that the Inland Revenue

had a special relationship with the Commissioners. ICAEW noted that in VAT cases all communications came direct from the VAT Tribunal and the Institute felt that this gave a greater impression of fairness.[3] The Law Society of Scotland thought that a legally qualified Chairman might assist the perception of fairness.

Information on the appeals procedure

2.15 The Law Society of Scotland believed that more information and material on appeals should be available to taxpayers (and Commissioners). There was a view that better publication of procedures could also help to negate the impression of familiarity between inspector and Commissioners. ICAS suggested that there should be better notification of a taxpayer's right to list the case for hearing. ICAEW felt that it was crucial that an appellant was fully aware in advance of the hearing of the rules under which the tribunal operated and the procedures at the hearing (see further 2.21 below).

2.16 In this respect, ICAEW noted that the Special Commissioners had produced a booklet for Appellants on taking appeals before the Special Commissioners and that the Lord Chancellor's Department had produced a similar booklet on taking appeals before the VAT and Duties tribunal. These were both helpful, although there was scope for improvement. The Institute was not aware, however, of any similar guidance for appeals before the General Commissioners, the body by which the majority of direct tax appeals were heard.

2.17 The NAGC thought that there should be a much clearer statement of appeal rights, especially on the issue of an assessment. The current assessment form advised taxpayers of their right to appeal but there was no indication to whom the appeal was made. The requirement to send the notice of appeal to the Inland Revenue suggested that it was they who would adjudicate. The NAGC suggested that all documents emanating from the Inland Revenue that carry a right of appeal against their contents should be accompanied by a separate statement, indicating clearly—

(a) how the appeal should be made,

(b) to whom,

(c) who would adjudicate, and

(d) stating that the appeal body was an independent body.

2.18 Other associations of General Commissioners shared the view that the statement on assessments that there was a right of appeal could be presented in a more prominent and clear fashion, emphasising that an independent body would hear that appeal if it were not accepted by the Inland Revenue. Some thought that a fully instructive tax pamphlet should be sent with every tax notice.

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[3] The ICAEW nevertheless expressed the view that such communications were often very formal and sometimes difficult for taxpayers to follow.

Other aspects of the six key objectives

2.19 Many respondents took the opportunity to comment in the context of this Chapter on aspects of our stated objectives, such as the need for procedural informality, costs, case allocation and the need for training for those responsible for adjudicating issues at all levels. These comments contained no serious divergence of views on the objectives of the system. We have accordingly recorded the comments in later paragraphs of this Appendix, under the specific subjects to which they related.

3. Internal Review and Dispute Resolution

Conclusions of our first Report

3.1 Our view was that further work was required to assess the scope in the UK for pre-adjudication procedures. The aims of such procedures would be to ensure that only cases founded on real disputes reached the tax tribunals and to facilitate settlement by agreement. At the same time we considered that, as a matter of principle, any internal review or pre-adjudication procedures should not be a barrier to an appeal to an independent tax tribunal. Review should not be a compulsory part of the process. We thought it likely that, if review did indeed provide a fast, effective and relatively low cost solution, the vast majority of taxpayers would be keen to make use of it as a preliminary stage to an appeal.

3.2 We felt that the present arrangements for internal reconsideration by both Inland Revenue and HM Customs and Excise were unsatisfactory, although for rather different reasons. We therefore suggested that a new scheme should be drawn up, with common principles applicable to all forms of tax, and that this should be piloted. The scheme should include arrangements to ensure the real practical independence of the reviewing officer from the operation sections of the revenue department concerned. We also thought that appropriate training of the reviewing officer would be an essential aspect of the scheme. Once piloted, there should be a proper evaluation of the results before any decision was taken as to whether the scheme should be extended and to identify the types of case most likely to benefit.

3.3 We also thought that there would be some benefit in exploring the scope for mediation in tax cases. The nature of the procedure and the potential time and costs involved might mean that this was useful in a limited range of cases. But a pilot project could provide some evaluation of this. It might even be that mediation could in some cases form part of the internal review.

Respondent's comments

Pre-adjudication procedures

3.4 The Council on Tribunals indicated that it would not wish to be dogmatic on the subject of internal reviews. The Council had supported internal review in many cases, tailored to the particular needs of the system. At the same time, the Council was concerned that the additional stage should not lead to extra cost and delay. Any procedure ought also not to act as a deterrent to taxpayers to exercising rights of appeal. In this respect, the existence of the procedure should not restrict the grounds

on which an appeal could be made and it should not leave the appellant with the feeling that no purpose would be served in pursuing an appeal.

3.5 In general terms, the Council would say that review should not be so formal as to lead to expense and delay. At the same time, the review should be sufficiently formal to ensure consideration of a case at a senior level. The Council also pointed out that the degree of formality required depends upon the quality of the initial decision taking. When staff of good quality takes the first decisions, the need for a formal review is questionable. In this respect, there appeared to be greater scope in the tax field for informal negotiation, compromise and settlement than in other fields, such as social security. The Council agreed that, in principle, a common approach in tax matters seemed desirable and that some form of piloting would assist in achieving the right balance.

3.6 The Chartered Institute of Taxation thought that the principle behind Chapter 3 of the Interim Report[4] was obvious and sound but the Institute did not find our discussion of the issues entirely satisfactory. The Institute was disappointed that Chapter 3 contained no concrete proposals as to how any change should be organised or what a new review process would entail. It was imperative that the time of an appeal body was not wasted, for example where the start of proceedings had to be adjourned as a result of additional information becoming available at the last minute. If a case were listed for hearing, all attempts to resolve the matter should have been exhausted before the hearing date.

3.7 CIOT thought that there was some evidence from HM Customs and Excise cases to suggest that pre-adjudication procedures worked. It found our reasons for rejecting compulsory review unconvincing. A compulsory procedure served to protect taxpayers, who might otherwise be unaware of their rights to a review. The Institute accepted the possibility that a review gave the Revenue Departments two chances to get a decision right and that it might reduce their incentive to get things right first time. Any indication that this was happening, however, might be a matter for comment by the Adjudicator's office and any additional costs involved could be taken into account in a final settlement.

3.8 The Law Society of Scotland agreed that there should be some form of internal Revenue review but the main aim should be to permit the appeal process to proceed as quickly as possible. That process should not be held up through an over-formalised review procedure.

3.9 ICAEW had mixed feelings on internal reviews. It thought it more sensible that the tax authorities adopt internal procedures to ensure that a matter in dispute did not lead to an assessment or to an appeal hearing unless the decision had been reviewed and affirmed by a person of appropriate seniority. They were opposed to a compulsory review procedure. This had the potential to create delay and would in many cases achieve nothing when both parties were well aware that the dispute would need to be determined by the appeals tribunal.

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[4] That appeals should only go to court or to the tribunal if they warranted it and could not be resolved beforehand.

3.10 ICAEW also saw no merit in an internal review where the reviewer merely looked at the file. An internal review procedure ought to involve the reviewer contacting the taxpayer and inviting him to put forward anything that he felt that the reviewer ought to consider to which the Officer responsible for the case had not given proper weight or was not aware of.

3.11 ICAS thought that there was no need for pre-adjudication procedures in the majority of factual disputes. It thought, however, that it might have considerable merit for technical matters but it concluded that at present it was inappropriate to recommend the introduction of another stage in the appeal process. The Institute acknowledged that the Inland Revenue had improved its handling of complaint cases and of the internal review of contentious issues.

3.12 The Institute of Directors ("IoD") agreed that pre-adjudication reviews merited investigation. The Institute thought that they could help to ensure that only those cases involving a real dispute reached the tribunals. IoD felt, however, that the reviewing official would have to be demonstrably independent of the official who had made the original decision. Otherwise the review would lack credibility in the eyes of the taxpayer. In addition, taxpayers must always retain the right to appeal to a tribunal. The Institute thought that that the treatment of professional costs incurred in preparing submissions for a review needed further consideration.

3.13 IoD drew attention to what it saw as a potential problem with internal review. Where the tribunal's function was to consider whether a decision by the Revenue Department was reasonable, rather than merely wrong, an internal review that confirmed a decision might be taken as confirmation that the initial decision was reasonable. This would be on the basis that while one official might slip up and make an unreasonable decision, it was most unlikely that two officials would make the same mistake. The Institute suggested therefore that the rule should be that internal review was not evidence of the reasonableness of any decision by the Revenue Department.

3.14 The Special Commissioners recommended that the rules about lodging appeals should be changed. They felt that inspectors had in the past shelved far too many appeals for long periods. For the future under self-assessment, assessments would be raised after the inspector had reviewed the taxpayer's affairs. They thought that a procedure similar to that by HM Customs and Excise should be used. Thus, once an assessment had been raised, there would be a 45-day period within which the taxpayer could ask for an internal review. Once that 45-day period had expired or the internal review upholding the assessment had been completed in the meantime, the appeal would be directed to the tribunal centre and not to the inspector.

3.15 The National Association of General Commissioners felt that there would only be benefit to be derived from being able to tell the taxpayer that particularly some higher or expert authority had reviewed his case. The Association thought that this must assist the taxpayer to feel that he had been treated fairly. They stressed, however, that such reviews should be considered only as part of the Inland Revenue's internal policy and should not be an alternative to independent review or adjudication.

3.16 The Greater London Association of General Commissioners ("GLAGC") thought that it would be a good public relations exercise for the Inland Revenue if the taxpayer were made aware that his case had been reviewed internally. The Association

believed that a number of cases that came before the General Commissioners would involve less stress if this were known to the taxpayer. Another Association of Commissioners thought it unlikely that an appeal of substance would go forward without at least two layers of review. As such it thought that the current procedures worked well in practice.

Mediation

3.17 The Council on Tribunals was interested in our suggestion for mediation but had some difficulty in seeing how mediation fitted in with the present tax appeals system. It was unclear what mediators could do that the tax tribunals did not already do. There were obvious questions as to who would conduct the mediation and whether there were sufficient suitable people available.

3.18 ICAEW saw no real merit in mediation as a method of resolving tax disputes. It felt that to a large extent the existing system of appeals, involving a relatively informal tax tribunal, could achieve the same objective. NAGC thought that in many smaller cases the General Commissioners already acted as mediators to resolve issues that inspectors and taxpayers were trying to settle. They thought that this was one of the benefits of hearings in an informal atmosphere and in private.

3.19 ICAS thought that, in Scotland, mediation had not been a beneficial step. Although its use was at an early stage, it had not proved particularly attractive to litigants in Scotland in areas where it had been suggested. The Institute believed that any feeling of "mistrust" by taxpayers in their dealings with the Inland Revenue or HM Customs & Excise were unlikely to be overcome by mediation and a more open tribunal would address that better.

4. A Rational Legislative Code for Appeals

Conclusions of our first Report

4.1 We noted in our first Report the absence of any coherent or clear structure to the present legislation on direct tax appeals. The legislation was extremely difficult to follow and taxpayers or their representatives could find it difficult to answer the very basic questions: "Is there a right of appeal?" "To whom does the appeal lie?" "Within what time limits must the appeal be made?" and "Is the appeal subject to any elections?" We thought that any non-specialist trying to make sense of the legislation was likely to be completely bewildered. By contrast, the VAT rules were considerably better, although there was room for improvement.

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

4.3 However, we did not feel that this, in isolation, would suffice 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, we considered that the content of the appeals provisions needed to be changed.

4.4 For direct taxes the rules relating to the jurisdiction of the various appellate bodies at first instance were unacceptably complicated. If appeals were to continue to be heard by more than one body, we thought that they ought to be simplified and streamlined. For taxes administered by HM Customs & Excise, we believed that there was 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.

Respondent's comments

4.5 There was no disagreement with these proposals of our first Report. The Council on Tribunals supported our proposal and thought that that it should be given a high priority in the context of the Inland Revenue's Tax Law Rewrite project and HM Customs and Excise's LEGIS project. The Chartered Institute of Taxation agreed and suggested that there be a rewrite of IR37, or a similar leaflet, in language that enabled taxpayers to understand their rights without having to refer to the actual legislation.[5]

4.6 The Law Society of Scotland also agreed with our proposals. ICAEW reaffirmed their view of the Rewrite Project—that the real need was to simplify the underlying principles of the legislation. It considered that the restructuring of the appeal system along the lines we proposed should achieve that and that simplification of the actual statutory language should not be a major problem in this case. The underlying principles did not involve anything of the complexity of tax legislation generally. ICAS agreed (as we had suggested in Chapter 2 of our Report) that there should be a clear, coherent and publicly available policy about appeals. It thought that a policy review was the natural prior step to the rewriting of the legislation.

4.7 The Special Commissioners endorsed our suggestions, as did the NAGC and other bodies of Commissioners. The NAGC thought that the basis of the decision between appealing to the Special and the General Commissioners was in particular need of clarification. It considered that taxpayers should have sufficient time to consider what was involved in the choice and its consequences. The current situation gave the average taxpayer neither the information on which to make the decision nor adequate time in which to obtain advice or research the matter himself. The National Association particularly endorsed our view that the rules were unacceptably complicated and needed to be simplified and streamlined. A number of other Associations expressed similar views.

5. A Unified Tax Appeals System

Conclusions of our first Report

5.1 We noted in our first Report that there were two sets of appeal system arrangements—one for taxes administered by the Inland Revenue and the other for those administered by HM Customs & Excise. There were also substantial discrepancies between the two systems. We considered that neither the existence of

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[5] A new version of the leaflet was issued in April 1999.

separate arrangements nor these discrepancies reflected objective differences between the taxes in question or the nature of the disputes that were likely to arise. In our view such differences as there were, could have been better accommodated under a reasonably flexible, unified appeals system, without any of the practical disadvantages to which the existing arrangements gave rise.

5.2 We concluded 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 HM Customs & Excise. In our view, the existing rigid demarcation of appeals made the system much more complicated to understand and operate, and its main justification appeared to be historical and administrative. The fundamental role of the appeals system, like that of the Adjudicator, was common to taxes administered by Revenue and Customs alike. We considered that 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.[6]

Respondents' comments

5.3 There was no significant disagreement with the proposition that there should be a unified tribunal system. The question was whether it should incorporate a lower and higher tier of adjudication (see 6 below).

5.4 ICAEW agreed that there should be a unified appeals system. It thought, however, that the proposal raised a number of issues arising from the different approaches of Inland Revenue and HM Customs & Excise to raising and resolving assessments. The Inland Revenue generally sought to resolve disputes informally so that comparatively few cases were actually heard by the appeals tribunal (other than penalty cases and, in the past, delay cases). HM Customs & Excise frequently raised assessments with very little prior discussion with the taxpayer on the technical issues involved and for procedural reasons once an assessment was raised many assessments quickly proceeded to a formal hearing before the VAT tribunal.

5.5 ICAEW found it difficult to believe that a unified system for hearings would function effectively in these circumstances. Direct tax appeals tended to be concerned with technical issues but many indirect tax appeals arose because, in ICAEW's view, Customs officers had made incorrect assumptions on the facts because they failed to discuss the problem in detail with the taxpayer. The Institute thought that a tribunal might have difficulty in dealing adequately with both types of appeal. If HM Customs & Excise adopted the Inland Revenue practice of seeking to resolve disputes informally before even an assessment was raised, most appeals on both types of taxes would be on technical issues. A unified tribunal might then function effectively.

5.6 ICAEW also noted that the legal basis for direct and indirect taxes was different. VAT in particular was founded on European law, which adopts a purposive approach, while direct taxes were largely based on UK law with a different

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[6] We also considered in Chapter 5 appeals on National Insurance matters. The changes in the National Insurance appeals system, consequent upon the merging of the Contributions Agency into the Inland Revenue, have dealt with our recommendations. We have not recorded the comments that we received on this subject.

interpretative approach. This pointed to having two parallel tribunals, one for direct tax and the other for indirect tax working to common procedural rules. Taxpayers would know that their direct tax appeals and VAT appeals would follow the same format but they would have the confidence that the tribunal hearing each case had the expertise in the particular tax in question.

5.7 These points were echoed by ICAS, which was not convinced of the need for completely amalgamating the existing tribunals. It thought that VAT was sufficiently different from the direct taxes that those sitting in VAT tribunals should usually be different from the Special Commissioners.

5.8 The Institute of Directors supported a unified tribunal but was concerned at its implications for privacy (see 9 below). The Institute also noted that bringing direct taxes and VAT together raised other issues for resolution. In particular, there were the differences (between Inland Revenue and HM Customs & Excise) in the pre-appeal internal review procedures and the role of European law in VAT.

5.9 The Law Society of England & Wales expressed the view that any amalgamation of direct and indirect tax appeals should make specific provision allowing the tribunal to review the exercise of discretion by both the Inland Revenue and HM Customs & Excise. This echoed ICAEW's comments recorded previously (see 2.10(a) above). The Society noted that the VAT Tribunal had power to review some discretions and there was a more general power in relation to Customs' duties in Schedule 5 of the Finance Act 1994. There was much less power to review discretions in relation to direct taxes.

5.10 The Society appreciated that this proposition raised a number of questions, such as the Tribunal's ability to take account of extra-statutory concessions. It also recognised that there was a substantial body of material whose status was uncertain. Some cases could involve a dispute both of interpretation of the law and of the application of a discretion. But this could necessitate a taxpayer in some cases needing to start separate judicial review proceedings. It may not be right that the Tribunal should have power to review all exercises of discretions and it would be important to formulate clear rules on the extent of the tribunal's jurisdiction. But the Society believed that the Tribunal should have a wider jurisdiction certainly than currently existed in direct tax cases and it thought that the approach in section 84(10) VATA 1994 might form an appropriate basis for this.

5.11 The Society agreed that the arguments for a specially constituted tribunal to hear appeals under section 703 ICTA 1988 were no longer of any practical relevance, and that issues arising under this section should be dealt with by an appeal to the Special Commissioners.

6. The Role of the Tax Tribunals

Conclusions of our first Report

6.1 We noted in our first Report that 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. We thought that it would be unrealistic to expect that a single appeal tribunal should be able to deal with the full spectrum of

cases. We therefore believed that appeals at first instance should be divided between two tiers. One of these would hear primarily the more straightforward appeals and smaller cases, with the other deciding the more difficult and technical issues.

6.2 We considered that the composition of the tribunals, their procedural rules and local organisation should reflect their different roles, to ensure adequate provision is available for cases at both ends of the spectrum.[7]

Respondents' comments

A unified single tier of adjudication

6.3 The Special Commissioners noted that we had highlighted in paragraph 6.4 of our Report the diversity of issues that come on appeal. Rather than have a two-tier tribunal they favoured a single tier of adjudication. They thought that a single tier would be easier and more flexible, with a range of "judges" competent to deal with the different types of issues that will arise. The allocation of judges to issues should be left to the President and the Vice-presidents. The panel could include judges experienced in the Community customs code (or other specialist taxes) who would not be at home with Inland Revenue anti-avoidance provisions—and vice versa. The allocation of "horses for courses" had been the practice since the Special Commissioners and the VAT Tribunals effectively merged. It had not, so far as they were aware, given rise to any significant problems.

6.4 Accordingly, they recommended the creation of a unified first instance tax appeal court that would embrace General Commissioners, Special Commissioners and VAT and Duties Tribunals. This unified tax court would be modelled on the VAT and Duties Tribunals system. This would mean, in essence, that—

- All local tribunals were presided over by a legally qualified Chairman;
- The legally qualified Chairman would come from a panel of centrally recruited and centrally trained chairman. There would be, say, 40 such legally qualified Chairmen throughout the country and some of them would be more or less permanently based at the regional centres;
- All the local tribunals should be managed from three (or possibly four) centres, i.e. London, Manchester, Edinburgh and Belfast;
- The hearings would take place in the same regional locations as are listed in the VAT and Duties Guidance Notes;
- All hearings would be in public unless the taxpayer requested otherwise;

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[7] We referred to the two bodies as the "General Tax Tribunals" and the "Special Tax Tribunal" respectively. These were labels for convenience only and we invited views as to the most appropriate titles for the new bodies.

- Clerking (which would be quite different from the present concept of Clerks to the General Commissioners) would be arranged by one of the regional centres;

- "Clerks to the General Commissioners" would be phased out.

6.5 Under these proposals, the existing General Commissioners would remain on the panel of General Commissioners. They would sit on Inland Revenue tax appeals. The Special Commissioners accepted that the interest of General Commissioners in remaining as Commissioners might diminish as the workload reduced. VAT and Duties Tribunal Members would continue to carry out their present role on "indirect" tax appeals. This proposal would necessitate some enlargement of the regional centres. But it would fit in with the concept of requiring taxpayers to give notice of appeal direct to the Tribunal centre – as distinct from giving notice to an inspector. It would enable a flexible use to be made of the legally qualified Chairmen.

6.6 The Special Commissioners considered that there were no serious resource implications to this proposal. It would cut down on the number of Clerks to the General Commissioners. The Special Commissioners thought that there were at present 400 of them. Their administrative roles would be replaced by the regional centres and the much smaller number of legally qualified Chairmen would replace the Clerks as providers of legal knowledge. Further, the use of locally based Chairmen should keep the travel and subsistence costs down to realistic levels.

6.7 The Special Commissioners thought that the greatest benefit of their proposal would be a centrally administered system with a few Chairmen who would be susceptible to training and regulation from a central point. This should lead to consistency in decision-making and in the manner in which hearings were conducted.

A unified system with two tiers of adjudication

6.8 The majority of respondents, however, favoured (or assumed the continuance of) two tiers of adjudication. In this respect, we should note that the Special Commissioners did say that their unified tax court proposal could be adjusted to fit in with the "two-tier" system. All tiers would be administered from the regional centres. Some of the legally qualified Chairmen would be "licensed" to sit in the higher tier. If the hearings were to be in public save where the taxpayer requested otherwise, the public would have the opportunity of seeing how the hearings were being conducted and of observing the standards set.

6.9 The Law Society of Scotland thought that the idea of combining the General Commissioners as the first tier of the unified tribunal with a local Chairman, to which direct tax and certain VAT work could be directed, might be more efficient and cheaper. The Special Commissioners should be combined at the second tier with the VAT tribunal. The Society thought that the VAT tribunal did to some degree in practice adopt a two-tier structure. There were occasions when the Chairman sat alone to deal with procedural or more routine cases. In other cases there was a tribunal of two or three members. The Society also felt that the first tier tribunal was a useful addition to minimise the more usual practice of the VAT Tribunal of sitting centrally. This should make it easier for appellants to appear.

6.10 The Scottish Society agreed that all taxes should be within the jurisdiction of the new tribunal. It also thought it important that a unified tribunal should recognise the Scottish dimension so that persons qualified in Scotland decided cases involving Scottish issues. ICAS made this point as well.

6.11 The Council on Tribunals endorsed our general approach of a unified system with two tiers. In principle, it thought it desirable that simpler, more factual cases should go to the lower tier and that the heavier, legally complex cases should go to the higher tier. However, the Council did not support the suggestion that we had made that appeals should go from the lower tier or to the higher tier. What was needed, in the Council's view, was a mechanism whereby cases were assigned to the appropriate tier at the outset. Indeed, the main problem foreseen by most Respondents was how to draw the dividing line between the jurisdictions of the two bodies (see further 9 below).

6.12 ICAS was not convinced of the need for completely amalgamating the existing tribunals. It thought that VAT was sufficiently different from the direct taxes that those sitting in VAT tribunals should usually be different from the Special Commissioners. The Institute also made the point that while our first Report suggested unifying the system, it argued that there was a place both for local, general tribunals and for a more specialist tribunal. The Scottish Institute thought that the exiting system should probably stay in place but that the operation of each tribunal should be improved.

6.13 The National Association of General Commissioners thought that a unified system with two tiers could incorporate its suggestion for a general and special division for VAT appeals. It believed that income tax appeals allowed for more simplified arrangements than VAT and was a more cost effective procedure. This would permit for some VAT issues a speedier response for the taxpayer and would make use of an existing organization for the benefit of all parties.

6.14 Other Divisions of Commissioners supported the idea of a unified tribunal. They believed that their independence (and that of any tribunal) was absolutely vital and had to be preserved. Their concern was that the real advantages (as they saw them) of the existing system of tax appeals at their level should not be lost. Respondents suggested that these advantages included the following features—

(a) They were a democratic body and were seen as such by many (perhaps most) appellants and by the great majority of accountants and other tax practitioners who act for appellants.

(b) Commissioners knew their locality, had a good knowledge of local business and were capable of applying good common sense.

(c) Their proceedings were accessible, speedy and informal. Taxpayers themselves, their agents and the Revenue, not the Commissioners, invariably caused delays.

(d) They were efficient in dealing with their workload.

(e) Their proceedings generally produced the right decisions. The percentage of General Commissioners' decisions that are overturned by the High Court on appeal is about the same as the percentage of Special Commissioners decisions overturned on appeal.

(f) They were a cheap tribunal to run. They were probably cheaper than the cost to the Exchequer of professional Chairmen and appeal centres staffed at the public expense.

6.15 They felt that it would be important to ensure that the lower tier maintained the characteristics of the present General Commissioners. The tribunal should be local [8] and hearings should be informal, not "lawyer driven" and free from a risk of costs. They attached significant importance to taxpayers being able to have their appeals dealt with by local people sitting locally. Suggestions that "centres" be set up at which appeals could be heard, perhaps up to one hour's travelling distance from taxpayers' homes, did not in many Commissioners' view take into account the cost of travelling, which for many appellants must be at least as important as travelling time.

6.16 Some General Commissioners thought that our first Report suggested that they were "country cousins" to the Special Commissioners. They rejected this view and noted that General Commissioners deal with a considerable number of complex cases with expertise and in many cases the taxpayer could have gone to the Special Commissioners. They thought that it would be a retrograde step if the structure of the tribunals suggested to the public that the General Commissioners were the bottom tier of tax appeals. The lower tier was thought to be appropriate for appellants running small businesses or otherwise not involved with large sums of money or points of complexity and who might prefer to conduct their appeals in person rather than be represented.

6.17 Under a unified two-tier structure, Commissioner respondents noted that adequate training of Commissioners and Clerks would become even more important. There was concern that without proper training being offered, the general tax tribunal would be unable to deal adequately with VAT issues, although reasonable excuse appeals were thought to be ideally suited to the General Tax Tribunal.

The title of the tribunals

6.18 ICAS thought that a new tribunal could simply be called the "Tax Tribunal". ICAEW had no particular views on the names that should be adopted for the appeal bodies. It thought that the style of "General" and "Special" was probably as good as any. These had the advantage of familiarity, at least in the direct tax field, and were reasonably descriptive of the split in jurisdiction between the two tribunals. The Institute of Directors supported our terms "General Tax Tribunal" and "Special Tax Tribunal".

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[8] The view was expressed that the present system of VAT and Duties Tribunals sitting in London, Birmingham, Newcastle and Manchester would have to be drastically altered to provide accessible and efficient service to every business community wherever it might be situated.

6.19 The Law Society of England and Wales agreed that the title "Commissioners" caused confusion amongst taxpayers and implied an administrative role. In the Society's view, if there were to be a two-tier system, the second tier should consist of a tax court whose members would be known as judges but without any limitation on rights of audience. The Special Commissioners' view was that the tribunals as a whole should be referred to as "the tax courts". They noted that many taxpayers assumed the "Commissioners" had a connection with either the Commissioners of Inland Revenue or the Commissioners of Customs & Excise.

6.20 NAGC recorded that there was a strong desire in the Association to retain the title of General Commissioners. It thought, however, that there might well be acceptance of a variation to General Commissioners of Tax Appeals. It was appreciated that the present title was really inaccurate, since General Commissioners now deal with corporation tax and capital gains tax. GLAGC confirmed that there was a very strong feeling of loyalty and affection to the title of General Commissioner and that there was a strong desire to retain the title as it stood.

6.21 The Nottinghamshire & Derby General Commissioners Association was of the view that the general public is entitled to think and substantially does think that "the General Commissioners for the purposes of the Income Tax" is in some way closely associated with the Inland Revenue. The Association was anxious to dispel this idea and suggested that the title should be amended to "General Commissioners of Appeal".

6.22 The Council on Tribunals was content with our suggestion for nomenclature. It had considered the suggestion that the higher tier should be described as a "court". In one sense, it may not matter greatly if a judicial body is described as a court or a tribunal. What matters is that it is performing its function properly, Also, the Council thought that it would be regrettable if the only way of emphasising the status of the higher tier would be to call it a court. The Council attached importance to the preservation of the tribunal "ethos" and the authority of tribunals generally. It considered that the word "court" is better kept for ordinary courts of law. Industrial tribunals and the Employment Appeal Tribunal are described as tribunals, even though they have many of the characteristics of courts. Moreover, in the present context, it would seem particularly unfortunate if the higher tier were described as a court and the lower tier not, since this might lead to the perception that the lower tier was offering an inferior sort of justice.

7. Composition of the Tax Tribunals—the General Tax Tribunals

Conclusions of our first Report

7.1 We acknowledged that the General Commissioners had 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 had been perceived as routine, we noted that their role appeared to have been seen by policy-makers as less important than many other forms of tribunal or the lay magistracy. As a result, they continued to operate under a framework that was less rigorous, open and accountable than other bodies. Our view was that the long-standing neglect of this framework was unacceptable.

7.2 We welcomed the recent initiatives to address the resulting problems, and recognised the significant contribution made by the Commissioners themselves. But we believed that it was crucial that the pace of change continued to reflect the urgent need for further modernisation, to ensure that the Commissioners were 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.

7.3 We therefore put forward for further consideration the following proposals for change within the existing structure–

- The Advisory Committee system for appointing General Commissioners should become more open and accountable. To achieve this we suggested 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. We thought that one or perhaps two (in the case of large divisions) Commissioners could be elected from each division covered by the committee;

  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 appointments sub-committee, whose chairman should be elected, followed by a shorter interview with the committee as a whole. Training for the chairman of the appointments 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 were required to implement the Lord Chancellor's policy that Advisory Committees and General Commissioners should broadly reflect the local community. In particular, women and members of ethnic minorities should be better represented. Data should be kept which would enable the success of initiatives to be monitored.

- In principle, it was 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 was 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 was an urgent priority for which adequate funding should be made available.

- The procedural rules for the General Commissioners should be amended so that hearings were 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 were required to address the level of assistance and information available to appellants. These could include the production centrally of leaflets and explanatory materials.

7.4 In addition, we considered that there was 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 were aware that this was a controversial proposal and our first Report therefore proposed it as an option for discussion. We recognised that, if pursued, this proposal would need to be implemented in a way that did not diminish or devalue the role of the lay tribunal members.

Respondents' comments

General comments

7.5 The Law Society of Scotland commented that in their perception the General Commissioners were in need of reform. The Council on Tribunals supported a large number of our proposals. The Council chose not to comment on each and every proposal. Instead, it offered some general observations on aspects of the present system that seemed to present particular difficulties, and made some suggestions as to how the difficulties might best be overcome.

7.6 The Council indicated that it had pressed over many years for improvements to the system. It drew attention to the special feature on General Commissioners in its Annual Report for 1987/88. This had reflected concerns arising from the Council's visits to meetings up to that time. Those concerns included problems of accommodation, domination of proceedings by inspectors, absence of sufficient experience through inadequate numbers of sittings attended, absence of training,

chairmen sometimes lacking the requisite qualities, and variable qualities of membership generally.

7.7 The Council noted that since that time there had been several important improvements and these were reflected to some extent in the Council's more recent visits to tribunal hearings and training events. The Council thought that the introduction of procedural rules and the issue of guidance notes by the Lord Chancellor's Department had had a beneficial effect. Some General Commissioners had recognised the pressure on them to become more professional and this had led to the establishment of the National Association and various regional associations, which the Council had supported.

7.8 While not dissenting from our analysis, the Chartered Institute of Taxation noted that much of the evidence that supported our views was anecdotal and that there had been no thorough published report of the tax tribunals. As a result many of the proposals were based on common sense. But the Institute felt that a thorough survey of the present General Commissioners would be advisable to support our conclusions and, possibly, raise other issues that we had not considered.

7.9 On the whole, the General Commissioners who responded rejected the suggestion that they were in need of wholesale reform. The General Commissioners of the City of Cambridge and University Division thought that past criticisms of Commissioners—by the Council on Tribunals, the Special Commissioners and others—had been based on standards of perfection that had no greater application to the work of the Commissioners than they did to that of the lay magistracy, which had not been subjected to similar criticism. The Greater London Association of General Commissioners believed that the role of the General Commissioners was to hold the balance between the taxpayer and the Inland Revenue. It thought that the General Commissioners provided an accessible route for appeal and were certainly cost effective.

7.10 The Dartford Division of General Commissioners disagreed with our statement that the General Commissioners were "not well adapted to meet the demands on a modern appeals which will soon be required mainly to adjudicate on contentious cases".[9] The Commissioners stated that their division had dealt with a number of contentious cases in the past few years—some involving complex matters of fact and law. They had found that appellants were usually represented and they had felt well able to deal with such cases. They noted that few decisions had resulted in a request for a case stated that was then pursued.

7.11 The Altrincham Division of General Commissioners took issue with some of our proposals. They thought that we had skated over the comparison of cost between a lay tribunal and a professional tribunal. A professional tribunal was bound to be more costly. They were of the view that the present system worked well, subject to the need to resolve the problems with training. They noted, however, that Commissioners still in work might have difficulty giving up further time to training and more regular sittings, while Commissioners who had retired from regular employment might not wish to attend or to travel more frequently to hearings at distant venues.

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[9] Paragraph 10 of the Summary of our Interim Report

7.12 Respondent Commissioners were not complacent as to the need to change and adapt to the needs of the tax system. They accepted that there was room for improvement in a number of aspects of their arrangements. This is reflected in their comments that appear in this Appendix. In particular, they acknowledged the inadequacies of current training and the need to improve training arrangements (see 7.23 below). The Dartford Commissioners agreed, for example, that they would require further information and training on the working of self-assessment.

Selection of tribunal members

7.13 The Council on Tribunals strongly supported our proposals for improved selection procedures. The Institute of Chartered Accountants of Scotland believed it would be in the public interest to clarify both the requirements and the associated selection procedures for the office of General Commissioner, and also the Clerks to the Commissioners. ICAS thought it vital that "the laity" continued to serve as General Commissioners.

7.14 The National Association of General Commissioners welcomed our suggestion that the Advisory Committee system should become more open and accountable. At present Advisory Committees were shrouded in mystery, both as to how they were appointed and the system of appointment. It felt that any system that was not clearly understood and visible but exerted authority invariably attracted some degree of questioning as to its real purpose. NAGC thought that our proposals [10] on this were welcomed and regarded as valid routes for improvement. The Greater London Association of General Commissioners agreed and suggested that the Advisory Committee should assume responsibility for reporting on the training given to the Commissioners that they appointed.

7.15 The Commissioners for Central and South Manchester Division also approved our proposals. They thought that—

(a) at least one Commissioner from each division should be appointed to sit on the relevant Advisory Committee

(b) the Chairman of the Advisory Committee should be elected by members of the Advisory Committee rather than appointed by the Lord Chancellor

(c) all application forms for the appointment of new Commissioners should be considered by the full Advisory Committee before the interview stage

(d) in all matters relating to the appointment of new Commissioners to particular divisions, the Advisory Committee should have regard to the wishes of individual divisions as expressed by the Chairmen whose responsibility it is to ensure that their divisions operate effectively.

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[10] In paragraphs 7.15 to 7.21 and 7.105 of our Interim Report.

7.16 The West Wessex Association thought that the Advisory Committees should be encouraged to be more active in the appointment of Commissioners. It also suggested that Commissioners should be appointed to a county panel. Any division that fell across a county boundary would be allocated to one county only.

7.17 ICAEW generally agreed with what we had said regarding the selection, appointment and training of General Commissioners. The Institute of Directors believed that lay tribunal members should be more representative of the local community. It acknowledged that formal training might then become more important because there might be a reduction in the proportion of members who had had some professional involvement with taxation. The Chartered Institute of Taxation thought that the idea that vacancies should be advertised in a similar way to lay magistrates could ensure that the Commissioners better represented the local community. It noted, however, that suitable applicants would have to have the time to devote to such a position and that this might be one reason for the current composition. It suggested that there might be scope to make appointment conditional on being available to sit more than six times a year. This should ensure that the Commissioners would not forget their training.

7.18 The National Association of General Commissioners were concerned that the Lord Chancellor's Department was insufficiently funded to have a modern database with full information on all Commissioners. It felt that a system of returns was needed, similar to that operated by the registrar of companies. Once set up for each Division it need only be updated for any changes each year. The Greater London Association of General Commissioners also thought it clear that the facilities of the Lord Chancellor's Department are insufficient for the staff to produce information on the General Commissioners in any degree of short notice. It would appear to be sensible to have available a database on the subject.

7.19 The GLAGC agreed that the selection of members from the ethnic minorities should be improved. The Association also acknowledged the tendency for Commissioners to be in the older age category. It felt that it might be easier to recruit younger Commissioners if a loss of earnings allowance were paid.

7.20 The General Commissioners for the Barton Regis Division supported any improvement in the selection of either Commissioners or Clerks. They thought that steps should be taken to encourage recruitment among the members of the accountancy profession not in active business or from the business or commercial sectors. They supported the suggestion that legally qualified (and accountancy qualified members) should have fiscal experience. Some experience of court procedure (e.g. as JPs) would also be useful.

7.21 The Salford and Manchester North Division agreed that the overriding requirement of any appointment must be that the individual is personally suitable. They were against any dilution of this overriding requirement on the grounds of "political correctness". The General Commissioners for the Brentford Division noted that the recruitment of Commissioners was causing concern. It was not easy to find and recommend middle-aged persons, male or female, or members of ethnic groups. They considered that recruitment would not become easier if Commissioners felt themselves under pressure. They particularly thought that it full time legally qualified Chairmen were appointed, few lay-people would feel able to champion an opposing

point of view and might well be reluctant to have their names put forward for consideration.

7.22 The Law Society of Scotland noted that even in Scotland VAT Tribunal members at present appear to be appointed by the Lord Chancellor's Department and it was felt that it might be more appropriate for appointments to be made by the Lord Advocate's Department and particularly if the new combined courts are introduced that this should apply to Scottish appointments to both levels of the court.

Training of tribunal members

7.23 There was little disagreement on the need for further training for General Commissioners. The Law Society of England and Wales thought that this was essential to cover their increased jurisdiction under a unified system. The Special Commissioners entirely endorsed the proposal that everyone involved in the decision making process should be subjected to training of some form. They felt that it was impossible to over-emphasise the benefits of training and noted that the VAT and Duties Tribunals have a well-established training programme.

7.24 General Commissioners who responded to our Report noted the steps that had already been taken to improve their organisation and training but acknowledged the need for more to be done and expressed their own willingness to undertake training. They were not slow to criticise government for the lack of training. The City of Cambridge and University Division noted that the Lord Chancellor had told them on more than one occasion that they should form local Associations for this purpose. The Commissioners were doing so across the country and themselves attempting to remedy the need for training. But the Division pointed out that government bore the responsibility for the absence of a more formal structured system of training, for the lack of funding and for leaving Commissioners to spend their time and energy on "do it yourself" solutions. It noted that the funds provided by the Judicial Studies Board for training were, and had always been, woefully inadequate, even for the level of training now being organised by the Commissioners themselves. The Division felt that until government was prepared to put its money where its mouth was, discussion of a formal structured training for Commissioners or their Clerks was useless.

7.25 Havant and Portsmouth Divisions pointed out that in practice it had not been easy to arrange training because there was no funding available. The Commissioners were willing to attend training but without funding it was difficult to see how this would ever become a reality. The attempts that had been made to obtain funding from the Judicial Studies Board had received such limited success that it had not been possible to set up any regular system of training.

7.26 The Council on Tribunals strongly supported our proposals for a more organized training programme. The Council thought that there was a greater awareness of the need to show independence from the Inland Revenue, and a greater recognition of the value of training. On the other hand, the quantity and quality of training varied greatly from region to region. The Council indicated that on some more recent visits by Council members, some of its old concerns had re-emerged. In particular, there had been doubts about General Commissioners' ability to handle contentious cases and even in delay cases, Commissioners had sometimes seemed excessively dependent on help from inspectors. Much depended on the quality of the

Clerk. Moreover, there was still a need for a better balance of age, gender and ethnic background among the General Commissioners.

7.27 The Council considered that the current organisation of General Commissioners into small local divisions was at the heart of problems relating to efficient use of resources. It supported the growing practice of appointing Commissioners to more than one division and urged that the whole concept of the divisional structure be closely looked at. The Council noted the possibility that self-assessment could lead to a dramatic fall in the Commissioners' workload. If this proved correct, the Council thought that this would give scope for a complete overhaul of the present geographical divisions. The Council envisaged that this would lead to larger divisions served by a full time legally qualified clerk.

7.28 The Council also felt that the Lord Chancellor's target of six sittings a year for General Commissioners was unduly modest. Even for unpaid volunteers, twelve sittings a year seemed a reasonable requirement. The Council thought that twelve sittings would be a realistic target if there were larger geographical areas and if the Commissioners always sat as a tribunal of three. It should also achieve a more appropriate balance of training and sittings.

7.29 The Council considered that full time professionally qualified Clerks would have an important role in securing improvements to the system. A pro-active Clerk working in a large area could have a positive impact in relation to training, appointments, and a general commitment to improving standards. This was not always possible with part time Clerks serving small divisions, who have a tendency to develop their own procedures and practices, resulting in inconsistency between divisions. The Council said that it would support attempts to find a mechanism whereby procedural innovation could be encouraged and good practice disseminated to all areas. The Council saw this as a matter of training and good communication between Clerks.

7.30 The Institute of Directors supported the idea of improved training for lay members, including some technical tax training. It saw no positive merit in lay members lacking technical knowledge. Improved technical knowledge did not impair their ability to take a rounded commonsense view. IoD thought that there might also be a need for additional training of professionally qualified members and of clerks, especially if they were to tackle VAT cases for the first time. It was important that the training received was seen to be completely unbiased. The Institute therefore preferred that some training be given by an independent body rather than by the Revenue Departments. While IoD was not suggesting that speakers for the Revenue Departments would seek to give anything other than a neutral view of the law and practice, tribunal members needed to be aware that in some areas there were alternative views of the law or of how it should be implemented, each view being entirely legitimate. In any event, the present arrangements for the appointment and training of General Commissioners, and their procedural rules, needed to be improved to ensure that the high quality of decisions was maintained. The Institute also supported our proposals and comments on the appointment, background and training of the Clerks to the General Commissioners.

7.31 The Institute of Chartered Accountants of Scotland also wished to encourage a training programme for General Commissioners. They envisaged the programme as

providing a broad overview of the tax system and, within this, the function of the appeals process. ICAS did not consider, however, that all General Commissioners needed to be tax specialists.

7.32 The National Association of General Commissioners mentioned that it was in discussion with the Judicial Studies Board regarding a training programme for the country as a whole. It suggested that one of the undertakings given on recruitment should be to undertake a period of training. In its view, all newly appointed General Commissioners should be required to attend an induction course as part of those undertakings. It thought that if there is a serious intention to ensure that General Commissioners receive training then it was essential that it be mandatory. As a practical matter, it might only be possible to introduce this gradually but a specific requirement was vital.

7.33 It noted that a number of existing Commissioners already attended training conferences. It thought that the introduction of self-assessment provided an opportunity to require that all Commissioners attend at least one meeting to be appraised of the new regulations and legislation. NAGC also considered that it would be in everyone's interest in providing a better service to the community if all Commissioners were required to attend an updating conference, say, every two years.

7.34 The West Wessex Association also believed that there should be compulsory induction training. The Association thought that this would acclimatise all General Commissioners to the idea of attending training sessions. In addition, all Clerks should be involved in compulsory training and there should be participation by all Commissioners in at least one part of a day's training, e.g. workshop sessions with each group comprising in more than five people. Most importantly, however, the West Wessex Association noted that adequate finance had to be available for training. Salford and Manchester North Division thought that Commissioners should attend an induction course on appointment to receive instruction on procedure, rules of evidence and the law governing tax appeals. An annual or biennial refresher course should be arranged for Commissioners and Clerks. The Division felt that the Lord Chancellor's Department should organise these courses, and not the Inland Revenue.

7.35 The Greater London Association of General Commissioners also endorsed the view that there should be a requirement to accept training. It noted that Commissioners were organising themselves into regional associations for better exchange of information and experience. But official support for training requirements was needed to benefit the system of appeals, particularly with recent fundamental changes in the taxation system to that of self-assessment. The GLAGC believed that the major factor regarding training was that there should be some degree of requirement by the Lord Chancellor's Department for every Commissioner to have training. The Association said that it had no difficulty in providing a training programme. However, to be effective, the Association believed that there should be an element of compulsion. It suggested a one-day session for a newly appointed Commissioner, to be attended within the first 12 months of appointment, and refresher courses to be attended at least once every two years thereafter.

7.36 The GLAGC thought that the training of Clerks could be linked to that of Commissioners, with some additional factors included. The Association noted that it was trying to encourage Clerks to attend Commissioners' training, but it had to be

borne in mind that most of them would be giving up chargeable time and might need to be recompensed.

7.37 Both NAGC and GLAGC agreed that the General Commissioners should be required to sit a minimum number of times in each year. They thought that comparison with other tribunals in this respect presented difficulties, either in specialisation, terms of reference or terms of undertaking. The GLAGC suggested that there was limited value in making a direct comparison with the magistracy. Magistrates had a wider spectrum of law to cover. And comparisons with other tribunals also had to be made with care. Social Security Law, for example, was complicated and a specialist chairman would probably be necessary but whilst tax law was complicated, General Commissioners should already have some personal experience of tax matters and often business experience also.

7.38 The Frome Division noted that most Commissioners are appointed to a single Division. In Frome, Commissioners sat four or possibly only three times a year but the Commissioners would have liked the opportunity to serve more often. They would then feel that they had been appointed to a real job and they would be better equipped to do it with greater experience. The accepted that training played an important part in this but 'on the job' experience was essential if training was not to be forgotten and wasted. They thought that the solution was to appoint fewer Commissioners and that they should be appointed to sit in more than one Division or possibly on a county basis, so that they sat 10 to 12 times a year. It appeared that the Commissioners for the Croydon and Walthamstow Divisions were already at this level of sittings.

7.39 The Brentford Division thought that it was clear that training was beneficial and that most Commissioners would accept the obligation to undertake training. In particular, they would welcome regular updates in the guidance notes. They were concerned, however, that the training ought not to put undue demands upon a body of persons who were volunteers from other disciplines and who were unpaid. Commissioners were usually well versed in the local community and its business environment and initially receive training by sitting with more experienced General Commissioners.

Composition of the Tribunal

7.40 The Council on Tribunals thought that a sensible and sensitive Clerk, capable of giving legal advice, might reduce the need for a legally qualified Chairman. It recognised that there could be difficulties in having both a heavyweight Clerk giving legal advice and a legally qualified Chairman, since this might lead to conflict. However, the Council felt that the maintenance of a lay tribunal and a part-time Clerk would make it very difficult to move towards a more professional system. The Council concluded that what was needed was either a legally qualified Chairman or a full time Clerk operating in larger divisions.[11]

7.41 The Law Society of Scotland also thought that if the General Commissioners had a legally qualified Chairman the need for a legally qualified Clerk to the first tier

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[11] If the latter option were chosen, it suggested that the example of the valuation tribunal system might be worth examining more closely.

tribunal would disappear. It noted that the proper officer in the VAT and Duties Tribunals was not legally qualified and that the arrangement worked perfectly well. The expense of the legally qualified Chairman would be offset by the reduction in the cost of the Clerk to the General Commissioners. If there were a legally qualified Chairman of the General Commissioners, the "decision" could be what is appealed (as it is at present with the VAT and Duties Tribunals and the Special Commissioners). This would cut down the need for a stated case, whether for General Commissioners in the present form or for new first tier tax tribunal, with consequent reduction of expense and delay.

7.42 The Institute of Directors supported the proposal for a system of general and special tribunals but it thought it important to maintain the General Tax Tribunal as a body of lay individuals supported by a clerk. It felt that this would allow access to fast, cheap and informal justice. Lay people with business experience should also be best equipped to bring a commonsense view of justice to penalty reasonable excuse cases, which were likely to be increasingly important for direct taxes under self-assessment. Lay people could also deal with cases related to VAT penalties, in contrast to the present arrangements under which VAT Tribunal Chairmen sitting alone heard such cases.

7.43 IoD could see the benefit of including a professionally qualified member in a tribunal that is hearing an appeal involving complex legal or accountancy issues. It did not think, however, that that member need be the Chairman. It thought that all panels of General Commissioners should include a number of individuals with a legal or accounting qualification, or otherwise with a sound tax background, so that they can sit in appropriate cases.

7.44 The Chartered Institute of Taxation endorsed the idea for Chairmen to have suitable professional qualification. It thought that tax professional knowledge rather than general professional knowledge should be preferred. Chairmen would also have to maintain their knowledge of tax compliance. CIOT did not agree that the only appropriate qualification for a Chairman should be a legal one.

7.45 The Law Society of England and Wales supported a proposal to introduce a professionally qualified Chairman to the first tier tribunal (i.e. a tribunal member qualified by training and experience to decide issues of law and mixed questions of law and fact). In effect, this would extend the form of the VAT and Duties Tribunal to cover the General Commissioners. The Chairman would not be expected to have a detailed knowledge of tax law, as proposed for the second tier tax tribunal. This would mean that the first tier tax tribunal would have a higher status than the present General Commissioners and therefore the prospect of more interesting work for the members of the Tribunal. The Society was clear that the lay members of the present VAT and Duties Tribunal do not regard themselves as second-class citizens because they sit with a legally qualified Chairman. Accordingly, the Society envisaged that it would be no different for the combined tribunal.

7.46 The Institute of Chartered Accountants of Scotland suggested that a balance might be struck if a tribunal consisted of three Commissioners and a Clerk, with the Chairman or the Clerk being a lawyer and the other office holders a tax practitioner. On balance, ICAS recommended that the Chairman ought to have the qualifications that would make him eligible to be a Special Commissioner.

7.47 Some Commissioners considered that major changes in the composition of the General Commissioners should not be made on the supposition that self-assessment will so radically change the type of cases they deal with that they will be unable to carry out their duties properly without a qualified Chairman. The Commissioners were perfectly capable of dealing with penalty proceedings, investigation cases, precepts and notices for the production of information and documents, which were likely to arise under self-assessment. The loss of delay cases would result in more time being available for other cases, including contentious cases. Their greater experience under self-assessment coupled with higher levels of training, should ensure that the Commissioners were competent to carry out their duties as were the lay magistracy to carry out theirs.

7.48 Replacing Commissioners' Clerks by qualified Chairmen was thought likely to subvert the General Tax Tribunals' independence and objectivity and prove far worse than even the most dominating of Clerks. It was suggested that our proposals were based solely on our perception of the changes in the workload of General Commissioners, which self-assessment will bring about. As a matter of common sense, however, there was a view that no such far-reaching changes should even be considered until the effect of those changes was known. It was felt that the criticisms that had been made of the Commissioners in the past had been based on standards of perfection that failed to recognise the success of the current arrangements against the odds and despite any proper training scheme.

7.49 The National Association of General Commissioners expressed the view that the introduction of legally qualified Chairmen would have considerable repercussions. It said that there was considerable opposition among its members to the idea of a tribunal with a paid chairman and wingmen. It could not over-emphasise the strength of feeling on the issue. The Greater London Association of General Commissioners, which suggested that there might be a substantial number of resignations if this idea were implemented, echoed this.

7.50 Both NAGC and GLAGC noted that the term 'legally qualified' raised its own debate. Many legally qualified people had no experience in the field of taxation. Equally, a non-legally qualified person might be very experienced in taxation, as for example Chartered Tax Advisers or Chartered Accountants.

7.51 There was strong disagreement with the suggestion that a legally qualified Chairman would be more competent as a Tribunal Chairman than a 'lay' Commissioner, who might have far greater experience of chairing meetings. Only experience of meetings could convey the many and varied situations that arose before General Commissioners. It required considerable degree of skill. The NAGC was of the view that skill in chairing a meeting was rarely pure instinct and required a degree of experience. Commissioners did not simply listen to two advocates and take a decision. They played an inquisitorial role in arriving at a just settlement in a situation where one party (the inspector) knew the technicalities and invariably the other party (the taxpayer) was very much a lay individual.

7.52 Both Associations agreed with the concept of the three-person tribunal and endorsed the idea that the appointment of Chairman of the Division should be put on a statutory footing. They considered that it would be counterproductive to the concept of an independent body if members of the Inland Revenue were appointed to the

Tribunal. It also thought that the independence of the Clerk was vital and it considered that ex-Revenue appointees, as Clerks, should be exceptional. The Associations considered that the General Commissioners were quite able to distinguish points of law from fact, especially with the assistance of a legally qualified Clerk to advise them properly and impartially. Many General Commissioners were professionally trained people who were well aware of the difference between points of law and fact.

7.53 The Dartford Division of General Commissioners also disagreed with the suggestion that the Chairman should be legally qualified. They pointed out that a number of them were professionally qualified in other disciplines and they saw that as a valuable asset to the Tribunal, as well as providing Commissioners who were well able to dissect arguments in a logical manner. More importantly, they believed that all of them were using their relevant skills, be they professional or commerce, in a way that led to a fair result. They also held the view that a lay tribunal was seen by most appellants to be totally independent body and composed of "ordinary" people. This composition put the General Commissioners in a position comparable to the lay magistracy and they felt that this was both accepted by and acceptable to the appellants. A legally qualified Chairman would not improve that perception. On the other hand, they viewed a legally qualified Clerk as an essential part of the system. Their Clerk was an experienced solicitor who acted for three divisions. His assistance on matters of law was helpful and, at times, necessary. He was more valuable to them than a legally qualified Chairman would be.

7.54 Nottinghamshire & Derby Association of General Commissioners agreed with the proposition that a tribunal consisting of three persons represented the ideal in normal cases. It was the unanimous and strongly held view of the Association to oppose a move to professional chairmanship. The Association's experience ran totally counter to the arguments developed in our first Report. So long as there was a qualified professional Clerk, there would be no requirement for a professional Chairman. The Association thought that the proposal would be costly to administer. They also thought that the majority of cases referred to General Commissioners in the future would not be highly technical or involve major points of law and that they were well able to handle them. Divisions were able to draw on a wide range of experience not only as Commissioners but also as Magistrates or lay VAT Tribunal members. None had ever experienced any difficulty in distinguishing fact from law and administering the appropriate law to the facts established by the evidence.

7.55 The Central and South Manchester Division took the view that we had made no proper case for the introduction of a qualified professional Chairman sitting with two lay members, in place of the current body of lay Commissioners. They had seen no evidence to indicate that this arrangement was in any way preferable to three lay Commissioners with a qualified Clerk. The Commissioners felt that there were some obvious disadvantages to such a change. First, the lay Commissioners might feel inhibited by the presence of a professional chairman and might feel that their role had been diminished. Second, since a Clerk would be required in any event to make administrative arrangements for a meeting, a qualified Chairman would appear to increase the general expense. Finally, there was no reason to think (if our other proposals were adopted) that trained lay Commissioners sitting with a trained and qualified Clerk would be other than fully competent to adjudicate in the

straightforward appeals and similar cases that we expected to be heard by the General Tax Tribunals.

7.56 Godalming Division agreed with our proposals but not with the idea that a professionally qualified Chairman was needed. It accepted, however, that if one of the consequences of self-assessment were greater complexity of appeals, the appointment of such a Chairman might be desirable. Similarly, Havant and Portsmouth Division thought that a qualified Chairman might be needed simply because of the potential complexity of the matters under appeal.

7.57 The General Commissioners for the Brentford Division acknowledged the criticism of the performance of some divisions but they did not accept the need for an obligatory change in the structure of appointment of General Commissioners. They thought that there needed to be clearer justification for a change. The existing preponderance of "lay people" on tribunals of this level in their view ensured that the layman's approach and views were reflected in the decisions reached, based as they must be on the facts of the case as presented and the law as it stands. They thought that General Commissioners should continue to rely for legal advice on their Clerk. This ensured that the legal advice was independent of the decision and that there would be no undue influence on the decision by a legally qualified Chairman.

7.58 The Brentford Commissioners were also against the appointment of a full time legally qualified Chairmen. They thought that people were only too well aware of the costs of legally qualified persons and an increase in their number in a voluntary field would be an additional cost on the system.

7.59 Wallington Division was against the idea of a paid professional chairman. In their view one of the strengths of General Commissioners was as local lay people of some relevant experience. A paid professional Chairman would detract from the role of lay members. They felt that it was less important for a tax appeal tribunal to reflect the make-up of the local community than was the case, for example for the magistracy. Most of their work concerned local businessmen who would rather have their case dealt with by their peers.

7.60 The Commissioners for the Salford and Manchester North Division believed it desirable for the General Commissioners to continue as a lay body with a legally qualified Clerk. They accepted that it would be unhelpful for both Chairman and Clerk to be legally qualified and they thought the Clerk's independent legal advice preferable. They thought that the quorum should be three Commissioners unless the parties consented to a hearing before two Commissioners. Clerks should have at least 7 years experience as a practising barrister or solicitor before appointment and should be able to familiarise themselves with frequently changing tax legislation. They should also ensure that the Tribunal operated with proper regard to procedure and for this reason it was more important to appoint a person with forensic experience than one with exclusively a tax background.

7.61 Finally, the Croydon and Walthamstow Divisions of General Commissioners raised a practical issue regarding the required quorum for meetings. They agreed that three Commissioners represented the optimum panel. Both Divisions, however, were fairly busy with 40 (in the case of Croydon) and 25 (in the case of Walthamstow) meetings a year, and the Commissioners sitting on average 10 to 12 times a year.

Under those circumstances, other commitments and illness often made it difficult to raise more than two Commissioners at a meeting. Of more importance, however, as it was a local appeal body, Commissioners were reluctant to sit when a case involved a taxpayer or representative known to the Commissioners. There might be little notice of that situation, leading to a last-minute withdrawal of a Commissioner in a particular case. Accordingly, there needed to be some flexibility on the quorum adopted.

A local appeal body

7.62 The Chartered Institute of Taxation thought that the reduction in the number of tribunal centres in order to cut costs warranted further discussion. The rationale for the General Commissioners was as an easily accessible local lay body that everyone could use. CIOT thought that our recommendations moved away from this principle in an attempt to streamline the system. It strongly believed that the implications of reducing the tribunal centres should be thought through carefully before being implemented.

Remunerating tribunal members

7.63 The Institute of Chartered Accountants of Scotland thought that General Commissioners should receive remuneration for their service. The Institute was inclined towards a set rate, for example, at a rate currently paid to tax VAT Tribunal members. It did not think that a "loss of earnings" measure of remuneration was appropriate.

7.64 The NAGC endorsed the idea that the volunteer status of Commissioners be retained. Any payment should be no more than loss of earnings. GLAGC noted that there was a tendency for Commissioners to be in the older age category and the concept of a loss of earnings allowance may well assist in alleviating that point. It recorded that there was a view that loss of earnings could be divisive as it would create a problem for the self-employed. The NAGC noted, however, that many General Commissioners were retired and an allowance of some sort might help recruit younger persons who might otherwise be unable to take time off work. The GLAGC expressed similar views.

7.65 The Nottinghamshire & Derby Association of General Commissioners pointed out that the current remuneration of Clerks was inadequate. But they recorded no support for the idea that Commissioners should be paid. They also wished to maintain volunteer status and thought the introduction of a loss of earnings allowance would be undesirable. The Salford and Manchester North Division were also against a loss of earnings allowance. They thought that Commissioners should be prepared to give their time as a public service.

7.66 The West Wessex Association thought the current system to be efficient and inexpensive. They approved of recent changes in mileage rates but thought that the change in subsistence allowances was a retrograde step. They thought that the change from 4 to 8 hour allowance to 5 to 10 hours was for the sole purpose of reducing payments. They also believed that paying Commissioners would have a detrimental effect on the quality of people applying for appointment. They did support a loss of earnings allowance as possibly necessary to attract younger Commissioners.

8. Composition of the Tax Tribunals—the Special Commissioners and VAT and Duties Tribunals

Conclusions of our first Report

8.1 We considered that 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. We welcomed the moves to open recruitment and thought that initiatives should be considered to extend the pool of applicants particularly for full-time appointments, as the calibre of appointees at this level had considerable practical impact on the development of tax law.

8.2 We believed that a policy of open recruitment needed to be developed for lay members. In our view, formal responsibility for appointment of VAT Tribunal members should be transferred from the Treasury to the Lord Chancellor's Department.

8.3 We could see no clear justification for the different rules governing the composition of the VAT and Duties Tribunals and the Special Commissioners. We suggested that rules governing the composition of both forms of tribunal should be assimilated. The object in doing so should be to provide a flexible structure that would enable both tribunals to accommodate the full range of disputed issues with which they deal. We thought that the following principles should apply:

- Both VAT and Duties 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 involving difficult issues of law, two legally qualified members should be able to sit together, with an additional lay member if there were other aspects of the case that made this appropriate.

- The working criteria for the allocation of tribunal members to particular cases should be more widely known.

8.4 We considered that the assimilation of the rules for the composition of the two forms of tribunal would ease the transition to a unified tax appeals system. We suggested 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 the right to make representations. We considered that the balance of arguments in the tax context was against making provision for the Tribunal to include members appointed on the basis of expertise in specialized business or technical subjects. However we thought that the Tribunal could be enabled to draw on specialist expertise by referring questions to an expert for advice or a written opinion.

8.5 Finally, our view was that there could be provision for one of a panel of nominated High Court judges to sit as 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.

Respondents' comments

Selection for the Tribunal

8.6 The Institute of Chartered Accountants in England & Wales was in general agreement with our proposals. The Council on Tribunals felt it unnecessary to comment at any length on these Tribunals as they regarded them as functioning satisfactorily. It thought that our proposal for more full-time members must depend upon the volume of work at the higher level. The Council had thought that there was difficulty in keeping fully employed those Special Commissioners who preferred not to do VAT work.

8.7 The Chartered Institute of Taxation also questioned the need for more full-time Commissioners. CIOT thought that the calibre of part time appointees made up for any disadvantages of there being only a few full time appointments, even if the full-time Commissioners were over-stretched when hearing lengthy cases. The Institute doubted whether the best-suited applicants would want to work as full-time Commissioners, so long as the salaries of the Commissioners were not comparable to earnings in professional firms. CIOT also thought that the part time nature of the appointment would appeal largely to retired or semi-retired professionals who would have the relevant experience and background to put themselves forward for selection.

8.8 The CIOT considered that the overlap between the Special Commissioners and the VAT and Duties Tribunals made their unification both practical and desirable. As both tribunals often dealt with cases that become the basis of statute and case law, the Institute thought it important that tribunal members should be well-informed individuals who have a thorough understanding of previous cases and decisions. A legal qualification was desirable but members with an extensive background in the tax profession or with the Revenue authorities should also be considered. ICAS believed that the Special Commissioners and VAT Tribunal Chairmen should be drawn from both legal and tax practice backgrounds with a minimum 10 years experience.

8.9 The Special Commissioners agreed that there should be a policy of open recruitment for lay members. They also agreed with our proposal that VAT Tribunal Chairmen and the Special Commissioners should have experience in the areas of law and practice relevant to their jurisdictions. The Commissioners felt, however, that there were serious practical constraints to this. The jurisdiction was so wide—extending from evidence to European law—that there were probably only two criteria that could be fulfilled in terms of legal experience. These were that the "judge" should have a familiarity with some form of fiscally related law and that he or she should demonstrate the capacity to cover the wider legal landscape.

8.10 The Law Society of Scotland thought that any Scottish appointments to the Special Commissioners would probably have to be part-time appointments. This would be necessary to attract the appropriate calibre of appointee and to permit them

to continue to develop their careers in other directions. The Society thought that this had worked satisfactorily with part-time Chairmen and members of the VAT Tribunal in Scotland. The Society thought it inappropriate to consider this a matter for the appointment of tax specialists only. The Society noted that there is often a non-tax point in issue and that the tradition of using non-specialist judges is well recognised in Scotland. It suggested that in the case of Scotland appointments should be made not by the Lord Chancellor's Department but the Lord Advocate's Department in Scotland.

8.11 The Law Society of England and Wales supported our proposal for a High Court judge to sit as an ex officio member of the tribunal. The Society thought that this supported the use of the title "court" rather than tribunal. It thought that it might be particularly desirable to use a High Court judge in large cases and suggested that rules should provide for this when both parties agreed.

Composition of the Tribunal

8.12 The Special Commissioners thought that it should be possible to have a single set of rules governing the composition of the VAT and Duties Tribunals and the Special Commissioners. The VAT Tribunal rules were flexible and had been easily adapted to include excise and customs duties and landfill tax appeals. The same could follow for Inland Revenue appeals.

8.13 The Institute of Directors welcomed the idea of greater flexibility in the composition of the tribunal, to reflect the issues involved. It agreed that some tribunals might comprise one or two or perhaps even three legally qualified members, while others included a single legally qualified member and two lay members. The Institute of Chartered Accountants of Scotland agreed that the composition could be more flexible. The Institute thought that there was merit in having two Commissioners sitting together given the complexities of both the commercial world and fiscal statute. The Law Society of Scotland pointed out that because of the composition of the VAT and Duties tribunal in Scotland, it is not uncommon for two legally qualified members to be sitting with a third member who is often an accountant.

8.14 The Council on Tribunals in principle supported the idea of Special Commissioners moving towards a three-person tribunal but thought that it would be necessary to monitor how this worked in practice. The Law Society of England and Wales on the other hand did not agree with our suggestion in this respect. It thought that there would be practical difficulties with this proposal. It suggested that Tribunal Chairmen should be permitted to sit with up to two other members but that there should never be more than three members of the Tribunal. It considered it inappropriate that the parties to a hearing should have the right to demand a three-member panel but it saw no objection to the parties making representations on the composition of the tribunal.

8.15 The Special Commissioners endorsed the proposal that both VAT Tribunal Chairmen and Special Commissioners should be able to sit with one or two lay members. They also agreed that in cases involving difficult issues of law, two legally qualified members might be able to sit together. Their experience was that there were occasions where two minds on an issue of law were better than one.

8.16 The Special Commissioners pointed out that there are working criteria allocating tribunal members to particular cases. If there were allegations of dishonesty there would almost always be two lay members appointed. Two members would be appointed in cases that raised unusually difficult factual issues. Examples of these were the Marks & Spencer "unjust enrichment" appeals where the Tribunal needed experience of economics as well as of the retail industry. In all other cases a chairman sits with one member save where—(i) a pure point of law is involved; and (ii) the appeal relates to a relatively small default surcharge assessment.

8.17 The Special Commissioners did not support our proposal that the tribunal should normally consist of a chairman and two members. They felt that a tribunal of three is seldom better than a tribunal of two. The problem with three was that it could lead to considerable delay in the production of the decision, which has to be circulated, amended and possibly re-amended, and can take a long time. Furthermore, in longer cases it can be difficult to arrange a tribunal of three. The Commissioners had heard of no public disquiet about the composition of the VAT and Duties Tribunals to support our proposal.

8.18 They felt that it would be better to leave the matter to the discretion of the President. The parties in individual cases could always make representations in advance to suggest that there should be a Chairman and two members. It should be possible to arrange for a very flexible composition for both VAT and Duties Tribunals and Special Commissioners. They suggested that if a long quasi-criminal fraud case lasting several weeks were listed, the President should be able to recruit a circuit judge with experience of fraud cases. Equally, if the case involved the valuation of land, being one that might otherwise have to be referred to the Lands Tribunal, it should be open to the President, in consultation with the President of the Lands Tribunal, to enlist one or two chairmen of the Lands Tribunal.[12] Generally, they thought that the demarcation between tribunals was far too rigid. There might even be cases where it was appropriate to call upon a High Court judge but they believed that it was difficult to envisage situations where this would be necessary and desirable.

Appeals

8.19 The Council on Tribunals had difficulty with the concept of the Special Tax Tribunal being both a first instance tribunal dealing with the more complex cases and an appellate tribunal hearing appeals from the General Tax Tribunal. They believed that this proposal required more thought.

9. Other Issues on Appeals to the Tribunals

Conclusions of our first Report

9.1 Our view was that the arrangements for allocation of direct tax appeals should be rationalised. In particular, the rules governing the respective jurisdictions of the General and Special Tax Tribunals should be simpler, clearer and more coherent. We suggested that in relation to the main direct taxes:

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[12] Special Commissioners also thought that they should be given the capacity to be transformed into a Lands Tribunal for specific purposes.

- All appeals should be heard at first instance by either the General or Special Tax Tribunal (and not referred direct to the High Court).

- Both Tax Tribunals 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 Tax Tribunal.

- This election 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.

- 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 Tax Tribunal.

Under the unified tax appeals system, this framework would extend to VAT cases as well as the main direct taxes.

9.2 To keep the jurisdiction of the General Tax Tribunal within a manageable compass, we thought that separate provision might be required for cases relating to some specialised forms of tax. These would be likely to generate a smaller body of appeals and such appeals could always lie only to the Special Tax Tribunal. This approach would be strengthened if the General Tax Tribunal were a lay body. The taxes covered would probably include petroleum revenue tax, insurance premium tax, landfill tax and stamp duty reserve tax. Other candidates would be stamp duty, excise duties and possibly also inheritance tax.

9.3 We noted that there was still dissatisfaction with certain aspects of the existing procedural rules for the Tax Tribunals. There were also discrepancies between the direct and indirect Tax Tribunal systems, which were difficult to defend except on administrative grounds and some of which were of considerable practical importance.

9.4 We asked for representations on the form that the tribunal rules should take, both under the present divided tribunal system and under a unified tribunal system, in the following key areas:

- 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 in private.

Respondents' comments

Choice of Tribunal

9.5 The Council on Tribunals noted that, where they had the choice, taxpayers with a good case tended to opt for the Special Commissioners. The Council also believed that decisions of Special Commissioners commanded the respect of the Inland Revenue in a way that those of the General Commissioners did not. The Council thought it important to know whether there was any evidence that the present right of election resulted in the Special Commissioners dealing with trivial cases. It thought that similar allocation issues would arise with VAT cases, if they were divided between the higher and lower tier according to weight and legal content, and the taxpayer were to retain the choice of forum.

9.6 The Council felt that jurisdictional questions needed to be sorted out at the start but that this could only be done in the context of a coherent appeals policy and a clear legislative framework. The Chartered Institute of Taxation also stressed the need for a unified policy that made it clear, both to taxpayers and to Revenue authorities, which tribunal was best suited to dealing with a specific case or tax. It thought that guidelines should be readily available in a form that could easily be understood by all prospective appellants.

9.7 Salford and Manchester North Division Commissioners considered that all appeals should in the first instance be made to the General Commissioners.[13] Thereafter, at any time, either the taxpayer or the Inland Revenue should be free to apply to the General Commissioners for the case to be heard by the Special Commissioners. They envisaged that it would be for the General Commissioners to decide whether it was appropriate to transfer the case. The General Commissioners ought also to have the right to ask for the case to be heard by the Special Commissioners.

9.8 They thought that this system would have an number of advantages—

(a) The appellant would not be disadvantaged if the subject of the appeal turned out to be more complicated than he has supposed. They felt that the 30-day limit was unduly restrictive in many cases.

(b) The system would be simple to administer.

(c) There were many bodies of General Commissioners that would have an extensive range of specialised experience and whose members would be wholly competent to hear cases presently dealt with by Special Commissioners. Such members would welcome involvement in potentially more interesting work.

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[13] They also thought that a comprehensive set of rules relating to appeals should be drafted under the aegis of the Lord Chancellor's Department and without the involvement of the Inland Revenue.

(d) The cost of using Special Commissioners could be considerable and it must be in the public interest to use voluntary General Commissioners where equally appropriate.

(e) Most cases would be dealt with more quickly.

9.9 The ICAEW agreed with most of what we had said in Chapter 9. It agreed with our objective of high quality decision-making but felt that this had to be balanced against the need for accessibility. Thus quality of decision-making might require the Special Tax Tribunal to hear a direct tax case on which a complex technical argument arose. But if the taxpayer appeared in person, the less formal environment of the General Tax Tribunal might well be the more appropriate forum, even if those hearing the case were less expert on the technical issues. The Institute suggested that the balanced answer in such cases might be for the Special Tax Tribunal to relax its own procedural rules to accommodate such a taxpayer.

9.10 ICAEW thought it important, however, that a taxpayer should not be forced to take his case to the Special Tax Tribunal if he had limited financial resources or was otherwise more comfortable with a hearing before the General Tax Tribunal. The Institute agreed that all tax appeals should be heard at first instance by the Tax Tribunals but proposed that taxpayers should have the absolute right to choose between the General and Special Tribunal, subject possibly to certain matters being reserved to the Special Tax Tribunal. The Institute thought that there might also be a penalty in terms of costs if a taxpayer unreasonably insisted on the Special Tax Tribunal hearing a case that was inappropriate for that Tribunal. The taxpayer's right of election should be exercisable at the time of first application for listing, with the case being allocated to the General Tax Tribunal if he made no election. If that were so, there would seem to be no reason for the appeal to be made in the first place specifically to one body or the other.

9.11 The Institute of Chartered Accountants of Scotland also believed that taxpayers should be able to elect to go either to the General or to the Special Tax Tribunal. The Institute anticipated that, as at present, the General Tax Tribunal would still tend to hear cases where the points at issue revolve around establishing the facts, while the more technical points would go to the Special Tax Tribunal for decision.

9.12 The NAGC agreed that there should be a better mechanism for allocating cases between the Special and General Commissioners. It thought that the structure of the present arrangements was well suited to distinguish between complex and time consuming cases and others. The system allowed complex cases to reach the General Commissioners where their experience of commercial matters was considered more important to the taxpayer than a high degree of tax law expertise.

9.13 The Greater London Association of General Commissioners thought that the objective of allocating cases to a suitable level within the appeal system by reference to the nature and complexity of the issues involved, would require an assessor either as part of the Inland Revenue or specifically appointed to allocate such cases. The GLAGC felt that this was best served under the current system of choosing between the General and Special Commissioners, although it also thought that the mechanism for choosing could be improved. Some Commissioners thought that it would be possible to divide VAT appeals between two tiers of tribunal, as in direct tax appeals.

9.14 The Law Society of Scotland thought that the present 30-day period for electing between the General Commissioners and the Special Commissioners was far too short. At least 60 days should be allowed and this should apply under any new unified system.

9.15 The Special Commissioners agreed that the arrangements for the allocation of direct tax appeals needed to be rationalised. They thought that taxpayers should have a general right to elect for hearing by the Special Tax Tribunal, exercisable as of right at any time up to two weeks before the hearing date. Later than that the right to elect should be with leave. The Special Commissioners considered that there were certain cases that should inevitably and always go to the Special Tax Tribunal. They also believed that those issues that are presently within the exclusive jurisdiction of the Special Commissioners should remain that way.

9.16 The Institute of Directors considered that all appeals should be allocated initially to the General Tax Tribunal unless the taxpayer elected otherwise. The taxpayer should have an unfettered right to elect for the case to be heard by the Special Tax Tribunal. The Institute thought that the General Tax Tribunal's jurisdiction should include specialist taxes such as PRT and landfill tax. There was no reason to think that the law on these subjects was more demanding than for the main direct taxes. The General Tax Tribunal would be just as capable of finding facts in such cases as the Special Tax Tribunal, particularly since the General Tribunal could include an individual with industry knowledge.

9.17 The Law Society of England and Wales agreed strongly with our concern over the procedures for stamp duty cases, which by-pass the tribunals altogether and start in the High Court. The Society's view was that the prospect of a hearing in the High Court was a powerful deterrent to taxpayers, who would otherwise seek to challenge an assessment to stamp duty. The Society pointed out that there were many more appeals against customs duties once the VAT and Duties Tribunal has jurisdiction as compared with when such appeals had to go to the High Court.

Procedure in the Tribunals

9.18 There was support for the idea that tax appeals, at their initial stages, should be relatively informal. Some Commissioners indicated that they would like to offer a fairer, more rational and relatively cost free appeal system for taxpayers. Some made the point that they did not want to see a gradual and remorseless progress towards a traditional "court of law" approach, with all the costs that that would involve.

9.19 The Institute of Chartered Accountants of Scotland wished to retain the relatively informality of the General Commissioners. It felt that there were benefits in informality and in an absence of formal rules. Justice may appear less accessible if the procedural rules are too formal, although some form of rules were required to ensure smooth conduct and the absence of rules should not permit "surprise". There had to be some structure to the regime.

9.20 ICAEW regretted that the formalisation of procedures before the General Commissioners in 1994 had added an unwelcome degree of formality to proceedings. On the other hand, the 1994 rules still left much of the procedure at the actual appeal hearing to the discretion of the Commissioners. What ICAEW thought was needed to

be achieved was a level of procedural informality that combined a degree of consistency or standardisation of procedure between different tribunals and ensured that a taxpayer or his representative would know before he arrived at the hearing what to expect.

9.21 ICAEW expressed concerns over the way some bodies of General Commissioners exercised their powers. It drew our attention to cases where a body of General Commissioners had adopted a procedural rule that, whatever the circumstances, it would not allow the taxpayer and the inspector to agree informally an adjournment of a hearing where the case has already been adjourned once. Its members had also encountered a situation where the Commissioners had decided that, whatever the circumstances, they would not be prepared to adjourn a hearing unless the taxpayer appeared in person—rather than through a representative—to request an adjournment.

9.22 ICAEW considered that, if there had to be formal procedural rules, it would be better for there to be a standard comprehensive procedure, spelled out clearly in advance. The Commissioners would retain powers to direct—in advance of the hearing taking place—that a different procedure should apply in cases where the normal procedure appeared to them to be inappropriate.

9.23 The Institute thought that there should be extensive consultation on any new procedural rules. Although consultation did take place in 1994 on the procedural rules for General and Special Commissioners, the Institute felt that this had been fairly cursory and had not led to the bipartisan discussions generally involved in consultation with the profession by the Revenue Departments themselves. The Institute believed that there should be a presumption at the outset that identical rules would be equally valid in all Tribunals.

9.24 The Council on Tribunals was aware of discrepancies between the existing rules for General Commissioners, Special Commissioners and the VAT and Duties Tribunals. The Council had traversed this ground when it was consulted on the procedural rules for the General and the Special Commissioners.[14] The Council had previously taken the view that the procedural rules for VAT and Duties Tribunals were unduly complex and legalistic but successive Presidents had not taken this view. The Council preferred therefore to leave to a later stage consideration of the matters raised in our Report on the content of the procedural rules.

9.25 The Law Society of England and Wales noted that by comparison with the VAT and Duties Tribunals, current rules did not give the Special Commissioners adequate knowledge of a case in advance. Some aspects of the VAT and Duties rules needed updating, but they formed a better basis for the rules of the Special Tax Tribunal than do the Special Commissioners' rules. In every VAT case, the taxpayer and the Tribunal should have advance knowledge from Customs' statement of case what the case is about. Unless there was a preliminary hearing, in a direct tax case the Commissioners would have little advance knowledge and could not make the parties agree the points in dispute. The Society felt that if the Special Tax Tribunal were to have power to sit with lay members, it would become more important for the Tribunal

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[14] See Annual Report for 1993/94.

to know in advance what was the nature of the dispute. This would facilitate the appointment of appropriately qualified lay members.

9.26 The Institute of Directors believed that the same procedural rules should apply to all tribunals (apart from privacy for General Tax Tribunal hearings). There would be some cases that would benefit from the use of more formal procedures than other cases. The Institute thought, however, that it would be difficult to prescribe in advance which cases would so benefit. IoD also suggested that the General Tax Tribunals be allowed to take a commonsense view and not to object to inadequate compliance by unrepresented taxpayers with procedural requirements. If the Tribunal did object, it should explain the requirements to the taxpayer and adjourn the hearing to give him a chance to comply.

9.27 IoD suggested that taxpayers should be given better written guidance on how to appeal, on their rights and on the procedure at hearings. These points were made in other comments on our Report (see 2 above). The Institute also pointed out that pleadings and pre-trial reviews would be appropriate to some cases but not to others (see our first Report, paragraph 6.10). The line between these cases might not coincide with the boundary between cases appropriate to the General Tax Tribunal and those appropriate to the Special Tax Tribunal. Most obviously, £10m of tax could turn on a simple question of fact for which elaborate rules were inappropriate. Such a large case would probably go to the Special Tribunal but IoD thought it arguable that it should go to the General Tax Tribunal—the problem of finding the facts is the same whether £100 or £10m is at stake.

9.28 The Special Commissioners made the point that the VAT and Duties Tribunals rules were flexible and could easily be adapted to cover Revenue tax appeals after self-assessment had come in. The VAT rules contained useful pre-trail procedures and powers and gave the Tribunal power to enforce directions by the imposition of fines. They enabled the Tribunal to get hold of the case well before the appeal came on for hearing. This meant that the issues were clarified and reduced, with a corresponding saving of costs to the taxpayer.

9.29 The National Association of General Commissioners expressed its concern at the reduction under self-assessment in the degree of flexibility and in the opportunity to exercise discretion. The Association considered that informality benefited both parties at a tribunal hearing. The Commissioners were able to encourage the taxpayer to make his points effectively and maybe mention factors that he was unaware were important. The Inland Revenue was able to be more flexible in dealing with individual cases. NAGC felt that both factors would suffer if formality and a public hearing were introduced. One of the great benefits of the current system operated by General Commissioners was that they could and did adapt to each case as it arose, be it a corporate body with Counsel appearing on behalf of the company or the local newsagent appearing on his own behalf.

9.30 NAGC thought that the guidance notes issued by the Lord Chancellor's department provided a substantial basis on which General Commissioners could operate. In order to be of value the independence of the tribunals had to be clear and be understood by all parties. To this end, the importance of making it clear to whom the taxpayer was initially appealing was paramount and hence NAGC's comment that all appeals should be direct to the Commissioners. NAGC felt that the mechanics of

sorting out the cases acceptable to the Inland Revenue without an appearance before the Commissioners should not obscure that fact.

9.31 Salford and Manchester North Division thought it important, particularly so in the case of unrepresented appellants, that there should be an informal atmosphere at the hearing. They accepted, however, that informality should not be allowed to become irregularity and that it was the duty of the Chairman, with the help of the Clerk, to achieve this balance. They strongly endorsed the need to make better known the right of a taxpayer to request a listing.

The costs of appeals

9.32 The Chartered Institute of Taxation believed that costs were a significant factor in the decision to pursue an appeal. It considered that any changes to the appeals process ought to ensure that taxpayers were not deterred from pursuing their legal rights on the basis of cost alone. ICAEW agreed that the appeal system should be affordable but it thought that this had to be looked at in the context of the potential overall costs. A cheap and easy appeals forum might be attractive to a taxpayer. But if on winning his appeal he ran the risk that the Revenue Departments would appeal to a higher and more costly tribunal, the affordability of the original appeal would be illusory.

9.33 ICAEW thought that there needed to be a system under which if a taxpayer won his appeal and the tax authorities wished to pursue the matter further, the taxpayer should not be at risk of costs. He might be protected against costs if either he were prepared to give up the benefits of his victory or it were clear that the Revenue authorities were taking the appeal on a question of principle rather than because of the tax at stake in the taxpayer's case.

9.34 The Special Commissioners thought that they should have unlimited power to award costs, as the VAT and Duties Tribunal are currently permitted to do. Many Special Commissioners cases were as expensive as High Court hearings and it was a serious burden to a taxpayer who reasonably believed his case to be good to have to contemplate the burden of his own costs even if he won.

9.35 The Special Commissioners noted that HM Customs & Excise had adopted a "self-denying" procedure of claiming costs (where they won) only in exceptional cases. They doubted that conferring power to award High Court costs on the Special Commissioners would lead taxpayers to choose the Special Commissioners rather than the General Commissioners. There were numerous advantages in using the local tribunal, particularly for small cases, and the advantages of convenience would be more than outweighed by the possibility of obtaining costs when succeeding.

9.36 They thought that the Inland Revenue ought not to be alarmed by this proposal. The Revenue won two out of three cases before the Special Commissioners. There were only eighty contentious hearings in the course of the year and this meant that they would have to carry the costs of about 26 hearings each year. Even if the costs were found to be £100,000 in each of these 26 cases, the total cost to the Inland Revenue would be £2,600,000. The Commissioners did not consider this an excessive price for a juster system and the costs of most appeals should be lower than this.

9.37 ICAS had divided views about costs. There was much to be said for each party bearing its own costs as at present. However, money should not be a barrier to justice. The Institute was aware that, on occasion, the taxpayer could feel threatened by the cost of any subsequent appeal. At present the Inland Revenue might be prepared to pay costs when an issue of principle affecting a number of taxpayers was involved. But this did not give the taxpayer entitlement to costs. On the other hand, if there were entitlement to costs, ICAS wondered how to protect the public purse from trivial claims. It suggested for consideration that the Inland Revenue pay all costs in the appeal process if the taxpayer were to win at any stage of the procedure i.e. at the Commissioners, the Court of Session or the House of Lords.

9.38 ICAEW noted our repeated references to VAT appellants being able to claim their costs. The Institute was concerned that those without experience of Tribunals might think that an award of costs leaves the successful litigant without any expense. They made the point that a claim for costs reasonably incurred on an appeal invariably fell short of the total time spent by the trader's representative. The reduction did not end there. There was still argument about the number of hours spent even when the work in question can be claimed and on the rate per hour. The Institute thought that 70% would be considered fairly typical of a satisfactory settlement of a costs claim. It seemed reasonable to suppose, therefore, that most successful appeals cost the trader at least 30% of his expenditure on professional advice plus any further time which had to be left out of the costs claim in the first place.

9.39 ICAEW observed that the subject of costs had been debated on many occasions, particularly in the context of the Special Commissioners' rules. It thought that there was no valid reason for applying different principles to the taxes involved, but a distinction could perhaps be drawn between those cases involving business liabilities (necessarily including all VAT cases) and those which are purely personal. There seemed no good reason in principle in a large commercial case, which is practically certain to be appealed further, why costs before the Commissioners should not be awarded on the same basis as the High Court. However any such rule would involve difficult boundary issues. On balance, ICAEW thought that the best way might be as we suggested, to retain the existing rules for the Commissioners subject only to broadening the circumstances in which the Special Commissioners can award costs against a party who had acted unreasonably.

9.40 The Law Society of Scotland thought that a test of whether an appeal was "not wholly unreasonable" might apply to the question of whether HM Customs & Excise or the Inland Revenue might be given costs.

9.41 The Law Society of England and Wales considered that there was a major difference in perception on costs between taxpayers and the Inland Revenue. From the Revenue's point of view, the Special Commissioners, like the General Commissioners, were a fact-finding tribunal. There was no argument for an exercise of fact-finding to be carried out at the Inland Revenue's expense, particularly when the parties could agree the facts in advance. From the taxpayer's point of view, a Special Commissioners' case was no different from, and in many ways more expensive than, a typical High Court case in which the taxpayer expected to receive costs if he won. Taxpayers tended to ask why they should have to pay to prove that they were right and that the Inland Revenue was wrong, when that proof could require

leading and junior counsel, solicitors, accountants, perhaps other expert witnesses and costs of tens of thousands of pounds?

9.42 The Society's view was that in the circumstances in which the Special Commissioners operated today, the balance of argument favoured the taxpayer's point of view as expressed above. The majority of time was not spent finding facts that could just as well have been agreed. The Society thought that it was rare for the basic facts not to be agreed. This left cases where either the facts were the substance of the case, such as what is the correct accounting treatment, or arguments of law. In other words, the analogy was much closer to the High Court than the General Commissioners.

9.43 The Society did not support our proposal that costs might be awarded on the basis of unreasonable conduct, as opposed to wholly unreasonable conduct. The purpose of awarding costs was wider than merely punishing unreasonable conduct, and the taxpayer should not be out of pocket. To award costs to taxpayers would be a discretionary remedy and there would be no difficulty in having a rule that costs were not to be awarded to the extent that they relate to the non-agreement of facts which could have been agreed.

9.44 The Society considered whether the same argument applied if the Inland Revenue were to win before the Commissioners? It thought that the essential difference between this and High Court litigation was that the identity of the taxpayer may depend upon chance. There may be many other taxpayers who are appealing on the identical point, either identified now or in the future. The fact that taxpayer A is the appellant and loses does not necessarily mean that he should pay for the Inland Revenue's ability to use the benefit of the decision against other taxpayers. The Society believed that the practice of HM Customs and Excise in the VAT and Duties Tribunal was the correct approach. It appreciated that this would involve the Inland Revenue in some additional expense, but this took into account the benefit to the Department of having clarified the law for other cases. The procedure already allowed for situations of unreasonable conduct by taxpayers.

9.45 The Institute of Directors noted that cost was a significant disincentive for a taxpayer taking an appeal. It thought that taxpayers should be able to recover costs from the Revenue Department concerned if they won, and that the costs of a Schedule D Case I or Case II appeal ought to be tax-deductible whether or not the taxpayer won. Conversely, IoD felt that the Revenue Departments should only be able to recover costs from a taxpayer if the taxpayer had acted unreasonably. The limits of reasonableness should be adjusted to reflect the abilities and resources of the person concerned. The highest standards should apply to taxpayers represented by leading tax specialists. Lower standards should apply to taxpayers represented by non-specialist practitioners and to unrepresented taxpayers. IoD recognised that this approach would involved problems of definition but considered that this may be the price of being fair to all parties.

9.46 The National Association of General Commissioners thought that General Commissioners would not wish to become involved in awarding costs nor did they think that it would affect cases coming before them. Commissioners appreciated that smaller taxpayers were often unrepresented and accepted that their case might not be presented in the best possible manner. As a result, they had developed the ability to

seek a just and equitable outcome in such cases and the award of costs would not assist in these cases. If either party were wasting time, the General Commissioners were quite capable of resolving this matter without using the award of costs as a weapon, and without destroying the feeling that the taxpayer had had the opportunity to put his case.

9.47 Salford and Manchester North Division of General Commissioners did not believe that they should be able to award costs. And the Central and South Manchester Division shared this view. The latter considered that taxpayers should feel free to bring cases before the Commissioners without any risk on costs (their only liability being in paying their own costs if they are professionally represented).

9.48 Wallington Division of General Commissioners had the impression that however hard the Commissioners try to help the many unrepresented appellants to present their cases, many do fail because they have not marshalled all the relevant evidence. If the Commissioners had the facility to award costs to some successful appellants, it might help those who had eschewed professional help because of the cost.

9.49 The Nottinghamshire & Derby Association also felt that the inability to award costs properly incurred was a considerable handicap. It thought that General Commissioners should be empowered to award costs in the appropriate cases but the issue of quantum, taxation and collection should be remitted to the Special Commissioners.

Public or private

9.50 The Institute of Directors supported a unified tribunal but expressed concerned at its implications for privacy. It felt that tax cases often concerned personal circumstances and confidential business matters, making the ability to keep a hearing private important. The Institute argued that a clear distinction should be maintained between General Tribunals (with private hearings) and Special Tribunals (with public hearings). VAT cases concerned mainly with matters of fact and simple matters of law, including most penalty/reasonable excuse cases, would go to the General Tax Tribunal because of the accessibility and their commonsense (as opposed to technical) approach.

9.51 The issue which would arise from a merger of part of the VAT and Duties Tribunal's jurisdiction with that of the General Commissioners is whether the status quo should be maintained, with the result that there is a difference between the two jurisdictions. Therefore, should VAT cases be changed to being in private, or should direct tax cases be changed to being in public? The Law Society of England and Wales did not have strong views but it had no objection to the General Tax Tribunal sitting in private for all its cases. It thought it unlikely that there would be any public interest in the type of VAT cases with which that Tribunal would deal and which would not be appealed. In its view, the sittings of the Special Commissioners in public, the right of the taxpayer to have the sitting in private and the arrangements for anonymising of decisions were working well in practice and did not need changing.

9.52 ICAEW thought that hearings before the Special Commissioners and the VAT and Duties Tribunal should continue to be heard in public (and that this rule should

extend to the unified appeals tribunal). This ensured that decisions on significant points of law became publicly available. The Institute thought that there was no particular reason for General Commissioners' hearings to be held in public and it imagined that this would be widely resisted.

9.53 The Institute of Chartered Accountants of Scotland also considered that there was less need for formality if hearings were in private. ICAS thought that General Commissioners' hearing should remain private. The issues in front of the General Commissioners could be of a private income nature and every citizen had a right to privacy. The Institute accepted that the Special Commissioners should be in public and should the taxpayer wish to have his case heard by the Special Commissioners a part of the price might be publicity. The only exception to General Commissioners' hearings remaining private would be where it was useful to have an anonymous outline of the decision. This would be particularly so in what ICAS expected would be a significant number of cases on what constituted reasonable excuse under the self-assessment rules. The Special Commissioners already had the experience of anonymising cases. ICAS had less concern about the need for privacy with the VAT and Duties Tribunals. It considered that VAT was different in nature, as a form of sales tax on business activities. There was not the same level of intimacy between an individual's private affairs and VAT. Therefore, ICAS believed that VAT Tribunal decisions should continue to be made publicly available.

9.54 The Nottinghamshire & Derby Association considered that meetings should continue to be held in private. The Central and South Manchester Division believed that no significant public interest would be served in the opening of Commissioners' meetings to the public, with consequent loss of confidentiality for taxpayers. Salford and Manchester North Division also preferred that appeals be heard in private. They noted that the assistance often given to a disadvantaged appellant might well be misconstrued were hearings to be in public and that this would probably result in such help not being given, which would not serve the cause of justice.

9.55 The NAGC expressed the view that the holding of meetings in private continued to benefit all parties. There was an atmosphere of informality, which assisted taxpayers and retained the confidentiality that was vital to him, and was not of real public interest. NAGC recorded a minority view that holding meetings in public would encourage better performance by the Commissioners. On the other hand, it would be likely to involve additional cost, with premises able to accommodate and appropriate facilities for the public including the press.

9.56 GLAGC supported the concept that the status as volunteers should be retained, paying no more than a loss of earnings and continuing to hold meetings in private. Any change to meetings being held in public would fundamentally change the whole procedure, which in its view, would be detrimental to the taxpayer, losing informality and confidentiality.

10. Appeals to the Courts in England and Wales

Conclusions of our first Report

10.1 We concluded that the 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 were unsatisfactory. We thought it preferable that VAT appeals, with direct tax appeals, be allocated to the Chancery Division. The arguments for moving other appeals—those on duties, insurance premium tax and landfill tax—to the Chancery Division were less compelling but we thought that there was a strong case for keeping these appeals with VAT appeals. Accordingly, our view was that all appeals from the decisions of the VAT and Duties Tribunal should lie to the Chancery Division.[15]

10.2 Although concentrating tax cases in the Chancery Division would help rationalise the existing system, we believed that further measures were required to meet the need for greater specialist expertise on the part of judges who decide tax cases at this level. Accordingly, we proposed that all tax appeals should be allocated within the Chancery Division to a panel of nominated judges.[16] The panel might include some judges from the Queen's Bench Division, appointed to the Chancery Division for this purpose.

Respondents' comments

10.3 For those who responded to this part of our first Report, there was broad agreement on the desirability of all tax cases going to the same division of the High Court and for there to be a panel of judges to hear most, if not all tax cases. The Council on Tribunals was of the view that VAT appeals, like direct tax appeals, should go to the Chancery Division.

10.4 ICAEW thought that there was a need for a pool of judges with experience in tax matters to hear tax cases. The Institute noted that the issues raised in indirect tax appeals were sufficiently different from those in direct tax appeals that there could be two separate pools. The Institute thought that this might make the need to move indirect tax appeals into the Chancery Division less compelling but that it would probably still be more convenient.

10.5 The Chartered Institute of Taxation questioned what the reaction of the judges would be to these reforms. It felt that this should have been researched. CIOT agreed that the system should benefit from a specialist panel of judges to hear tax appeals. It wondered, however, whether on appointment judges would be willing to specialise in the hearing of tax appeals only. The Law Society of Scotland thought that, in Scotland, the composition of the Inner House was relatively flexible. It did appear not to need any special new rules to deal with the case where an Outer House judge with particular expertise was thought by the Lord President to be appropriate to hear a case.

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[15] This change has been implemented.

[16] Our understanding has been that this recommendation was to be implemented. It appears from reported decisions in 1999, however, that it may be proving difficult in practice to secure this objective.

11. Reducing the Tiers of Appeals

Conclusions of our first Report

11.1 We considered that there was a strong case for omitting one of the present tiers of appeal. Our view was 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, we felt that the natural stage to omit would be the High Court. With the benefit of a reasoned decision in the Special Tax Tribunal, it was difficult to define a distinctive role for the High Court in the appeals process. Appeals would lie direct to the Court of Appeal.

11.2 We recognised, however, that this approach did raise some difficult issues. The main one was to ensure that the Court of Appeal had adequate depth of relevant expertise. It would also be important to keep any increase in its workload to a minimum. We thought that there would also have to be separate provision for the large number of cases heard at first instance in the General Tax Tribunal, for which we thought an appeal direct to the Court of Appeal would be inappropriate.

11.3 Our proposal for further consideration and debate was to allow the Court of Appeal when hearing tax appeals to include, where appropriate, one or two High Court judges with experience in tax cases. In addition, the majority of appeals from the General Tax Tribunal would be heard by the Special Tax Tribunal, possibly 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.

Respondents' comments

11.4 The Council on Tribunals was sympathetic to the view that there are too many tiers of tax appeal in England & Wales. This led them not to favour the Special Tax Tribunal being given an appellate role. Although the Council normally preferred that appeals from tribunals go direct to the High Court on questions of law, it accepted that there might be a case for tax appeals in England and Wales to go direct to the Court of Appeal.[17] This would bring appeals in England and Wales into line with those in Scotland and Northern Ireland.

11.5 The Special Commissioners made it clear that they welcomed any sensible proposal for reducing the number of layers of appeal. They considered that the number of existing tiers deterred many taxpayers from pursuing meritorious cases. In their view the right to one onwards appeal should be the norm.

11.6 The Chartered Institute of Taxation thought it important to strike the correct balance between an efficient and cost effective appeal system and the avoidance of excessive layers. On balance it thought that an appeal from the Special Tax Tribunal should lie to the Court of Appeal rather than to the High Court. If this were accepted, CIOT believed that additional judges should be appointed. The intention would be to

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[17] As happens in the case of appellate tribunals such as the Social Security Commissioners, the Transport Tribunal, the Employment Appeal Tribunal and the Immigration Appeal Tribunal, and also in the case of the Lands Tribunal.

ensure that appeals were heard expeditiously to avoid excessive time from the start of the appeals process to the final decision being taken.

11.7 ICAEW also agreed that appeals from the Special Tax Tribunal should be direct to the Court of Appeal. It thought that this would allow a panel of judges within the Court of Appeal to develop the necessary expertise in tax matters. It pointed out that our suggestion for High Court judges to sit in the Court of Appeal would only be a short term expedient. One consequence of our proposal would be that most tax appeals of any consequence would by-pass the High Court. As a result, experience of tax matters by High Court judges would decline.

11.8 ICAEW nevertheless thought it more appropriate for appeals from the General Tax Tribunal to go to the High Court, and not to the Special Tax Tribunal as we had suggested. The Institute of Directors shared this view. IoD saw no merit in an appeal from the General to the Special Tax Tribunal before moving into the higher courts. It doubted whether the Special Tax Tribunal could add anything useful to the work of the first. The members of the General Tax Tribunal were as capable of finding facts as those in the Special Tax Tribunal.

11.9 IoD accordingly suggested that the stages should be (a) tribunal; (b) High Court or Court of Appeal (not both); (c) House of Lords (directly from the High Court or Court of Appeal). The choice at (b) could be agreed between the parties, depending on the nature of the case. IoD thought that higher costs in the Court of Appeal should deter any litigants who would otherwise go for the highest available court on principle. If there were no agreement, a single judge would review the papers and decide.

11.10 The Commissioners who responded to this part of our first Report were concerned that the choice between General and Special Tax Tribunals be retained. They also thought that the existing appeal procedure to the High Court worked well and that there seemed little point in having a retrial before the Special Tax Tribunal. Both Tribunals would be final arbiters of fact. And as to the law, they felt that one only had to examine the Law Reports to see the divergence of opinion between the High Court, Court of Appeal and House of Lords. It was questionable whether there would be any benefit in inserting another layer in the appeal system, merely adding to the cost of appeals.