ICAEW
REPRESENTATION 71/24

CHANGES TO THE PROCEDURE RULES ON THE PROVISION OF WRITTEN REASONS FOR DECISIONS

Issued 10 October 2024

ICAEW welcomes the opportunity to comment on the consultation published by The Tribunals Procedure Committee on 30 July 2024, a copy of which is available from this link.

This response of 10 October 2024 has been prepared by the ICAEW Tax Faculty. Internationally recognised as a source of expertise, the ICAEW Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business. ICAEW Tax Faculty's Ten Tenets for a Better Tax System, by which we benchmark the tax system and changes to it, are summarised in Appendix 1.

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KEY POINTS

1. Our comments in this consultation response focus solely on the impact of the proposals on the First Tier Tax Tribunal, as this is the body that our members and volunteers most interact with.
2. We understand the driver to reduce costs in the Tribunal system and that the proposed changes could help to achieve this by reducing the number of written decisions that First Tier Tribunals will be required to publish. However, we believe that this is a false economy.
3. We share the observations you raise in paragraphs 77 and 80 that these changes could result in an asymmetrical access to justice and may offend the principle of open justice. A practical outcome could be that, with less decisions being made public, more cases may find their way to Tribunal, due to a reduced body of published case law, hence increasing cost overall.
4. The tax system, in particular, is in dire need of simplification. Simplifying rules and procedures could make the application of the law easier to understand and therefore reduce the number of cases being taken to Tribunal. Enhancements and increased publication of other taxpayer routes available to resolve disputes with HMRC, including statutory reviews and alternative dispute resolution, would also have the same impact. We believe that these changes should be explored first before making any changes to the procedures for written decisions.
5. In relation to the reduction in the time window for applying for written decisions from 28 to 14 days, it would be a useful exercise to analyse how many requests are generally made in the second half of the existing 28-day window. If most requests are made in the first half, this may indicate that the reduction in the time window would have a limited negative impact on those it applies to. However, we are concerned that postal delays could reduce the time window even further if it were halved to 14 days. Overall, we see no compelling justification for halving the time in which parties can apply.
6. We also believe that the government should consider finding easier ways for parties to request a written decision and for the tribunals to deliver them. Greater use of digitisation, for example, could potentially help to achieve the cost savings being sought.

ANSWERS TO SPECIFIC QUESTIONS

Reduction in time limits for applications for written decisions

Question 1: Do you agree that the time limit for requesting discretionary written reasons should, in general, be reduced to 14 days?

7. We do not agree with the proposed reduction in time limit. We note that there are several instances in The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 where certain actions need to be taken within 28 days of an earlier event. Reducing one (or more) of those deadlines produces inconsistency and complexity.
8. We note that an application made for a written decision under para 35 (4) of those rules must be made in writing so that it is received by the Tribunal within 28 days of it providing a decision notice. If this notice is sent by post, there may already be a few days between the party writing the application and the Tribunal receiving it. While a few days out of 28 is acceptable, a few days out of 14 is significant.

Question 2: Do you agree with the proposed exceptions? Should there be any other exceptions for other classes of case, and if so why?

9. None of the exceptions set out in paragraph 26 of the consultation document apply to the First Tier Tax Tribunal.

Question 3: Do you have any other observations about this proposal?

10. We believe that options should instead be explored for reducing the cost of administering the justice system, such as digitising the making of applications. This would give more time for applicants to make requests for written decisions while also reducing the cost to the Tribunal of administering these requests.

Other changes relating to the First Tier Tax Tribunal

Question 4: Do you agree that rule 35(2) of the Tax Chamber rules should be amended to remove the obligation to provide the notice of decision within 28 days?

11. If requiring the notice of decision to be provided within 28 days of making the decision reduces the quality of the notices issued, then we agree that this change should be made as soon as practicable. We note that some cases can be extremely complex, with written notices running to 50 pages or more. While we are concerned that removing a fixed deadline could result in such notices being delayed indefinitely, we believe that it is more important that the quality of written notices is maintained so that the reader can easily deduce the reasons for the decision. To address the question of whether notices could be delayed indefinitely, it would be reasonable to include a ‘backstop’ date by which they must be produced.

Question 5: Do you agree that the consent of the parties should not be required in the Tax Chamber for an unreasoned written decision to be given provided sufficient oral reasons have been provided?

12. Amended paragraph 31 (4) of the Tribunal Rules would require the Tribunal to consider whether providing a short decision would be contrary to the interests of justice. Provided the Judge considers that there is a public interest in decisions being made available in a form that most easily assists the reader in interpreting the law concerned, we believe that this requirement would ensure that longer decisions would be provided where it is in the public interest to do so.
13. Guidance could be given to judges on how to apply this test. We consider that this could be made more watertight by amending paragraph 31 (4) to explicitly state that the judge needs to consider the public interest in determining whether the issue of a short decision is appropriate. However, taking the time to consider how to apply this test may significantly reduce the administrative savings achieved by issuing more short decisions.
14. We also note that the first tier tribunal is where the facts that underpin any decision are identified and ultimately underpin any later appeal. We are concerned that any increased reliance on oral decisions would reduce the opportunity for those facts to be put on record. This would make it harder, not just for the parties involved and other interested parties relying on case law but also any tribunal or court at which the case is subsequently heard.

Question 6: (a) Do you agree that full written reasons should be restricted to the unsuccessful party, where oral reasons have been given at a hearing?

15. We disagree with this proposal as there may be situations where the successful party would find it useful to receive the full written reasons for the decision. The Tribunal should not need to consider whether it is in the interests of justice to accede to a request to receive these reasons.

16. For example, if HMRC were to be successful in a tax case, it would want to understand why the decision was made and whether the reasoning has any impact on its technical guidance for practitioners and caseworkers. Similarly, a taxpayer may feel a degree of vindication and may make it easier for them to repair their reputation if the reasons for their success are set out in writing. Overall, we believe that the proposed change would favour HMRC over the taxpayer which reduces the extent to which the justice system is a level playing field.

(b) Do you agree that such reasons should be limited to the issues upon which the party was unsuccessful?

17. Similarly, limiting the reasons to the issues upon which a party was unsuccessful could make it more difficult for that party (or any other reader of the decision) to understand those reasons. It would generally be more helpful if those reasons were set out within the context of the circumstances of the case as a whole.

(c) Do you agree with the proposed definition of "unsuccessful party"?

18. Yes, we note that there will be some cases where both parties to the case are partially unsuccessful. It is important that both parties are then treated as 'unsuccessful' for these purposes (though, as noted above, we do not believe that written decisions should only be made available to unsuccessful parties).

Question 7: (a) Do you agree that an "interests of justice" test will be sufficient to address any concerns raised by the TPC (and any other observations you may have)?

19. We believe that some judges may find it difficult to apply this test in practice. As a result, different judges may apply the test differently, resulting in inconsistencies in application of the law.

20. We note that an interests of justice (IoJ) test is applied in various areas of UK criminal and civil law. For example, an IoJ test is applied when determining whether a party is entitled to criminal legal aid. We note that guidance has needed to be issued in determining how to apply this test, which suggests that such a test is likely to be highly subjective without further clarity being provided.

(b) Are the proposals consistent with the principle of open justice or nonetheless desirable to achieve greater efficiencies in the system?

21. We believe that, as matter of principle, written decisions should be made available in all cases where they would be useful for all parties and the general public in interpreting the law. We understand that there may be some cases where the facts are so demonstrably similar to those of a similar case that publication of a decision other than to the unsuccessful party adds little to the understanding of the successful party or any other person. If an IoJ test were to be introduced, we believe that judges should take this into account in applying it, which would potentially increase their workload compared to whether decision notices were issued to all parties to the case as a matter of course.

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APPENDIX 1

ICAEW TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. Statutory: tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. Certain: in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. Simple: the tax rules should aim to be simple, understandable and clear in their objectives.
4. Easy to collect and to calculate: a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. Properly targeted: when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. Constant: Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. Subject to proper consultation: other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. Regularly reviewed: the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. Fair and reasonable: the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. Competitive: tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see https://goo.gl/x6UjJ5).

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