



Institute for Fiscal Studies

TLRC Report

Tax Law Review Committee

The tax tribunals: the next 10 years



Economic
and Social
Research Council

The tax tribunals: the next 10 years

Michael Blackwell

Tax Law Review Committee

Published by **The Institute for Fiscal Studies**

7 Ridgmount Street

London WC1E 7AE

+44 (0)20 7291 4800

mailbox@ifs.org.uk

<http://www.ifs.org.uk/>

[@TheIFS](#)

© The Institute for Fiscal Studies, July 2021

ISBN 978-1-80103-050-2

The Tax Law Review Committee

Chair:

Judith Freedman Pinsent Masons Professor of Tax Law and Policy, University of Oxford

Secretary to the Committee:

Kunal Nathwani Senior Associate, Eversheds Sutherland (International) LLP

Members:

Michael Blackwell Associate Professor of Law, London School of Economics and Political Science

Steve Bousher Barrister, Joseph Hage Aaronson LLP

Emma Chamberlain Barrister, Pump Court Tax Chambers; Partner, Joseph Hage Aaronson LLP; Visiting Professor, University of Oxford

Dominic de Cogan University Senior Lecturer, University of Cambridge

Stephen Daly Lecturer in Corporate Law, King's College London

Chris Davidson Formerly HMRC; formerly KPMG

Bill Dodwell Tax Director, Office of Tax Simplification

Malcolm Gammie QC, One Essex Court

Paul Johnson Director, Institute for Fiscal Studies

Judith Knott Formerly Director of Large Business, HMRC

Sarah Lane Senior Counsel, Simpson Thacher & Bartlett LLP

Graeme Macdonald Formerly University of Kent

Sam Mitha Formerly Head of Central Tax Policy Group, HMRC

Paul Morton Non-Executive Director, HMRC; formerly Tax Director, Office of Tax Simplification

Dan Neidle Partner, Clifford Chance LLP

Christiana HJI Pannayi Professor in Tax Law, Queen Mary University of London

Geoff Pennells Formerly Tax Policy Director for EMEA, Citigroup

Tina Riches Formerly National Tax Partner, Smith & Williamson LLP

Christopher Sanger Partner, EY

Heather Self Partner, Blick Rothenberg

3 The tax tribunals: the next 10 years

Andrew Summers Associate Professor of Law, London School of Economics
and Political Science

Richard Thomas Formerly Tribunal Judge; formerly Assistant Director,
HMRC

For a list of the TLRC's corporate sponsors, see <https://ifs.org.uk/research/TLRC>.

Members of the TLRC who are also current members of the Tax Tribunal are not signatories to this report, in order to avoid conflicts of interest.

Any views expressed in this report are not those of the Institute for Fiscal Studies, which has no corporate views.

Contents

1. Executive summary	7
2 Recommendations	10
3 Introduction	14
4 Delay	16
Introduction	16
Delay by tribunal administration.....	18
Delay by judges in issuing decisions after a hearing	18
Delay due to length of tribunal decisions	22
Delay through a lack of judicial availability and late listing of cases	24
Delay through poor case management	26
Delay by HMRC	27
Delay by taxpayer’s representatives	27
Delay due to four levels of appeal	27
5 Other issues with tribunal administration	31
6 Judicial preparation for and involvement in hearings.....	32
7 Pleadings in tax appeals.....	34
8 Other issues with the conduct of hearings and decisions.....	35

5	The tax tribunals: the next 10 years	
9	A specialist tribunal: judicial recruitment and case allocation	36
	Introduction	36
	Use of tribunal members	37
	Allocation of judges to cases	38
	Judicial recruitment	39
10	Costs	43
	Introduction	43
	Cost-shifting	43
	Cost-shifting in the FTT	45
	Cost-shifting in the UT	46
	Rees practice	48
	Pro bono representation	50
11	Other aspects of access to justice	52
	Litigants in person and equality of arms	52
	Hearings in private and anonymised decisions	53
	Paper appeals and video hearings	54
	Jurisdictional issues	55
12	Digital bundles	57
	Appendix A: report on survey and interviews	58
	A.1 Introduction	58

6 The tax tribunals: the next 10 years

A.2 Delay	59
A.3 Other issues with tribunal administration	70
A.4 Judicial preparation for and involvement in hearings.....	72
A.5 Other issues with the conduct of hearings and decisions.....	76
A.6 A specialist tribunal: judicial recruitment and case allocation.....	77
A.7 Judicial recruitment.....	79
A.8 Costs	81
A.9 Other aspects of access to justice	84
A.10 Digital bundles.....	86
Appendix B: outline of survey design and interviewing methodology	88
Appendix C: questionnaire	90
Appendix D: issues relating to the COVID-19 pandemic.....	93

1 Executive summary

1.1 The Tax Law Review Committee (TLRC) actively promoted and participated in the reform of the tax appeals system leading to the abolition of the Special and General Commissioners of Income Tax and the VAT and Duties Tribunal and their replacement in 2009 by the First-tier Tribunal (Tax Chamber) – hereafter FTT – and the Upper Tribunal (Tax and Chancery Chamber) – hereafter UT. As it is now more than 10 years since the establishment of the FTT, the TLRC has decided to inquire into, and report on, the operation of the FTT, with a view to making recommendations for the operation of the FTT going forward.

1.2 In the 1996 review of the tax appeals system, the TLRC noted that:

‘The appeals system is a crucial safeguard for the taxpayer. If the appeals system is ineffective or inaccessible, taxpayers are for practical purposes unable to challenge the revenue departments’ own interpretation of the law. Improving the appeals system should therefore be seen as a vital part of the initiative to improve the standards of customer service by the revenue departments at the most fundamental level—namely, the performance of their obligation to collect tax only in accordance with the law.’¹

1.3 This report is partly based on a review and analysis of documentary evidence and on a survey of FTT users (mainly barristers and solicitors) conducted in December 2020, together with follow-up interviews conducted in February 2021.² It also draws on the experience of members of the TLRC. A consequence of this is that the report focuses on the more complex work of the FTT, of the kind that used to be undertaken by the Special Commissioners and the more complex cases of the VAT and Duties Tribunal. However, this does not compromise the findings, so far as they relate to this more specialist category of cases, which are obviously very important in terms of sustaining an internationally competitive economy in the UK. We have also drawn on the expertise of the TLRC and some barristers involved in pro bono representation to make recommendations concerning litigants in person and paper cases.

1.4 Prior to the onset of the COVID-19 pandemic, the FTT had been trialling video hearings. It was therefore one of the first tribunals to move online. Although there

¹ Tax Law Review Committee (1996), *Interim Report on The Tax Appeals System*, [2.1], p. 4, London: Institute for Fiscal Studies, <https://www.ifs.org.uk/comms/comm58.pdf>.

² Details of the research methodology are supplied in Appendices A and B. When interpreting the survey results, it is important to note that this was a qualitative survey. The survey respondents are not randomly sampled from a population. Hence, the frequency of responses and representations cannot be taken to be representative of any wider population (such as all tribunal users, or all solicitors). Rather, the purpose of the survey and interviews is to typify the varieties of experiences of FTT users. The survey respondents and interviewees are together referred to as the ‘research participants’.

8 The tax tribunals: the next 10 years

were teething difficulties (reported in Appendix D), the FTT adapted better than many other tribunals.

- 1.5 A benefit of the original reforms that introduced the FTT is that the FTT deals with matters in a more consistent and professional fashion than the General Commissioners will have been able to do (being locally organised bodies of volunteers).
- 1.6 Another strength of the reformed FTT is that judges generally assist litigants in person by conducting hearings in an inquisitorial manner. We consider the assistance to litigants in person could be further improved through improving the accessibility of information to them on the FTT website and tailoring content towards them. We also suggest that, given the assistance that litigants in person receive from tribunal judges at hearings, access to justice could further be improved by a shift from paper cases to remote hearings. We also query if there might be potential to operate a pro bono advocacy scheme, organised on a duty basis (i.e. with an advocate always on call), to assist litigants in person. We note that such a scheme has worked successfully in other jurisdictions, such as the Chancery Court.
- 1.7 A major cause of dissatisfaction among tribunal users is delay. This existed before the COVID-19 pandemic.
- 1.8 Many respondents attribute delays to the FTT judiciary: both through a lack of robust case management and because of delays in writing up decisions, which can sometimes be over one year.
- 1.9 There is a perception among many survey respondents that the FTT administration (based in Birmingham) is responsible for delays – especially delays in listing cases and delays relating to the filing and dissemination of documents. Many users hope that the eventual introduction of an automated online filing system will reduce the extent of these delays.
- 1.10 In addition to delay, many research participants also expressed concerns about a lack of communication with the FTT administration. The respondents felt that it was not easily contactable and did not communicate with them. Several respondents also referred to errors being made by the FTT administration. We note that there is a very high turnover of staff within the FTT administration, with many staff regularly leaving to join other government departments on more favourable terms. This often results in the tribunal administration being understaffed, due to delays in recruitment.
- 1.11 Some tribunal users also report a lack of engagement by some judges during the hearing, which they attribute either to a lack of judicial preparation for the hearing or to the judge not having the necessary knowledge or skills to hear that particular case. Some interviewees also attribute the delay in judgment writing to similar reasons. The interviewees thought that if the judge engaged more with the argument, this would help them in reaching their decision, so writing up afterwards may often be a simpler exercise. We suspect any lack of preparation may stem from the lack of judicial resources in the FTT that has been identified to exist in several of the recent annual reports of the President of the FTT. We have no doubt that the tribunal judges are highly conscientious and committed. However, if they are over-listed, a backlog

of decisions will build up. This will create a vicious cycle: due to the build-up of decision writing work, tribunal judges may not be able to appropriately read into new cases. For some cases in the FTT, such reading will necessarily involve a great degree of case law and highly technical argument, which cannot be read at the same speed as more factual material.

- 1.12 Costs were also seen by many respondents as a major concern. Due to the technically complex nature of tax law, many respondents thought that it was very difficult for taxpayers to access the FTT and effectively present their case without engaging professional advisors and representatives. Professional fees in relation to tax litigation can be very high. For many taxpayers, this expense was unaffordable or a deterrent to accessing the FTT. For some taxpayers, the general inability³ of the taxpayer to recover their costs from Her Majesty's Revenue and Customs (HMRC), even if they succeed in the FTT, makes appeals to the FTT especially unattractive.
- 1.13 Conversely, for other taxpayers, the 'cost-shifting' regime in the UT, where if the taxpayer is unsuccessful they can be liable for HMRC's costs, is a deterrent to appealing a decision of the FTT to the UT, or to continuing with an appeal they won in the FTT if HMRC receive permission to appeal.
- 1.14 Some comments were made by survey respondents and interviewees expressing concern about the allocation of judges to cases. The comments described cases where the judge concerned either appeared to have insufficient technical ability or insufficient knowledge of the specific area of tax law covered by the case.
- 1.15 Some survey respondents and interviewees considered access to justice could be improved by adopting anonymisation of judgments/private hearing, especially in personal tax cases where part of the factual evidence related to minors. There is also uncertainty regarding why some judgments are published and others are not.

³ Other than in 'complex' cases where they do not elect out of the costs-shifting regime.

2 Recommendations

- 2.1 We recommend the following measures to monitor and reduce delay.
- 2.1.1 **To increase the overall number of sitting days** available in total (including through appointing new salaried judges).⁴
 - 2.1.2 To ensure that all judges (both salaried and fee-paid) have **sufficient paid writing and preparation days** (both being proximate to the hearing days) to realistically discharge the job they are asked to do. Parties should be asked to provide a judicial reading list in advance of the hearing and to provide estimates of judicial reading time.⁵
 - 2.1.3 The FTT should develop a plan for **reducing the backlog of unwritten decisions**, something we are pleased to note has already been initiated; the FTT should publish targets both (i) for hearing cases and (ii) issuing judgments after hearing cases (and we suggest those targets be broken down by the category the case is allocated to – i.e. ‘default paper’, ‘basic’, ‘standard’ or ‘complex’); and the FTT should publish in the Quarterly Tribunal Statistics their success in meeting these targets.⁶
 - 2.1.4 Whilst it is vital that that any FTT decision properly records the evidence and findings of fact, FTT judges should **consider whether the length of some decisions might be reduced**, both to aid accessibility and also, potentially, to reduce the delay in issuing the judgment after the hearing.⁷
 - 2.1.5 **Case management should be more robust** and we suggest that the Judicial College provides training on case management specifically tailored for judges in the FTT (Tax). We expect that this would be of particular benefit to recently appointed judges or judges whose professional background was in an advisory capacity rather than a contentious role. We suggest that the training should be available to all judges in the chamber.⁸
 - 2.1.6 The FTT should take steps to **list complex cases at an earlier stage** of preparing the case for hearing, once the evidential requirements of the case have been established but before service of witness statements or any expert reports.⁹
 - 2.1.7 **In some cases, four levels of appeal are unnecessary.** It both delays a final decision and causes unnecessary expense. To potentially reduce the time it takes

⁴ See [4.33].

⁵ See [6.6].

⁶ See [4.20] and [4.35].

⁷ See [4.26].

⁸ See [4.39].

⁹ See [4.34].

for a final decision in the most complex tax cases, we consider that it would be desirable for rule 28 of the FTT Rules, which allows the transfer of a case from the FTT to the UT, to be amended so that the consent of both parties is not required. Rather, the parties should be able to make an application to the FTT, which would then determine the application on the basis of the interests of justice. We note that the Leggatt review contemplated that parties should be able to make an application, but that the tribunal should decide the matter. We see no reason why the consent of all parties should be required for rule 28, when it is not required for other leapfrog applications.¹⁰

- 2.2 We note that tax lawyers who have a predominantly advisory practice will often have excellent technical skills and knowledge that may make them appropriate people to be appointed to the FTT. However, as their exposure to contentious matters and tribunal proceedings may be limited, we suggest that **introductory training is appropriately comprehensive with regard to procedural matters and the conduct of hearings.**¹¹
- 2.3 Interviewees were generally unclear as to why some cases were heard by a panel of a judge and a ‘member’ and others heard by judges sitting alone. We consider that tribunal members (who sit with FTT judges to hear appeals) can perform a useful function in many cases. We recommend that the **FTT publishes a policy on when members are assigned to hear cases.** We recommend that additional members are recruited to address the declining number of members in the FTT in recent years.¹²
- 2.4 Considerable concern was expressed by survey respondents and interviewees over the allocation of judges to hear cases. Many survey respondents and interviewees suggested that some judges lacked either the technical knowledge or technical ability to hear the cases they were allocated. We recommend that the **FTT publishes a policy on the allocation of judges to cases.** We note that different levels of technical ability and technical knowledge are required to hear cases that turn on the application of well-understood tests to factual situations, such as penalty appeals, and those cases that concern complex or novel matters of statutory interpretation. These should be reflected in the ticketing/allocation policy.¹³
- 2.5 Due to the highly technical nature of tax law, adjudication of tax disputes requires substantially different skills to many other areas of law. It can more easily be done with some prior familiarity with tax law. We therefore recommend that any appointment of judges to the FTT (Tax) should, unless the judges are only to be ticketed to hear routine matters such as penalty appeals, be in a **tax-specific appointments exercise** (rather than a general exercise that recruits for all chambers of the FTT), which places specific emphasis on technical ability as a recruitment

¹⁰ See [4.53].

¹¹ See [8.4].

¹² See [9.10].

¹³ See [9.16] and [9.10].

12 The tax tribunals: the next 10 years

criterion. Given the possible difficulties of recruiting tax professionals, we consider that, as with the 2014 recruitment exercise, there may be a benefit in the Lord Chancellor **waiving the usual requirement for salaried appointments to have had previous fee-paid service** in judicial office. However, we acknowledge that any such applications would require especially careful scrutiny.¹⁴

- 2.6 Noting the considerable dissatisfaction of tribunal users with their experience of the tribunal administration, which appears associated with the shortage of and very rapid turnover of staff in recent years as they are ‘poached’ by other government departments that can offer better remuneration, we suggest that **the terms and conditions of employment of administrative staff be reviewed to ensure they are competitive with similar positions in the Civil Service.**¹⁵
- 2.7 Our survey shows that the threat of costs in the UT can be a deterrent to taxpayers pursuing an appeal. This was also identified as an issue by the Cost Review Group,¹⁶ which was chaired by Mr Justice Warren (who was then President of the UT),¹⁷ and served as the basis of one of a series of recommendations that Group made in relation to costs in tribunals, including in the FTT (Tax). In our report, we also note the importance of pro bono representation in tax litigation, which assists taxpayers without means, who can be drawn into tax disputes. To facilitate access to justice, we support¹⁸ **the implementation of the Cost Review Group’s recommendations**, including that:
- 2.7.1 the Rees practice (whereby in very limited circumstances HMRC agrees not to seek an adverse cost award, if they are successful) should be formalised within the tribunal’s procedure rules, making provision for a taxpayer to apply for an appropriate order in defined circumstances where HMRC declines to apply the Rees practice;¹⁹
- 2.7.2 for cases before the UT where the taxpayer was successful in the FTT, other than cases allocated to the complex category in the FTT, cost-shifting should not apply unless the taxpayer chooses to elect into the cost-shifting regime in the UT;²⁰

¹⁴ See [9.27].

¹⁵ See [4.9] and [5.3].

¹⁶ Costs Review Group (2011), *Costs in Tribunals: Report by the Costs Review Group to the Senior President of Tribunals*, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/costs-review-group-report-tribunals-dec-2011.pdf>.

¹⁷ The other members of the Costs Review Group were George Bartlett QC (Chamber President, Lands Chamber of the Upper Tribunal), David Latham (President, Employment Tribunals of England and Wales), Alison McKenna (Principal Judge (Charities), General Regulatory Chamber of the First-tier Tribunal; Deputy Judge, Administrative Appeals Chamber and Tax and Chancery Chamber of the Upper Tribunal) and Bronwyn McKenna (Member, Administrative Justice and Tribunals Council; Member, Tribunal Procedure Committee).

¹⁸ See [4.40].

¹⁹ See [10.31].

²⁰ See [10.23.1].

13 The tax tribunals: the next 10 years

- 2.7.3 for cases before the UT that were allocated to the complex category in the FTT, but where the taxpayer had elected out of cost-shifting before the FTT, cost-shifting should not apply in the UT if (i) the taxpayer was successful before the FTT and (ii) the taxpayer does not elect into cost-shifting before the UT;²¹
- 2.7.4 section 194 of the Legal Services Act 2007 should be extended to the tribunals so that (like the courts at present), where a party to proceedings ('P') has a representative ('R') who acts free of charge in whole or in part, the tribunal would have the power to order HMRC (in the case of tax appeals where the taxpayer received pro bono representation) to make a payment to the Access to Justice Foundation in respect of R's representation of P (we consider this change would increase the availability of such pro bono representation);²² and
- 2.7.5 the tribunal rules should expressly specify that failure to comply with directions is necessarily, of itself, unreasonable conduct that can potentially lead to a costs sanction.²³ We consider that this would go some way towards addressing issues of delay caused by the parties.²⁴
- 2.8 We recommend that the FTT consider how the **FTT website can be improved to assist litigants in person**. Changes might include **provision of a simple guide** on processes involved in making an appeal, about what to expect on the day of a hearing and on what sort of evidence the FTT expects taxpayers to produce in the most common types of cases. Perhaps the FTT website could also host **short videos simulating hearings**, which may make the experience less daunting for litigants in person.
- 2.9 We query whether there might be professional interest in organising a **'duty' scheme to provide advice to litigants in person**, such as the Chancery Bar Litigant in Person Support Scheme (CLIPS) scheme organised by the Chancery Bar Association.
- 2.10 We suggest that the FTT may wish to consider whether **taxpayers could be given an option of short video hearings instead of paper hearings, which might allow taxpayers to present their case more effectively**.²⁵
- 2.11 We suggest that **the FTT considers issuing guidance to judges on appropriately balancing considerations of privacy and open justice**, especially in cases that involve factual evidence concerning minors.²⁶ We also suggest that **the FTT considers issuing a policy on which decisions are published**.²⁷

²¹ See [10.23.2].

²² See [10.36].

²³ See [4.40] and [10.9].

²⁴ See [4.40].

²⁵ See [11.19].

²⁶ See [11.14].

²⁷ See [11.15].

3 Introduction

- 3.1 The TLRC actively promoted and participated in the reform of the tax appeals system leading to the abolition of the Special and General Commissioners of Income Tax and the VAT and Duties Tribunal and their replacement in 2009 by the FTT and the UT. As it is now more than 10 years since the establishment of the FTT, the TLRC has decided to inquire into, and report on, the operation of the FTT, with a view to making recommendations for the operation of the FTT going forward.
- 3.2 In the 1996 review of the tax appeals system, the TLRC noted that:
- ‘The appeals system is a crucial safeguard for the taxpayer. If the appeals system is ineffective or inaccessible, taxpayers are for practical purposes unable to challenge the revenue departments’ own interpretation of the law. Improving the appeals system should therefore be seen as a vital part of the initiative to improve the standards of customer service by the revenue departments at the most fundamental level—namely, the performance of their obligation to collect tax only in accordance with the law.’²⁸*
- 3.3 This report is partly based on a review and analysis of documentary evidence and on a survey of FTT users (mainly barristers and solicitors) conducted in December 2020, together with follow-up interviews conducted in February 2021.²⁹ It also draws on the experience of members of the TLRC.
- 3.4 A consequence of this is that the report focuses on the more complex work of the FTT, of the kind that used to be undertaken by the Special Commissioners and the more complex cases of the VAT and Duties Tribunal. However, this does not compromise the findings, so far as they relate to this more specialist category of cases, which are obviously very important in terms of sustaining an internationally competitive economy in the UK. We have also drawn on the expertise of the TLRC and some barristers involved in pro bono representation to make recommendations concerning litigants in person and paper cases.
- 3.5 This report discusses a range of concerns that were raised by our survey respondents and interviewees: most notably, delay, poor performance by the tribunal

²⁸ Tax Law Review Committee (2016), *Interim Report on The Tax Appeals System*, [2.1], p. 4, London: Institute for Fiscal Studies, <https://www.ifs.org.uk/comms/comm58.pdf>.

²⁹ Details of the research methodology are supplied in Appendices A and B. When interpreting the survey results, it is important to note that this was a qualitative survey. The survey respondents are not randomly sampled from a population. Hence, the frequency of responses and representations cannot be taken to be representative of any wider population (such as all tribunal users, or all solicitors). Rather, the purpose of the survey and interviews is to typify the varieties of experiences of FTT users. The survey respondents and interviewees are together referred to as the ‘research participants’.

administration, a lack of engagement by some judges during some hearings, poor case management by judges and the impact of costs on access to justice.

- 3.6 Many of the issues we identify as concerns would appear attributable, at least in part, to an under-resourcing of the FTT. Specifically, issues of delay seem partly due to the salaried judiciary being overwhelmed with case management and lacking sufficient time to write up their decisions. We also suspect that some of the lack of engagement during hearings, which advocates report, may be attributable to salaried judges having insufficient time to prepare. Similarly, performance issues related to the FTT administration seem, partly, to derive from a high turnover of staff caused by staff frequently leaving for better-paid jobs elsewhere in the Civil Service. This means both that the FTT is short staffed while recruitment takes place and that the existing staff often lack substantial experience.
- 3.7 Other issues do not so clearly entail cost consequences for the FTT. We recommend that those appointed to the FTT should have significant experience of tax. We also recommend that, in allocating a judge to a specific case, that judge's technical knowledge and ability should be taken into account. This should be so regardless of whether the judge is fee-paid or salaried.
- 3.8 A strength of the reformed FTT is that judges generally assist litigants in person by conducting hearings in an inquisitorial manner. We consider that the assistance to litigants in person could be extended further by improving the accessibility of information provided for them on the FTT website and tailoring content towards them. We also suggest that, given the assistance that litigants in person receive from tribunal judges at hearings, access to justice could further be improved by a shift in paper cases to remote hearings. We also query whether there might be the potential to operate a pro bono advocacy scheme, organised on a duty basis (i.e. with an advocate always on call), to assist litigants in person. We note that such a scheme has worked successfully in other jurisdictions, such as the Chancery Court.

4 Delay

Introduction

- 4.1 Concerns about delay were a major theme among survey respondents and interviewees. This chapter discusses several causes of delay before the FTT: (i) delay by tribunal administration; (ii) delay by judges in issuing decisions after a hearing delay; (iii) delay through a lack of judicial availability and listing issues; (iv) delay through poor case management; (v) delay due to the parties' conduct; and (vi) delay due to four levels of appeal.
- 4.2 It is a well-established legal principle that justice should be speedy, because 'delay is in effect a denial'.³⁰ The provisions of article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR), which guarantees a right to a hearing within reasonable time, will not generally apply to tax appeals.³¹ However, as a matter of public policy, delay is clearly undesirable in the FTT.
- 4.3 Prior to tribunal reform, in 2001, the time taken to deal with a case, from first receipt to final disposal was:
- 4.3.1 for the General Commissioners, one or two months;
 - 4.3.2 for the VAT and Duties Tribunal, 35 weeks; and
 - 4.3.3 for the Special Commissioners, 20 weeks.³²
- 4.4 In the two most recent years for which data are available,³³ Table 4.1 shows the average time (broken down by case categorisation) from the date of receipt of a notice of appeal/application through to the date on which the file is closed after release of a decision, strike out or withdrawal, etc. (i.e. the average lifespan of an appeal).

³⁰ This can be traced back to Sir Edward Coke's *Institutes of the Laws of England* ('*quia dilatio est quaedam negatio*' 2 Inst. 56). The principle was recently cited with approval by the Supreme Court in *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51 [57].

³¹ *Ferrazzini v. Italy* [2001] STC 1314 (Application no 44759/98).

³² Sir Andrew Leggatt (March 2001), *Tribunals for Users: One System, One Service*, <https://web.archive.org/web/20071225141630/http://www.tribunals-review.org.uk/tribreview/lcd.htm#part1>.

³³ The figures were presented at a recent Tax Tribunal Users Group on 21 April 2021.

Table 4.1. Average lifespan of disposed cases (corrected for stays) in weeks

	2019–20	2020–21
Default paper	14	22
Basic	33	37
Standard (lower category)	60	73
Standard (higher category)	84	110
Complex and MTIC cases	142	135

- 4.5 In relation to the time between the hearing and the issuing of decisions, it appears there is now a far greater delay in issuing decisions after a hearing compared with 10 years ago. Indeed, as we discuss below, the time it now takes the FTT to issue a decision after a hearing will often be a period greater than its predecessor tribunals took to deal with a case, from first receipt to final disposal.
- 4.6 Delay was the major concern of our research participants. They suggested that delay negatively affected the ability of the taxpayer to present their case. An interviewee explained that during the time of the enquiry the taxpayer’s evidence may ‘decay’. For example, it may be difficult for them to find documentary evidence, and electronic files or photographs may be accidentally deleted. Also, a witness may become ill, become forgetful or lose material. In corporate cases, witnesses may no longer work for the company and so may not be available. As the burden of proof is on the taxpayer, this is especially detrimental to the taxpayer’s case, as the tribunal makes inferences to fill in the gaps. It is especially evident in ‘back duty’ cases, as it was in residence cases before the introduction of the statutory residence rules.³⁴
- 4.7 The majority of the time period between the underlying facts and the hearing will be due to the enquiry phase rather than the FTT. It appears that such delay has not

³⁴ Interview with Barrister R.

increased in recent years.³⁵ It was felt by research participants that the FTT could be more sympathetic in considering what is reasonably required to cross the evidential threshold, given that the delays in enquiries are often attributable to HMRC.³⁶ One way of addressing this might be if the FTT adopted a more liberal approach to ordering HMRC to issue a closure notice.

Delay by tribunal administration

- 4.8 A perception of the FTT administration as a cause of delay was common across all categories of FTT users who responded to our survey. A common theme was delays in the listing of appeals. Delays were also attributed to the failure of the tribunal staff to respond to emails and disseminate documents.³⁷
- 4.9 *We discuss, below,³⁸ the very rapid turnover of staff in recent years as they are ‘poached’ by other government departments that can offer better remuneration. We suspect that this rapid turnover of staff, with associated vacancies due to delays in recruitment, is responsible for the delays caused by the tribunal administration. Accordingly, we suggest that the terms and conditions of employment of FTT administration staff be reviewed to ensure they are competitive with similar positions in the Civil Service.*

Delay by judges in issuing decisions after a hearing

- 4.10 Of those respondents to our survey who experienced delays that they considered attributable to the FTT, many suggested the delay was caused by the length of time it took judges to issue their decisions after the hearing.³⁹
- 4.11 As the Court of Appeal has emphasised, delay at this stage can be especially detrimental:

³⁵ If anything, the delay in the enquiry phase seems to have shortened or HMRC are opening enquiries earlier. We sampled cases in 2005, 2008, 2011, 2014 and 2017 and calculated the times between the end of the relevant tax year (or last relevant tax year) and the date when HMRC amended the self-assessment (if this was only expressed as a year we took this to be mid-year for the purpose of our calculations). In the small number of instances in which the tribunal decision did not specify the date when HMRC amended the self-assessment, we used the date of notification to the tribunal. Our calculations show median times between the end of the relevant tax year and HMRC’s decision to be 1,341, 1,574, 630, 456 and 912 days in respect of 2005, 2008, 2011, 2014 and 2017. Obviously, these lengths are not necessarily typical of all enquiries, given that they are samples of disputes that were litigated.

³⁶ See Appendix A [A.2.4].

³⁷ See Appendix A [A.2.5]–[A.2.8].

³⁸ See Chapter 5.

³⁹ See Appendix A [A.2.9].

‘where the decision turns less on the interpretation and application of the law than on the resolution of factual disputes, on which the tribunal has heard contradictory oral evidence from witnesses. Excessive delay may seriously diminish the unique advantage enjoyed by the tribunal in having seen and heard the witnesses give evidence and may impair its ability to make an informed and balanced assessment of the witnesses and their evidence.’⁴⁰

- 4.12 Such delay has also been held by the Court of Appeal to potentially undermine the loser’s confidence in the decision.⁴¹
- 4.13 In a recent appeal concerning a Missing Trader Intra-Community (MTIC) fraud, the Court of Appeal referred to an ‘unwritten rule... that a judgment should be delivered within 3 months of the hearing’.⁴²
- 4.14 We understand that, some years ago, the official time limit for issuing decisions in complex cases was 60 days, with a time limit of 42 days for standard cases, with others less. It is understood that the time limit for issuing decisions in complex cases has been increased to 90 days. Cases in the standard category are subdivided between ‘high’ and ‘low’ categories, with the time limit for issuing decisions in standard (high) being 60 days and standard (low) being 30 days. Paper/basic cases and interlocutory applications have an official time limit of 14 days. It is not known which cases are complex cases, although from the caselaw where the FTT’s decision is challenged it appears that the FTT is rather narrow in its interpretation of the relevant rules.⁴³
- 4.15 To ascertain the extent of delay in issuing decisions, and how this has changed, we examined all the reported decisions in *Simon’s First-tier Tax Decisions* and *Simon’s Special Commissioners Decisions*. Obviously, these are not a representative sample of all cases, but rather represent the more complex cases where one would, perhaps, be more likely to expect to experience delay. We calculated the writing time, in days, from the last day of the hearing until the day on which the decision was issued. The results are shown in Figure 4.1. The left-hand panel of the figure presents a ‘box plot’, which shows the time to write reported decisions, broken down by the year of the decision. In the box plot, the central thick black line is the median observation; and the rectangular box is between the first and third quartiles, (the top and bottom of the

⁴⁰ *Connex South Eastern Ltd v Bangs* [2005] EWCA Civ 14; [2005] ICR 763 at [43], per Mummery LJ.

⁴¹ *Sambasivam v Secretary of State for the Home Department* [2000] Imm. A.R. 85 (CA).

⁴² *NatWest Markets plc v Bilta (UK) Ltd* [2021] EWCA Civ 680. In support of this the Court of Appeal cites, with approval, *Bank St Petersburg v Arkhangelsky* [2020] EWCA Civ 408, per Sir Geoffrey Vos.

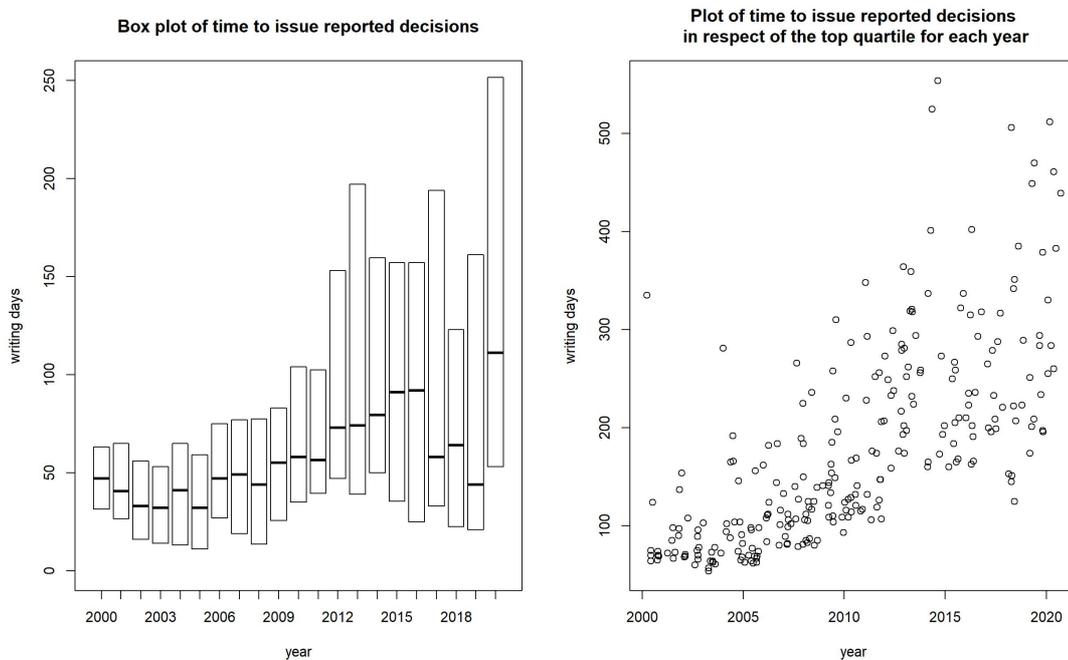
⁴³ See, for example, *JSM Construction Ltd v HMRC* [2015] UKFTT 474. For a discussion of the case law, see Gordon, K. (2019), *Tax Appeals: Law and Practice in the FTT*, 4th edn, Chester: Claritax Books, p.118.

box are known as its ‘hinges’), so half of all observations fall in this boxed area. The right-hand plot shows the ‘outlier’ cases, which fell within the upper quartile (i.e. the 25% of cases each year where the delay between the hearing and when the decision was issued was greatest).

- 4.16 From the figure, it is immediately apparent that the number of days taken to write reported decisions has increased over time. We see that it is not just that some decisions are taking longer to write, but most decisions seem to take longer. This is shown by the median decision time increasing in addition to both hinges increasing. From the right-hand plot, it is very evident that, in those cases that take longest to write up after the hearing, the time taken to issue decisions has also increased greatly over the last decade.

Figure 4.1. Time taken to issue decisions after hearing

Note: Box plot (left) showing the distribution, for each year, of the number of days between



the hearing and the decision being issued by the FTT, in respect of reported decisions (the central thick black line is the median observation and the rectangular box is between the first and third quartiles (the top and bottom of the box are known as its ‘hinges’). The scatter plot (right) shows, for each year, the number of days between the hearing and the decision being issued by the FTT, in respect of the ‘outlier’ cases, which are those that fell within the upper quartile (i.e. the 25% of cases each year where the delay between the hearing and when the decision was issued was greatest).

Table 4.2. Delay between the hearing and the decision being issued by the FTT, in respect of reported decisions

Year	Percentage of reported cases where decision is not issued within			
	60 days	100 days	150 days	200 days
2000	30	5	2	2
2001	33	6	3	0
2002	22	2	0	0
2003	20	4	2	2
2004	30	13	6	0
2005	25	3	3	0
2006	40	19	4	0
2007	42	14	5	3
2008	38	18	1	1
2009	45	23	10	4
2010	47	25	7	3
2011	48	25	14	11
2012	61	41	25	19
2013	52	41	30	24
2014	68	40	30	15
2015	58	47	30	16
2016	57	49	27	18
2017	49	38	28	18
2018	55	30	21	17
2019	43	39	27	18
2020	68	55	42	32

- 4.17 From Table 4.2, it becomes immediately apparent that, prior to tribunal reform, the majority of reported decisions were issued within two months of the hearing. Since 2012, this has only occurred once, in 2019. Since tribunal reform, the number of cases taking over 100 days to issue the decision has more than doubled. Also, prior to reform, very few cases took over 150 days to issue the decision, but now roughly one-third of cases do.
- 4.18 We note, from Table 4.2, there does appear to have been some improvement in recent years. However, such progress seems to have been set back by the COVID-19 pandemic. We are aware from discussions that the Chamber President is actively working with the FTT judges to ensure that as far as possible no decision is issued more than three months after the hearing and that the parties are kept informed where delays do arise.
- 4.19 We note that, at present, no information on the FTT (Tax) is published in the Quarterly Tribunal Statistics.⁴⁴
- 4.20 *We recommend that the FTT should develop a plan for reducing the backlog of unwritten decisions; that the FTT should publish targets for issuing judgments after hearing cases (and we suggest those targets be broken down by the category the case is allocated to; i.e. ‘default paper’, ‘basic’, ‘standard’ or ‘complex’); and that the FTT should publish in the Quarterly Tribunal Statistics their success in meeting these targets.*

Delay due to length of tribunal decisions

- 4.21 Several research participants speculated that the delay in issuing decisions might be attributable to the length of decisions, which they considered, often, to be excessive.⁴⁵ Specifically, interviewees thought they contained excessive quotations from judgments and reproduction of counsel’s arguments, with often little of the judge’s own analysis.
- 4.22 The median length of the 603 FTT decisions reported in *Simon’s First-tier Tax Decisions* between 2009 and 2020 is 10,210 words, with an interquartile range of 6,236 to 16,518 words. Of those decisions, 27 were longer than 30,000 words and eight were longer than 50,000 words. The lengthiest decision was 146,778 words long.
- 4.23 Figure 4.2 shows the delay between the final date of the hearing and the date on which the decision is issued. To show the relationship between such delay and decision length, for each year the data are divided into four categories: (i) the quarter of cases in which the delay was longest (i.e. the top quartile); (ii) the quarter of cases in which the delay was longer than the median time but cases were not in the top quartile (i.e. the third quartile); (iii) the quarter of cases in which the delay was equal to or less

⁴⁴ <https://www.gov.uk/government/collections/tribunals-statistics>.

⁴⁵ See [2.10] Appendix 1.

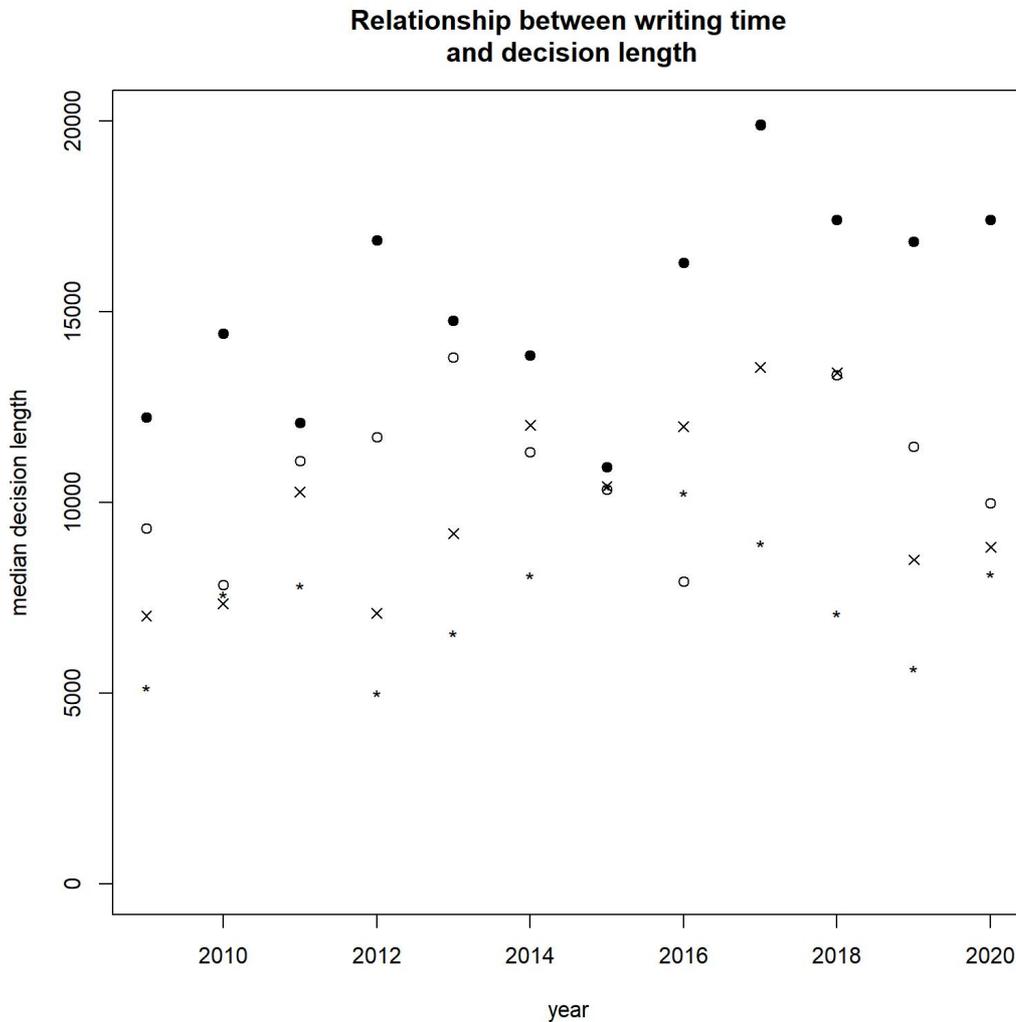
than the median time but cases were not in the bottom quartile (i.e. the second quartile); (iv) the quarter of cases in which the delay was least (i.e. the bottom quartile). The median delay for each quartile is then plotted on the graph. The solid dots, hollow dots, times symbols and asterisks represent the median decision length for cases in the top quartile (where the delay was longest), third quartile, second quartile and bottom quartile, respectively. It is evident from the graph that, as may be expected, the delay between the final date of the hearing and the date on which the decision is issued tends to be longest for longer decisions.

- 4.24 While there is a clear correlation between the length of the decision and the delay between the final hearing date and the release of the decision, as interviewees noted, any causal connection is not necessarily clear cut. It could be the length is due to the complexity of the facts and issues.
- 4.25 While decisions of the FTT do not create binding precedent,⁴⁶ they are often relied on by taxpayers and by HMRC as a source of guidance as to the law. As such, it is unhelpful if they are unduly long, because that hinders accessibility and therefore reduces their guidance value.⁴⁷ It is evidently necessary that all decisions present the evidence to support the facts found. However, in presenting their analysis of legal arguments, the FTT judges could perhaps do so more concisely.
- 4.26 ***We suggest that FTT judges consider whether the length of some decisions might be reduced, both to aid accessibility and also, potentially, to reduce the delay in issuing the judgment after the hearing.***

⁴⁶ Tax Law Review Committee (2016), *Interim Report on The Tax Appeals System*, London: Institute for Fiscal Studies, [8.9]. <https://www.ifs.org.uk/comms/comm58.pdf>. See also the comment of Judge Sinfield that ‘while a decision of the First-tier Tribunal would not be binding in law in other cases, the parties’ arguments before the First-tier Tribunal and the Tribunal’s approach to those arguments may help a higher court or tribunal to formulate its decision on the issues. Therefore, a hearing before First-tier Tribunal in the first instance is not incompatible with the objective of producing a binding precedent in a case such as this: rather it may be a helpful first step in the production of that precedent.’: *Aozora GMAC Investment Ltd v HMRC* [2018] UKFTT 706 (TC) at [8].

⁴⁷ For example, see the comment by J. F. Avery Jones about the FTT’s decision in *Revenue and Customs Commissioners v Development Securities Plc* [2017] UKFTT 565 (TC) where he notes ‘[b]ut the FTT’s decision could perhaps have benefited from more summarising of the salient details and omission of the rest. It used to be the case that decisions did not record evidence but findings of fact with enough evidence to support them. That has the advantage that the salient facts stand out and the message cannot be lost in the detail.’ See John Avery Jones, *Revenue and Customs Commissioners v Development Securities Plc*: seeing the Wood (v Holden) from the trees, [2021] *British Tax Review*, 107–111, 108.

Figure 4.2. Relationship between decision length and delay between the hearing and issuing the decision



Delay through a lack of judicial availability and late listing of cases

4.27 Sometimes delay appears to be caused by a lack of judicial availability to hear applications.⁴⁸

4.28 There also appears to be substantial delay in relation to the time it takes to list hearings after notification. In an interview conducted in February 2021, one

⁴⁸ See Appendix A [A.2.11].

respondent⁴⁹ stated he had been told by the FTT that there was no availability to list that particular hearing until the summer of 2022.

- 4.29 Several of the recent annual reports of the President of the FTT have suggested that there is insufficient judicial resource in the FTT.⁵⁰ We note that the other professional commitments of many fee-paid judges means they cannot expand on the number of their sitting days.
- 4.30 The stage at which complex cases are listed also causes delay. The usual form of directions in complex cases envisages that listing particulars are only given after all the preparatory steps in assembling evidence, etc., have been taken. In a case where both parties are represented by counsel, this can often mean that it is difficult to find a date that fits the diaries of both counsel within six months of providing listing information. This means that complex cases are rarely heard within a year of being referred to the FTT and often nearer two years (or more) thereafter.
- 4.31 The reason for delaying listing is because it can be difficult to give an accurate time estimate for the hearing until it is known precisely what evidence is needed. However, this is not invariably the case and the evidential needs for the appeal should at least start to take shape once HMRC have delivered their Statement of Case (SoC), assuming HMRC have properly enquired into the matter and the SoC is approached sensibly.
- 4.32 An advantage of early listing, even if the time estimate has to be confirmed and adjusted as preparation proceeds, would be to impose on both parties a discipline to move the preparation forward to a known end date.
- 4.33 ***We recommend increasing the overall number of sitting days in the FTT (either through recruitment or increasing the number of sittings allocated to fee-paid judges) to increase judicial availability.***
- 4.34 ***We recommend that the FTT take steps to list complex cases at an earlier stage of preparing the case for hearing, once the evidential requirements of the case have been established but before service of witness statements or any expert reports.***
- 4.35 ***We recommend that the FTT should publish targets for reducing the delay in hearing cases after notification to the FTT (and we suggest those targets be broken down by the category the case is allocated to; i.e. ‘default paper’, ‘basic’, ‘standard’***

⁴⁹ Interview with Solicitor Y.

⁵⁰ See, for example, Judge Greg Sinfield in *The Senior President of Tribunals, The Senior President of Tribunals' Annual Report 2018*, p.37, <https://www.judiciary.uk/wp-content/uploads/2018/05/spt-annual-report-2018-v3.pdf>; Judge Greg Sinfield in *The Senior President of Tribunals, The Senior President of Tribunals' Annual Report 2019*, p.40, https://www.judiciary.uk/wp-content/uploads/2019/10/6.5845_The-Senior-President-of-Tribunals-Annual-Report-2019_Print_NoCrops.pdf; Judge Greg Sinfield in *The Senior President of Tribunals, The Senior President of Tribunals' Annual Report 2020*, p.40, https://www.judiciary.uk/wp-content/uploads/2020/07/6.6755_The-Senior-President-of-Tribunals-Annual-Report-2020_WEB-CS-amend-1.pdf.

or ‘complex’); and that the FTT should publish in the Quarterly Tribunal Statistics their success in meeting these targets.

Delay through poor case management

- 4.36 Among our survey respondents, delay was also attributed to a lack of robust case management by the judiciary, exacerbating delays caused by the parties. Many survey respondents suggested that judges could be more robust in case management. Some respondents suggested that new judges with little prior litigation experience should have training on this.⁵¹
- 4.37 Commenting on case management, many respondents suggested that the FTT was especially slow in dealing with applications and when parties failed to comply with directions.⁵² We consider that the issue of robust case management is inextricably intertwined with the judicial availability in the FTT: if the parties cannot agree in preparing for a case, it is unhelpful if you then have to wait three months or more for a case-management hearing to resolve the issue.
- 4.38 We note that there are decisions in the FTT that suggest non-compliance with a direction is prima facie evidence of unreasonable conduct that can give rise to cost sanctions.⁵³ We also note the comments of the Costs Review Group that ‘the Rules should provide expressly that failure to comply with a direction of the FTT will be treated as unreasonable behaviour, so that if the other party is put to expense in obtaining compliance with a direction, he will be able to recover that expense.’⁵⁴
- 4.39 *We recommend that case management should be more robust and that the Judicial College provides training on case management specifically tailored for judges in the FTT (Tax). We expect that this would be of particular benefit to recently appointed judges or judges whose professional background was more in an advisory rather than a contentious role. We suggest that the training should be available to all judges in the chamber and that fee-paid judges should be remunerated for attending.*
- 4.40 *As also noted below in the chapter on costs,⁵⁵ we support the proposal of the Costs Review Group that the tribunal rules should expressly specify that failure to comply with directions is necessarily, of itself, unreasonable conduct, which can potentially lead to a costs sanction.*

⁵¹ See Appendix A [A.2.13], [A.2.14] and [A.2.22].

⁵² See Appendix A [A.2.16].

⁵³ *Eclipse Film Partners No.35 LLP v HMRC* [2010] UKFTT 448 [81].

⁵⁴ Costs Review Group, *Costs in Tribunals: Report by the Costs Review Group to the Senior President of Tribunals* [69], p. 5, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/costs-review-group-report-tribunals-dec-2011.pdf>.

⁵⁵ See [10.9].

Delay by HMRC

- 4.41 Many survey respondents identified HMRC as a cause of delay.⁵⁶
- 4.42 HMRC's approach to litigation can be very tactical. If they are raising an issue on which they have more than one possible case, they will aim to manoeuvre the best case for them to the FTT first, so they may seek to stall progress in other cases.⁵⁷ When HMRC delay in other cases, it may be due to either a lack of resources or unavailability of their chosen counsel.

Delay by taxpayer's representatives

- 4.43 We note that taxpayers and their representatives can be a source of delay too, although this appears to be limited to avoidance cases.

Delay due to four levels of appeal

- 4.44 Reviews of the system of tax appeals have consistently argued that four levels of appeal are too many. The Keith Committee recommended this be reformed by appeals from the Special Commissioners going directly to the Court of Appeal.⁵⁸ The TLRC's 1996 report likewise thought there were good arguments for eliminating one tier of appeal, with appeals from the Special Commissioners potentially going directly to the Court of Appeal.⁵⁹ The report noted that the UK was out of step with comparative jurisdictions in having so many tiers of appeal.⁶⁰ That report noted the consequences in respect of delay:

'One of the main reasons for the delay between first hearing before a tax tribunal and a final decision in cases raising important points of principle is the number of tiers of appeal. Every hearing also increases the costs incurred by the parties—and thereby raises the stakes in any further appeal, since the winner in the final stage of appeal can expect to receive costs... In many tax cases, considerable sums of public money are at stake, because of the wider effect of individual decisions on points of principle... Delay in the resolution

⁵⁶ See Appendix A [A.2.24].

⁵⁷ See, for example, the written evidence of Keith Gordon to the Treasury Select Committee enquiry on 'Disputing Tax': <http://data.parliament.uk/WrittenEvidence/CommitteeEvidence.svc/EvidenceDocument/Treasury%20Sub-Committee/The%20conduct%20of%20tax%20enquiries%20and%20resolution%20of%20tax%20disputes/Written/83610.html>.

⁵⁸ Committee on Enforcement Powers of the Revenue Departments, *Report* Volume 2. (Cmnd. 8822) Chapter 25 'Disputes Procedures' [25.4.3] p 512. <https://parlipapers.proquest.com/parlipapers/docview/t70.d75.1982-075818?accountid=9630>.

⁵⁹ Tax Law Review Committee (1996), *Interim Report on The Tax Appeals System*, London: Institute for Fiscal Studies, [11.13] and [11.35], <https://www.ifs.org.uk/comms/comm58.pdf>.

⁶⁰ Tax Law Review Committee (1996), *Interim Report on The Tax Appeals System*, London: Institute for Fiscal Studies, [11.16] and Appendix 1, <https://www.ifs.org.uk/comms/comm58.pdf>.

of cases is therefore a major problem, not only for the taxpayer, but also for the revenue authorities and, potentially, the Treasury.’⁶¹

- 4.45 The Leggatt Report suggested there ‘are probably too many’⁶² levels of appeal in tax cases and suggested that the types of appeals heard by the Special Commissioners should start in the UT that Sir Andrew had contemplated. He noted that respondents thought having all cases start in the First-tier either would not be feasible or would be a ‘threat to the expertise of the Special Commissioners and the VAT and Duties Tribunal’.⁶³ HM Government’s blueprint for tax tribunal reform contemplated that the FTT would only hear ‘the less complex cases that concentrate primarily on settling factual issues.’⁶⁴ This proposal considered that it would be inappropriate for cases, such as those that went before the Special Commissioners, to go through both tiers. Therefore, it contemplated that ‘the new structure would allow the President of the tax jurisdiction to assign suitable cases for hearing at the appellate tier in the first instance.’⁶⁵ There was to be no requirement for consent of the parties.
- 4.46 The government’s proposal was however substantially watered down by how it has been implemented in rule 28 of the FTT Rules, which allows for a ‘complex’ case to be transferred to the UT, with the consent of both parties and the consent of the Presidents of the FTT and UT. This only applies to ‘complex’ cases. While the FTT does not publish statistics on the proportion of cases which the FTT allocates to the complex category, we understand them to be a small category of cases and substantially fewer than the numbers previously heard by the Special Commissioners. Further, the requirement for consent means that one party, who may wish to use litigation as a means of attrition against the other, can lengthen the dispute by withholding consent.
- 4.47 Clearly not all complex cases would be appropriate for transfer to the UT. For instance:

‘a very long missing trader intra-community fraud case taking many weeks to hear may be inappropriate for transfer (even if it is very complex in nature)

⁶¹ Tax Law Review Committee (1996), *Interim Report on The Tax Appeals System*, London: Institute for Fiscal Studies, [11.1] and Appendix 1, <https://www.ifs.org.uk/comms/comm58.pdf>.

⁶² Sir Andrew Leggatt (March 2001), *Tribunals for Users: One System, One Service* (see section Tax Tribunals: Reform of the Tax Appeals System), <https://web.archive.org/web/20040617122105/http://www.tribunals-review.org.uk/leggatthtm/leg-13a.htm#8>.

⁶³ Sir Andrew Leggatt (March 2001), *Tribunals for Users: One System, One Service* (see section Tax Tribunals: Reform of the Tax Appeals System at [3]) <https://web.archive.org/web/20040617122105/http://www.tribunals-review.org.uk/leggatthtm/leg-13a.htm#8>.

⁶⁴ Secretary of State for Constitutional Affairs (July 2004), *Transforming Public Services: Complaints, Redress and Tribunals* Cm 6243, [9.13], p.47, <https://web.archive.org/web/20040804004606/http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf>.

⁶⁵ Secretary of State for Constitutional Affairs (July 2004), *Transforming Public Services: Complaints, Redress and Tribunals* Cm 6243, [9.14], p.47, <https://web.archive.org/web/20040804004606/http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf>.

for the very reason that its length makes it inappropriate to be heard by the Upper Tribunal having regard to its judicial, estate and financial resources.’⁶⁶

Put more positively, the FTT judges may well have developed a comparative expertise in analysing factual material and evidence in relation to tax matters. However, members of the Tax Appeals Modernisation Stakeholder Group felt that there were many cases that do turn on law as opposed to fact.⁶⁷ We consider that such cases could potentially be suitable to start in the UT.

- 4.48 We note that when the FTT was being established the need for both parties to consent for a case to start in the UT was opposed by the representatives of both the Law Society and the ICAEW, who were members of the Tax Appeals Modernisation Stakeholder Group. The representative of the Law Society:

‘was concerned at the proposal that consent of both parties be required to go directly to the Upper Tribunal. He considered that the taxpayer’s consent should be required but not that of HMRC. This was based on his concern that HMRC might try to prolong litigation by keeping cases in the first-tier, and taxpayer consent should always be required for a case to come within the costs regime of the Upper Tribunal.’⁶⁸

- 4.49 The representative of the ICAEW commented:

‘that at times it seems as though HMRC deliberately build up the costs of appealing in order to deter the taxpayer from accessing their rights.’⁶⁹

- 4.50 In some instances, the taxpayer might wish to postpone the final resolution of tax disputes. Perhaps, historically, this would be most common in avoidance cases. However, we would expect this to be less so now, following the introduction of accelerated payment notices.
- 4.51 It is technically possible to circumvent the four stages of appeal via a ‘leapfrog’ from the UT directly to the Supreme Court.⁷⁰ We are not aware of this provision having

⁶⁶ *Capital Air Services Ltd v HMRC* [2010] UKUT 373 (TCC); [2010] STC 2726 at [21].

⁶⁷ Comments of Malcolm Gammie and John Avery Jones. John Avery Jones gives the example of *Carvill v Inland Revenue Commissioners* [1996] STC 126. Tax Appeals Modernisation Stakeholder Group, Meeting Minutes (13 February 2008) at [19] (2 April 2008) https://web.archive.org/web/20090123220027/http://www.financeandtaxtribunals.gov.uk/Documents/taxAppealsModernisation/SG_minutes02_04_08_v1.pdf.

⁶⁸ Ron Downhill (Representative of the Law Society) in Tax Appeals Modernisation Stakeholder Group, Meeting Minutes (13 February 2008) at [16] (2 April 2008) https://web.archive.org/web/20090123220027/http://www.financeandtaxtribunals.gov.uk/Documents/taxAppealsModernisation/SG_minutes02_04_08_v1.pdf.

⁶⁹ Robert Maas (ICAEW) in Tax Appeals Modernisation Stakeholder Group, Meeting Minutes (13 February 2008) at [19] (2 April 2008), https://web.archive.org/web/20090123220027/http://www.financeandtaxtribunals.gov.uk/Documents/taxAppealsModernisation/SG_minutes02_04_08_v1.pdf.

⁷⁰ Tribunals, Courts and Enforcement Act 2007 ss 14A-14C inserted by Criminal Justice and Courts Act 2015.

been used in tax appeals and we do not consider this a useful provision for tax appeals. We consider that the relevant prerequisites would be unlikely to be satisfied. There are not likely to be many tax cases where either the Court of Appeal is bound by a decision of itself or the Supreme Court, or the decision is time sensitive and a matter of national importance. Further, we consider the highly analytic engagement of the judges during oral argument in the Court of Appeal is something from which tax cases benefit, as is apparent from the comments of interviewees in relation to FTT hearings, reported below.⁷¹ Similarly, we note that in Inheritance Tax Act claims it is still possible to start some claims in the High Court, rather than FTT, and then appeal to the Court of Appeal.⁷² Such appeals require either the consent of both parties or can be made by the High Court on the application of either party. However, obviously, Inheritance Tax Act claims make up a very small fraction of tax appeals.

- 4.52 We note that HM Government is presently considering tightening the test for second appeals to the Court of Appeal.⁷³
- 4.53 *We consider that in some cases four levels of appeal is excessive. It both delays a final decision and causes unnecessary expense. To potentially reduce the time it takes for a final decision in the most complex tax cases, we consider that it would be desirable for rule 28 of the FTT Rules, which allows the transfer of a case to from the FTT to the UT, to be amended so that the consent of both parties is not required. Rather, the parties should be able to make an application to the FTT, which would then determine the application on the basis of the interests of justice. We note that the Leggatt Review contemplated that parties should be able to make an application, but that the tribunal should decide the matter. We see no reason why the consent of all parties should be required for rule 28, when it is not required for other leapfrog applications.*

⁷¹ See Chapter 6 and especially [4.5].

⁷² See s 222(3) Inheritance Tax Act 1984. For a recent example, see *Routier v Revenue and Customs Commissioners* [2014] EWHC 3010 (Ch); [2015] STC 451.

⁷³ Ministry of Justice, *Reforms to arrangements for obtaining permission to the Court of Appeal*: <https://www.gov.uk/government/consultations/reforms-to-arrangements-for-obtaining-permission-to-the-court-of-appeal>.

5 Other issues with tribunal administration

- 5.1 In recent years, issues with the tribunal administration for FTT (Tax) have been repeatedly acknowledged in the annual reports of the President of the FTT (Tax), which are published in the annual reports of the Senior President of the Tribunals. Specifically, those reports have described a rapid turnover of staff who leave for other government departments (including HMRC), as they are able to pay them more.⁷⁴ This means that the administrative staff often lacks the benefit of experience, and that the FTT is often short staffed as vacancies are not filled until some time after existing members of staff leave.
- 5.2 In addition to the FTT administration being identified as a cause of delay by survey respondents, as discussed above,⁷⁵ several other concerns were identified with how it functions. Survey respondents noted frequent communication failures with the FTT administration, including communications to the FTT getting lost and communications from the FTT being sent to the wrong people.⁷⁶ A lack of access to the administrative team and a lack of information at the call centre were identified as major issues by FTT users.⁷⁷ Respondents often suggested that the tribunal administration could be improved with more resources.⁷⁸
- 5.3 ***Noting the considerable dissatisfaction of tribunal users with their experience of the tribunal administration, which appears associated with the very rapid turnover of staff in recent years as they are ‘poached’ by other government departments that can offer better remuneration, we suggest that the terms and conditions of employment of FTT administration staff be reviewed to ensure they are competitive with similar positions in the Civil Service.***

⁷⁴ Report of Judge Colin Bishop in *The Senior President of Tribunals’ Annual Report 2016*, p.79, <https://www.judiciary.uk/wp-content/uploads/2016/02/The-Senior-President-of-Tribunals-Annual-Report-2016-final-1.pdf>. Report of Judge Colin Bishop in *The Senior President of Tribunals’ Annual Report 2017*, p. 54, <https://www.judiciary.uk/wp-content/uploads/2017/07/The-Senior-President-of-Tribunals-Annual-Report-2017-2.pdf>. Report of Judge Greg Sinfield in *The Senior President of Tribunals, The Senior President of Tribunals’ Annual Report 2018*, p.38, <https://www.judiciary.uk/wp-content/uploads/2018/05/spt-annual-report-2018-v3.pdf>. Report of Judge Greg Sinfield in *The Senior President of Tribunals, The Senior President of Tribunals’ Annual Report 2019*, https://www.judiciary.uk/wp-content/uploads/2019/10/6.5845-The-Senior-President-of-Tribunals-Annual-Report-2019_Print_NoCrops.pdf.

⁷⁵ See [4.8]–[4.9].

⁷⁶ See Appendix A [A.3.1].

⁷⁷ See Appendix A [A.3.2].

⁷⁸ See Appendix A [A.3.4].

6 Judicial preparation for and involvement in hearings

- 6.1 Due to the extent of the tax code, tax cases that involve substantive points of law will often require the judge to become familiar with legislation and cases that they may not have encountered previously.⁷⁹
- 6.2 Many research participants observed that some judges were not actively involved in the hearings. Some gave examples of lengthy hearings where the judge did not ask a single question. Some inferred from this that those judges had not prepared for the hearing. They suggested that hearings would be improved if the judges had more opportunity to prepare in advance and review the arguments/bundles. Other research participants thought the lack of judicial participation in hearings was because some judges lacked either the tax knowledge or technical ability to hear the cases they were assigned. Interviewees emphasised that this varied between judges, and some judges were clearly prepared and would actively participate in the hearing.⁸⁰
- 6.3 These research participants often contrasted their experience before the FTT with their appearances before other courts/tribunals where the judges were far more interventionist.⁸¹
- 6.4 We share the concern of these advocates: if a judge says nothing during the hearing, one has no way of knowing whether they understand the argument.
- 6.5 If judges had time to prepare by reading through relevant cases and documents, one would expect that they would marshal, prior to the hearing, much of the material that they need to write their decision. We do not consider it necessary for judges to read all the cases listed in the skeleton arguments and would expect the parties to provide guidance on which cases to read. If judges prepared in this manner, then the decision could be written very soon after the hearing. With regard to factual evidence determined at the hearing, we would expect that the most natural thing to do would be for the judge to write up their factual findings on the day of the hearing, while facts were still fresh in the judge's mind. We understand that is the norm for judges in many other chambers of the FTT. It is especially worrying if judges take a lengthy time to write up their findings in relation to factual issues in the Tax Chamber

⁷⁹ See Appendix A [A.4.1].

⁸⁰ See Appendix A [A.4.4]–[A.4.6].

⁸¹ See Appendix A [A.4.3].

because, unlike other Chambers of the FTT, there is no separate record of proceedings made by the judges (although judges will make extensive notes, and recently hearings have started to be recorded). Accordingly, if the first time the findings of fact are put to paper is many months after the hearing, one concern (as shown in the case law on delay)⁸² would be that such findings are based on evidence that the judges reconstruct rather than having recorded.

- 6.6 *We suggest ensuring that all judges (both salaried and fee-paid) have sufficient paid writing and preparation days (both being proximate to the hearing days) to realistically discharge the job they are asked to do. Parties should be asked to provide a judicial reading list in advance of the hearing and provide estimates of judicial reading time.*

⁸² See [4.11]–[4.12].

7 Pleadings in tax appeals

- 7.1 There is a ‘venerable principle’⁸³ of tax law that it is in the public interest that taxpayers pay the correct amount of tax. Tax appeals are therefore fundamentally different to civil litigation in that the ‘pleadings’ are only relevant to identify the facts that a taxpayer must establish (given that the burden of proof is on the taxpayer); tax legislation then provides the essential framework that provides the context within which the issues that the legislation raises on the facts must be answered, whether a point of law has been pleaded or not.
- 7.2 The only essential ‘pleading’ is HMRC’s SoC because this provides the framework within which a taxpayer must assemble their evidence to make good their case in the FTT. It follows from the ‘venerable principle’ that HMRC can amend their SoC and to raise novel legal arguments, as long as the taxpayer is not required to prove new matters.
- 7.3 HMRC are entitled to seek to amend their SoC before the appeal is heard, provided that provides time for the taxpayer to add to their evidence if the amended SoC requires the taxpayer to prove new matters.⁸⁴
- 7.4 Accordingly, at variance to the views of some survey respondents, we would not support the use or development of greater formality of pleadings in tax cases that might prevent either party raising legitimate legal arguments that go to the correct determination of a taxpayer’s liability to tax on the facts that are agreed or that are shown by the evidence to exist.

⁸³ See *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners* [2008] STC 3366, [2008] EWHC 2387 (Ch) at [115], approved in *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners* [2011] STC 1143, [2011] UKSC 19. See also *Investec Asset Finance plc and another v Revenue and Customs Commissioners* [2020] STC 1293, [2020] EWCA Civ 579 at [60], [64], [72] and [100].

⁸⁴ *London Luton Hotel BPR Property Fund LLP v Revenue and Customs Commissioners* [2019] UKFTT 746 (TC).

8 Other issues with the conduct of hearings and decisions

- 8.1 Several interviewees commented that judges had tried to control the order in which advocates called their witnesses, rather than the usual procedure of allowing advocates to call their witnesses in the order that they best considered advanced their case.⁸⁵
- 8.2 One interviewee suggested that some judges sought to impose unnecessary formality that unsettled witnesses. For example, a judge intervening in examination of a witness to tell the witness to refer to the witness's colleague as Mr [Smith] rather than [Steve].⁸⁶
- 8.3 One interviewee commented adversely in relation to a draft decision that a judge issued, which attempted to decide the matter on the basis of arguments that were not fully argued before him.⁸⁷
- 8.4 We note that tax lawyers who have a predominantly advisory practice will often have excellent technical skills and knowledge that may make them appropriate people to be appointed to the FTT. However, their exposure to contentious matters and tribunal proceedings may be limited, and so they might benefit from training on procedural matters and on the conduct of hearings.
- 8.5 ***We suggest that introductory training for judges is appropriately comprehensive with regard to procedural matters and the conduct of hearings.***

⁸⁵ Interview with Barrister R; interview with Barrister U.

⁸⁶ Interview with Barrister U.

⁸⁷ See Appendix A [A.5.3].

9 A specialist tribunal: judicial recruitment and case allocation

Introduction

- 9.1 The Court of Appeal and Supreme Court have repeatedly emphasised that the FTT is a specialist tribunal and:

‘[p]articular deference is to be given to such tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker.’⁸⁸

- 9.2 The previous reports of the TLRC on tax appeals emphasised the importance of specialist knowledge and experience in relation to judges who heard tax appeals.⁸⁹ It was felt that in relation to simple matters, such as were heard by the General Commissioners, the requisite skills and knowledge could be obtained by training.⁹⁰ However, in relation to more complex matters, such as was dealt with by the Special Commissioners, the report recommended that:

‘it should be a recognised policy that appointees should have a reasonable level of experience in the practice either of tax or some aspect of fiscally

⁸⁸ *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407; [2009] STC 1990 at [11] per Jacob LJ referring to *Baroness Hale in AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 at [30]. It has been further suggested that the UT is itself a specialist tribunal ‘with the function of ensuring that First-tier Tribunals adopt a consistent approach to the determination of questions of principle which arise under the particular statutory scheme in question’: *Pendragon plc and others v Revenue and Customs Commissioners* [2015] UKSC 37; [2015] STC 1825, at [48] per Lord Carnwath.

⁸⁹ The TLRC’s 1996 report envisaged retaining two separate tribunals similar to the General Commissioners and Special Commissioners. The report suggested, for the General Tax Tribunal, that the clerks for the General Commissioners should ‘be required to have both legal qualifications and tax experience until a reasonably sophisticated training programme has been instituted’ [7.61].

⁹⁰ Tax Law Review Committee (1996), *Interim Report on The Tax Appeals System*, London: Institute for Fiscal Studies, [7.37]–[7.40], <https://www.ifs.org.uk/comms/comm58.pdf>. Tax Law Review Committee (2009), *A Unified Tax Tribunals System: A Second Report on the Reform of the Tax Appeals System*, London: Institute for Fiscal Studies [3.11] <https://www.ifs.org.uk/comms/comm79.pdf>.

related law. This seems to us to be the whole point of having a specialist tax tribunal.’⁹¹

- 9.3 Indeed, the report more generally recommended that, at higher levels of appeal, tax cases should be dealt with by judges with expertise in tax, because ‘adequate experience cannot be gained by involvement in a mere handful of tax cases, whether at practitioner level or following appointment.’⁹²
- 9.4 These recommendations were made in the TLRC’s 1996 report, which was subject to an extensive consultation exercise, as reported in the final 1999 Report.⁹³ Among the recorded responses, there is no record of any objection to the foregoing propositions.
- 9.5 However, the actual expertise of the FTT has been questioned. A common theme among our survey respondents and interviewees⁹⁴ was a questioning of the expertise of FTT judges to hear the particular cases to which they were assigned. Writing in 2009, Jackson LJ suggested that the:

‘new First Tier Tribunal, which has been set up under the Tribunals Courts and Enforcement Act 2007, appears to be less specialist than some courts.’⁹⁵

- 9.6 He then qualified this, in a footnote, saying ‘[t]his point will not be correct if, in practice, First Tier Tribunal members only ever sit in chambers corresponding with their own specialist expertise’. However, as discussed below,⁹⁶ recent years have seen appointments of judges to the FTT being made either by assignment from other chambers or as a result of generic (non-tax) competitions.

Use of tribunal members

- 9.7 In other chambers of the FTT, members (who are not judges) are often an essential component of the expertise of the tribunal. For example, in Mental Health cases (now in the Health, Education and Social Care Chamber) a consultant psychiatrist will sit as a member. Their expertise is clearly invaluable in evaluating the views of the

⁹¹ Tax Law Review Committee (1996), *Interim Report on The Tax Appeals System*, London: Institute for Fiscal Studies, [8.9], <https://www.ifs.org.uk/comms/comm58.pdf>; Tax Law Review Committee (2009), *A Unified Tax Tribunals System: A Second Report on the Reform of the Tax Appeals System*, London: Institute for Fiscal Studies, [4.5]–[4.6], <https://www.ifs.org.uk/comms/comm79.pdf>.

⁹² Tax Law Review Committee (1996), *Interim Report on The Tax Appeals System*, London: Institute for Fiscal Studies, [10.9]–[10.11], <https://www.ifs.org.uk/comms/comm58.pdf>.

⁹³ Tax Law Review Committee (2009), *A Unified Tax Tribunals System: A Second Report on the Reform of the Tax Appeals System*, London: Institute for Fiscal Studies, <https://www.ifs.org.uk/comms/comm79.pdf>.

⁹⁴ See section entitled ‘Allocation of judges to cases’ at [9.11]–[9.16].

⁹⁵ Jackson LJ (May 2009), *Review of Civil Litigation Costs: Preliminary Report*, Vol.2, Chapter 46, ‘Should the Cost Shifting Rule be Modified?’, pp. 467–76, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf>.

⁹⁶ See [9.19].

clinician who has charge of the appellant in determining whether the appellant should continue to be subject to compulsory detention.

- 9.8 Interviewees were confused about when tribunal members were used in the Tax Chamber. Several reported not having seen members in recent years. Others were unable to comment on their contribution, as they felt they had no evidence. However, several interviewees were very positive about the contributions of members.⁹⁷
- 9.9 We note below how the number of members in the FTT has declined. When the FTT was established, there were about 181 members, but by 2020 this had reduced to 57.⁹⁸
- 9.10 *We consider that tribunal members (who sit with FTT judges to hear appeals) can perform a useful function in many cases. We recommend that the FTT publishes a policy on when members are assigned to hear cases. We recommend that additional members are recruited to address the declining number of members in the FTT in recent years.*

Allocation of judges to cases

- 9.11 The basis of allocation of cases to judges, particularly where the case was a highly technical one, was queried by some of our survey respondents. The concern was that in cases where the judge concerned did not have the necessary technical knowledge in the area, or the technical skills, the outcome became more of a lottery.⁹⁹
- 9.12 Some respondents thought that judges who were assigned to hear a case should be skilled in that subspecialism of tax law. Others disagreed with the view that specialist knowledge was desired, except that they thought it might be advantageous where the taxpayer was unrepresented. We note that where litigants appear in person before the FTT, many judges do adopt a more inquisitorial approach.¹⁰⁰
- 9.13 Some interviewees also felt that tax knowledge was not required for FTT judges, but they observed that the technical ability to get to grips with complex legislation and detailed case law seemed to vary among the tribunal judiciary.¹⁰¹ Accordingly, they thought such technical ability should influence which judges were assigned the more legally complex cases.
- 9.14 It is understood that the Chamber operates under a ticketing policy, which limits the nature of cases assigned to fee-paid judges. Judges are classified into five categories. Category 1 is for salaried FTT judges who can do anything, including a great deal of

⁹⁷ See Appendix A [A.6.1].

⁹⁸ See [9.17] and [9.20].

⁹⁹ See Appendix A [A.6.2].

¹⁰⁰ Thomas, R. (2020), 'Chapter 14: Tax Tribunals and Justice for Litigants in Person' in Dominic de Cogan and Peter Harris (eds), *Tax Justice and Tax Law: Understanding Unfairness in Tax Systems*, Oxford: Hart Publishing.

¹⁰¹ See Appendix A [6.6]. In addition to the comments below, see the text accompanying footnotes 269 and 271.

case management. Category 2 is for those judges with substantial knowledge of tax, who also have, in particular, knowledge of complex tax legislation involving financial instruments. Category 3 requires good tax knowledge. Categories 4 and 5 are for judges without a tax background, or much of one – it is understood that the distinction between Categories 4 and 5 is that some judges are restricted to penalty cases, and others can do a bit more.

- 9.15 We consider that the same ticketing policy should apply to salaried judges as it does to fee-paid judges.
- 9.16 *We recommend that the FTT publishes a policy on the allocation of judges to cases. We note that different levels of technical ability are required to hear cases that turn on the application of well-understood tests to factual situations, such as penalty appeals, and those cases that concern complex or novel matters of statutory interpretation. These should be reflected in the ticketing policy, which should apply to both fee-paid and salaried judges.*

Judicial recruitment

- 9.17 When the new tribunal structures were created in 2009, the Special Commissioners, Deputy Special Commissioners and Chairmen and members of the VAT and Duties Tribunal were all transferred into the new tribunal structure.¹⁰² In addition, there was a substantial recruitment exercise, with four salaried judges, 14 fee-paid tribunal judges and 75 fee-paid non-legal members being recruited; a criterion for this recruitment exercise was experience of tax.¹⁰³ In total, the initial tax chamber had a total compliment of 61 judges and 181 members.¹⁰⁴
- 9.18 A further tax-specific recruitment exercise was held in 2014 for four salaried judges¹⁰⁵ and up to 25 fee-paid judges,¹⁰⁶ in addition to up to 10 fee-paid deputy

¹⁰² The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56) reg.5. <https://www.legislation.gov.uk/ukxi/2009/56/article/5/made>.

¹⁰³ JAC, *Interested in tax? An opportunity to be among the first sitting in the new First Tier Tax Chamber*, (Archived on 5 December 2008) <https://webarchive.nationalarchives.gov.uk/20081205141819/http://www.judicialappointments.gov.uk/current/1576.htm>.

¹⁰⁴ Report of HH Sir Stephen Oliver QC in Senior President of Tribunals, *The Senior President of Tribunals' Annual Report: Tribunals Transformed* (February 2010) [7.73] [174], p. 51. <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/senior-president-tribunals-report-2010.pdf>.

¹⁰⁵ JAC, 00914: Salaried Judge of the First-tier Tribunal, Tax Chamber (Archived on 4 Dec 2014) <https://webarchive.nationalarchives.gov.uk/20141204093637/http://jac.judiciary.gov.uk/selection-process/2831.htm>.

¹⁰⁶ JAC, 00915: Fee-paid Judge of the First-tier Tribunal, Tax Chamber (Archived on 4 Dec 2014) <https://webarchive.nationalarchives.gov.uk/20141204093639/http://jac.judiciary.gov.uk/selection-process/2728.htm>

judges of the UT.¹⁰⁷ The selection criteria against which candidates were selected for the roles included expertise in tax as a practitioner,¹⁰⁸ and the selection material for the competitions was based on tax law.¹⁰⁹

- 9.19 Subsequent to this selection exercise, all appointments to the Tax Chamber of the FTT (both salaried and fee-paid) have been either from assignment from other chambers of the FTT, or as a result of generic Judicial Appointments Commission (JAC) competitions for all the chambers of the FTT. In such generic competitions, there is no selection on the basis of tax knowledge – successful candidates are assigned to a chamber by the Senior President of Tribunals following selection by the JAC. However, appointments to the UT have continued to be made in jurisdiction-specific competitions and require candidates to ‘demonstrate tax experience as a practitioner having dealt with complex and high value tax issues in the field of direct tax, indirect tax, or both’.¹¹⁰
- 9.20 As of 2020, there were 10 salaried judges, 50 fee-paid judges and 57 members, including one authorised presiding member, in the FTT. Of those, four fee-paid judges and 14 non-legal members were due to retire in the following two years.¹¹¹
- 9.21 There appears, at present, to be a shortage of judges, leading to hearings being cancelled.¹¹² There is a particular need for salaried judges, both because they undertake much of the case management, and also because fee-paid judges are often not available to hear many of the lengthy hearings that are necessary in tax cases.¹¹³

¹⁰⁷ JAC, 00916: Fee-paid Deputy Judge of the Upper Tribunal, Tax and Chancery Chamber (Archived on 4 Dec 2014), <https://webarchive.nationalarchives.gov.uk/20141204093641/http://jac.judiciary.gov.uk/selection-process/2729.htm>.

¹⁰⁸ JAC, Qualities and Abilities (undated), https://webarchive.nationalarchives.gov.uk/20141204095112/http://jac.judiciary.gov.uk/static/documents/00914_00915_and_00916_Qualities_and_Abilities.pdf.

¹⁰⁹ JAC, Selection Exercises 2014 (undated), https://webarchive.nationalarchives.gov.uk/20141204095102/http://jac.judiciary.gov.uk/static/documents/Legislation_and_sign_posts.pdf.

¹¹⁰ JAC, 078: Salaried Judge of the Upper Tribunal, Tax and Chancery Chamber (Archived on 7 Dec 2017), <https://webarchive.nationalarchives.gov.uk/20171207182239/https://jac.judiciary.gov.uk/vacancies/078> and JAC, 065: Fee-paid Judge of the Upper Tribunal, Tax and Chancery Chamber (archived on 7 Dec 2017), <https://webarchive.nationalarchives.gov.uk/20171207182245/https://jac.judiciary.gov.uk/vacancies/065>.

¹¹¹ Judge Greg Sinfield in *The Senior President of Tribunals' Annual Report 2020*, https://www.judiciary.uk/wp-content/uploads/2020/07/6.6755_The-Senior-President-of-Tribunals-Annual-Report-2020_WEB-CS-amend-1.pdf.

¹¹² Judge Greg Sinfield in *The Senior President of Tribunals' Annual Report 2018*, p.37, <https://www.judiciary.uk/wp-content/uploads/2018/05/spt-annual-report-2018-v3.pdf>; Judge Greg Sinfield in *The Senior President of Tribunals' Annual Report 2019*, https://www.judiciary.uk/wp-content/uploads/2019/10/6.5845_The-Senior-President-of-Tribunals-Annual-Report-2019_Print_NoCrops.pdf.

¹¹³ Law Society (2018), ‘Catch up with Nicholas Aleksander, part-time judge and partner at Gibson Dunn’ (Podcast 27 June), <https://www.lawsociety.org.uk/en/topics/the-city/nicholas-aleksander-part-time-judge-and-gibson-dunn-partner>.

- 9.22 It is perhaps not surprising that it is difficult to recruit tax specialists to be judges. The financial rewards from tax work, in private practice, are very substantial and (even having regard to judicial pensions) such rewards cannot be realistically matched by a judicial salary or the daily fee of a fee-paid judge. Moving to a job in a tribunal, which appears overstretched and under-resourced and does not have a realistic assessment of the hours necessary to prepare for and write up decisions, would therefore, perhaps, not seem attractive.
- 9.23 Research participants generally thought that judges should be recruited who had experience in tax. Several research participants indicated that they knew of people who had applied to be FTT judges, and considered them to be very suitable, but they had been rejected. This was thought to have a general chilling effect on others coming forward. One respondent suggested that candidates might benefit from more guidance on the approach they should take to applying.¹¹⁴
- 9.24 One barrister suggested, historically, probably few barristers applied, as the tribunal was thought not to be a way to access the High Court. However, they thought this has now possibly changed with the appointment of Sarah Falk to the Chancery Division.¹¹⁵ We also note the appointment of Ian Huddleston, as a judge of the High Court of Northern Ireland in 2019 and that Ashley Greenbank, Jonathan Richards and Robin Vos are now Deputy High Court Judges. The interviewee also noted that given the financial rewards at the tax Bar, at any given time it is always tempting to say ‘another year’ before going to the bench.¹¹⁶
- 9.25 One respondent expressed concern over former HMRC employees being appointed as FTT judges.¹¹⁷ As noted in the TLRC’s 1996 report, we do not regard this as a concern, as tax practitioners in private practice sit in fee-paid positions while they or their firms represent client in disputes with HMRC. It has never been suggested that ‘the judgement of such practitioners is tainted by any potential conflict of interest, or by a professional perspective derived from their experience of advising only taxpayers’.¹¹⁸ A respondent also expressed a concern of fee-paid judges being drawn from solicitors in private practice, as they then adjudicated on disputes where clients were represented by ‘rival’ firms.¹¹⁹ For similar reasons, we do not regard this as an issue.

¹¹⁴ See Appendix A [A.7.3]–[A.7.4].

¹¹⁵ Interview with Barrister O.

¹¹⁶ See Appendix A [A.7.5].

¹¹⁷ Solicitor X.

¹¹⁸ Tax Law Review Committee (2006), *Interim Report on The Tax Appeals System*, London: Institute for Fiscal Studies, [8.13], <https://www.ifs.org.uk/comms/comm58.pdf>.

¹¹⁹ Solicitor X.

- 9.26 We note HM Government's plan to increase the mandatory retirement age of judges from 70 to 75.¹²⁰ We anticipate that this might somewhat ease the pressure on judicial resource, as some judges and members that were due to retire may choose to stay on for a number of years. It also increases the pool from which judges and members may be recruited.¹²¹ As such, we welcome this change.
- 9.27 *Due to the highly technical nature of tax law, adjudication of tax disputes requires substantially different skills to many other areas of law. It can more easily be done with some prior familiarity with tax law. We therefore recommend that any appointment of judges to the FTT (Tax) should, unless the judges are only to be ticketed to hear routine matters such as penalty appeals, be in a tax-specific appointments exercise that places specific emphasis on technical ability as a recruitment criterion. Given the possible difficulties of recruiting tax professionals, we consider that, as with the 2014 recruitment exercise, there may be a benefit in the Lord Chancellor waiving the usual requirement for salaried appointments to have had previous fee-paid service in judicial office. However, we acknowledge that any such applications would require especially careful scrutiny.*

¹²⁰ Ministry of Justice (March 2021), 'Press release: Judicial retirement age to rise to 75', <https://www.gov.uk/government/news/judicial-retirement-age-to-rise-to-75#:~:text=Judges%2C%20magistrates%2C%20and%20coroners%20will,increase%20their%20mandatory%20retirement%20age.&text=The%20move%2C%20which%20will%20raise,these%20rules%20in%2027%20years>.

¹²¹ The JAC's view is that 'the age at which someone is appointed should allow for a reasonable length of service, which is usually between 3 and 5 years before retirement': JAC, 'Am I eligible?' <https://judicialappointments.gov.uk/am-i-eligible/>.

10 Costs

Introduction

- 10.1 Often respondents to our survey cited costs as a major impediment to access to justice.¹²²
- 10.2 With any recommendation on costs we note, and agree with, the view of the Tax Appeals Modernisation Stakeholder Group, that:

‘The Tribunals Procedure Committee is empowered to make rules for the new Tax Chamber which would cover a costs regime. However, it is not feasible for any proposed regime not to be supported by Ministers, both Treasury and MoJ.’¹²³

- 10.3 The 2011 report of the Costs Review Group (chaired by Warren J, who was then President of the UT) made a number of recommendations, which remain unimplemented. In this part of the report, we discuss those unimplemented recommendations of the Costs Review Group that either specifically relate to tax appeals or are of particular relevance to tax appeals. We consider that they are sensible proposals that would improve access to justice. We endorse these limited recommendations and hope that HM Government would consider supporting them in order to better promote access to justice in tax appeals.

Cost-shifting

- 10.4 Cost-shifting is the procedure under which the losing party is generally responsible for the legal fees incurred by the successful party in litigation. Cost-shifting generally applies in courts, as it is considered to promote access to justice and legal representation.¹²⁴ Conversely, before the tribunals, cost-shifting is generally not

¹²² See Appendix A [A.8.1].

¹²³ Tax Appeals Modernisation Stakeholder Group, Meeting Minutes (13 February 2008) at [11.2], https://web.archive.org/web/20090123220033/http://www.financeandtaxtribunals.gov.uk/Documents/taxAppealsModernisation/StakeholderMeeting_13Feb08_Version10.pdf. An internal footnote to this quoted passage states: ‘TCE Act 2007 Schedule 5, 28(3). Rules made by the Committee must be signed by a majority of the members of the Committee and submitted to the Lord Chancellor, who may allow or disallow Rules so made.’

¹²⁴ Jackson LJ (May 2009), ‘Should the cost shifting rule be modified?’, in *Review of Civil Litigation Costs: Preliminary Report*, Vol. 2, Chapter 46, pp. 467–76, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf>; Jackson LJ (December 2009), ‘Appeals’, in *Review of Civil Litigation Costs: Final Report*, Chapter 34 [3.3], p. 340, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf>.

thought to be something that would promote access to justice. The distinction is made on the following basis.

‘First, tribunals are intended to be user-friendly bodies before which parties can safely appear unrepresented. Secondly, tribunals are expected to possess relevant expertise, so that they need less assistance from the parties in arriving at correct decisions. Thirdly, in the context of tribunals the cost shifting rule is generally seen as a deterrent for parties, in other words as a rule which inhibits (rather than promotes) access to justice.’¹²⁵

10.5 With regard to the third point, that cost-shifting is generally seen as a deterrent, this is said to be so because the parties to tribunal disputes are not on equal footing, some cannot afford representation, and that the costs of losing litigation could bring financial ruin to the paying party.¹²⁶ These considerations will not have uniform application in all tax cases before the FTT. For example, many factually and legally complex cases could not be successfully presented without legal representation. Also, in cases where both parties are represented, the costs in tax appeals are generally highly asymmetric, with HMRC’s costs being substantially less than the taxpayer’s costs.¹²⁷ Hence, one would expect a represented risk-neutral taxpayer, who considered themselves to have an even chance of success, to prefer a cost-shifting regime. Although, one would expect that most individual taxpayers will not be risk-neutral.

10.6 We note that, prior to tribunal reform, the VAT and Duties Tribunal had the power to award costs. However, HM Customs & Excise applied the ‘Sheldon principle’ and so did not seek costs when they were successful. Sir Stephen Oliver QC suggested at the Tax Appeals Modernisation Stakeholder Group that:

‘there were a middle-ground of medium-sized appeals where appellants could be deterred unless costs were available. He gave these examples – appeals by charities, the appeal by the husband and wife in Arctic Systems and disputes over zero rating of appliances for the disabled. For the Tribunal to have the power to award costs in such a case, however, would need an assurance that

¹²⁵ Jackson LJ (May 2009), ‘Should the cost shifting rule be modified?’, in *Review of Civil Litigation Costs: Preliminary Report*, Vol. 2, Chapter 46, [3.5], p. 471, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol2-low.pdf>.

¹²⁶ Costs Review Group (December 2011), *Costs in Tribunals: Report by the Costs Review Group to the Senior President of Tribunals*, [11]–[12], p. 5, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/costs-review-group-report-tribunals-dec-2011.pdf>.

¹²⁷ An interviewee (Solicitor X) commented that he advises clients, as a rough estimate, that HMRC’s costs usually amount to around one-third of the taxpayer’s costs. The main reason for this is that the government is able to set the hourly rates of the counsel it instructs on the Treasury Panel (so called ‘Panel Rates’) and these have not changed much in many years. Taxpayers do not have access to such preferential rates.

*HMRC would not itself seek costs. From the Tribunal's point of view, costs should ensure adequate representation.'*¹²⁸

- 10.7 When tribunal reform took place, HMRC decided not to apply the Sheldon principle to any cases in the new tribunal structure.¹²⁹ Whilst we accept the Sheldon principle will have promoted access to justice, we cannot envisage its return.

Cost-shifting in the FTT

- 10.8 In all cases, the FTT may make an order either for wasted costs or for costs if it 'considers that a party or their representative has acted unreasonably in bringing, defending or conducting the proceedings.'¹³⁰
- 10.9 *As discussed above,*¹³¹ *we support the recommendation of the Costs Review Group*¹³² *that the tribunal rules should expressly specify that failure to comply with directions is necessarily, of itself, unreasonable conduct, which can potentially lead to a costs sanction.*
- 10.10 One respondent suggested that there should be cost consequences when HMRC amends its case at the tribunal.¹³³
- 10.11 We note that in some cases this has indeed led to a partial cost-award, as the conduct was held to be 'unreasonable',¹³⁴ but the FTT has sometimes declined to award costs in such circumstances.¹³⁵ We consider that the present rules provide sufficient flexibility to allow the FTT to do justice in individual cases.
- 10.12 Otherwise, in the FTT, the rule is that there is generally no cost-shifting, so a party must bear their own legal costs regardless of whether they win or lose. However, for cases allocated to the 'complex' category, a cost-shifting regime potentially applies, unless the taxpayer elects out of it,¹³⁶ so the losing party may be responsible for the legal costs of the winner. It is unclear how frequently adverse costs are awarded.

¹²⁸ Sir Stephen Oliver QC, in Tax Appeals Modernisation Stakeholder Group, Meeting Minutes at [4.2] (26 September 2007), https://web.archive.org/web/20090123215949/http://www.financeandtaxtribunals.gov.uk/Documents/taxAppealsModernisation/StakeholderGroup_minutes_26-09-07v2.pdf.

¹²⁹ Tax Appeals Modernisation Stakeholder Group, Paper 1, Update on Costs (11 December 2007) <https://web.archive.org/web/20090123220036/http://www.financeandtaxtribunals.gov.uk/Documents/taxAppealsModernisation/Paper1Costs11Dec2007v1.0.pdf>.

¹³⁰ First-tier Tribunal (Tax Chamber) Rules, r.10(1)(a).

¹³¹ See [4.40].

¹³² Costs Review Group (December 2011), *Costs in Tribunals: Report by the Costs Review Group to the Senior President of Tribunals* [69], p. 22, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/costs-review-group-report-tribunals-dec-2011.pdf>.

¹³³ See Appendix A [A.8.5].

¹³⁴ *Rokit Ltd v HMRC* [2017] UKFTT 618 (TC).

¹³⁵ *John Schofield v HMRC* [2012] UKFTT 673 (TC).

¹³⁶ First-tier Tribunal (Tax Chamber) Rules, r.10(1)(c).

Cost-shifting in the UT

- 10.13 In tax appeals, the UT has a cost-shifting regime.¹³⁷ This is a tax-specific exception to the general rule, applicable in other chambers of the UT, that it only awards costs if the tribunal whose decision is being appealed had the right to award costs.¹³⁸
- 10.14 Many respondents to our survey suggested that the adverse costs regime in the UT acted as a deterrent to the taxpayer appealing, and included, in some cases, encouraging taxpayers to abandon appeals where they were successful in the FTT.
- 10.15 When considering costs in other chambers of the UT, the Costs Review Group noted the following.

‘If permission to appeal is given to the public body which was the respondent below, there are good arguments for protecting the individual citizen from any liability to pay the appellant’s costs, absent unreasonable conduct. In particular, if the individual, having succeeded at first-instance, were to be faced with an appeal in respect of which he would be at risk as to costs, he might well be deterred from appearing on the appeal and seeking to uphold the decision appealed against. That is the same, or a very similar, denial of access to justice as would be a costs-shifting regime at first instance. There is therefore a powerful argument for saying that the individual should not be exposed to the risk as the costs of the appellant body on appeal even if the appeal is successful, particularly where the public body’s reason for appealing is to establish a wider point that goes beyond the case in hand.’¹³⁹

- 10.16 The Costs Review Group went on to observe the following.

‘Where the individual citizen was unsuccessful at first instance, matters may appear rather differently. Thus it can be argued that the individual has been provided with a forum for redress. He has had his “day in court” (or, rather, in the tribunal) and should accept the decision. Cases of obvious error can be dealt with pursuant to a review without the need for an appeal at all. Subject to that, it can be argued, the individual has the right to appeal, if he can obtain permission, but he should do so at risk of being liable for the costs of the appeal: there is no reason why he should put the respondent to expense which is irrecoverable if the original decision is upheld. Further, if the appellant individual succeeds in his appeal, he ought to have the opportunity of receiving

¹³⁷ The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), r.10(1)(a).

¹³⁸ The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), r.10(1)(b).

¹³⁹ Costs Review Group (December 2011), *Costs in Tribunals: Report by the Costs Review Group to the Senior President of Tribunals* [117], p. 38, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/costs-review-group-report-tribunals-dec-2011.pdf>.

his costs of the appeal. These factors point to introducing a costs-shifting regime where it is the individual who appeals.’¹⁴⁰

- 10.17 Applying these principles to appeals from the Tax Chamber, the Costs Review Group recommended that, for cases other than complex cases, where the taxpayer was successful in the FTT, the taxpayer should be able to opt out of the cost-shifting regime in the UT.¹⁴¹ This was consistent with their general recommendation that ‘in a citizen v State appeal, the citizen should be able to opt into a general costs shifting regime when he has been the successful party at first instance.’¹⁴² Where the taxpayer was unsuccessful before the FTT, they recommended that cost-shifting should continue to apply.
- 10.18 In complex cases where the taxpayer had not opted out of cost-shifting in the FTT, regardless or not of whether they were successful in the FTT, the Costs Review Group thought there to be ‘no reason why the UT should not also have a general power to make a costs order, and that is the current position which we do not suggest should be changed.’¹⁴³
- 10.19 In complex cases where the taxpayer had opted out of cost-shifting and was unsuccessful before the FTT, the Costs Review Group thought ‘there is little to be said for maintaining the costs free regime that applied in the Tax Chamber as the result of the opt-out. If the taxpayer wishes to challenge the decision of the Tax Chamber in a Complex case, we consider that it is right that he should be at risk of an adverse costs order (subject always to the Rees practice in appropriate cases).’¹⁴⁴ Accordingly, the existing rules were thought appropriate in these circumstances.
- 10.20 However, the Costs Review Group recommended that the rules be amended in complex cases where the taxpayer had opted out of cost-shifting in the FTT and also been successful before the FTT. In such circumstances, they noted the following.

‘The taxpayer who has opted out of the costs-shifting regime in the Tax Chamber has taken a view reflecting his own approach to risk and reward; he has effectively decided that access to justice for him is achieved only by opting out of the costs-shifting regime. One view is that it is only right that the taxpayer should be able to appear before the UT to defend the decision of the Tax Chamber without thereby exposing himself to the risk of paying HMRC’s costs.’¹⁴⁵

¹⁴⁰ Ibid, [120], p. 39.

¹⁴¹ Ibid, [123], p. 40.

¹⁴² Ibid, [121], p. 40.

¹⁴³ Ibid, [124], p. 40.

¹⁴⁴ Ibid, [126], p. 41.

¹⁴⁵ Ibid, [127], p. 41.

10.21 The Costs Review Group noted that this was not HMRC's view, but nonetheless recommended that:

*'[w]here a case is allocated as Complex and the taxpayer has opted out of the costs-shifting regime, and where the taxpayer is successful in the Tax Chamber, there should be a costs-shifting regime in the T&CC but with the taxpayer again having the right to opt out of it.'*¹⁴⁶

10.22 We note that in 2018 the CIOT specifically endorsed the Costs Review Group's proposals in relation to the UT, writing to the President of the Upper Tribunal (Tax and Chancery Chamber) to that effect.¹⁴⁷

10.23 *We too support the proposed reforms to costs in the UT suggested by the Costs Review Group. We therefore recommend that the Tribunal Procedure (FTT) Rules should be amended so that:*

10.23.1 *for cases before the UT where the taxpayer was successful in the FTT, other than cases allocated to the complex category in the FTT, cost-shifting should not apply unless the taxpayer chooses to elect into the cost-shifting regime in the UT;*

10.23.2 *for cases before the UT that were allocated to the complex category in the FTT, but where the taxpayer had elected out of cost-shifting before the FTT, cost-shifting should not apply in the UT if (i) the taxpayer was successful before the FTT and (ii) the taxpayer does not elect into cost-shifting before the UT.*

Rees practice

10.24 In limited circumstances, where cost-shifting applies, HMRC may agree not to seek a cost award if they are successful. This is known as the 'Rees practice', originating from a Parliamentary written statement by Peter Rees, then Minister of State at the Treasury, in 1980 in which he said:

'[t]he general rule in the appeal courts is that the losing party risks having to pay the other side's costs, and I do not think it would be right to treat tax cases differently as a matter of course. However, both revenue departments exercise their discretion on matters of costs, and are willing in appropriate circumstances, and in particular where it is they who are appealing against an adverse decision, to consider waiving their claims to costs or making other arrangements. Influential factors include the risk of financial hardship to the other party and whether the case is one of significant interest to taxpayers as a whole, turning on a point of law in need of clarification. If the revenue departments are to come to an arrangement of this nature, they would expect

¹⁴⁶ Ibid, [132(c)], p. 42.

¹⁴⁷ CIOT (24 October 2018), 'Costs in the Upper Tribunal', <https://www.tax.org.uk/policy-technical/submissions/costs-upper-tribunal>.

*to do so in advance of the hearing and following an approach by the taxpayer involved.*¹⁴⁸

- 10.25 It was confirmed by Stephen Timms, then Financial Secretary to the Treasury, in 2009 that the Rees practice would continue to apply in the UT.¹⁴⁹ HMRC's published guidance states that it is 'rare' for the Rees practice to be applied.¹⁵⁰
- 10.26 One respondent to our survey observed that 'it is not unusual for HMRC to apply the Rees Practice restrictively.'¹⁵¹
- 10.27 In his 2009 review of civil costs, Jackson LJ noted that the application of the Rees practice was 'notoriously haphazard'.¹⁵²
- 10.28 Similarly, in their 2011 review of tribunal costs for the Senior President of Tribunals, the Costs Review Group noted that 'HMRC continue generally to apply'¹⁵³ the Rees practice.

*'However, unfortunately, there are cases where HMRC have declined to invoke the Rees practice where an impartial observer might think that it should have been. In one case which has been brought to our attention, HMRC declined to invoke the practice and, having lost in the Court of Appeal, sought (and obtained) leave to appeal to the House of Lords on the basis that a point of law of general public importance was involved. The taxpayers were ultimately successful. But they had to fund their litigation by making an appeal (through tax professionals) for support in meeting their costs. The need for the Rees practice is, by its very existence, recognised by HMRC. A case such as the one we have just mentioned indicates that in practice a deserving case can fail to attract an application of the practice.'*¹⁵⁴

- 10.29 This led the Costs Review Group to recommend that the Rees practice should be formalised within the tribunal's procedure rules, making provision for a taxpayer to

¹⁴⁸ HC Deb 12 March 1980 vol 980 c572W, <https://api.parliament.uk/historic-hansard/written-answers/1980/mar/12/high-court-costs>.

¹⁴⁹ HL Deb 30 March 2009 vol 709, <https://hansard.parliament.uk/lords/2009-03-30/debates/0903307000122/CourtAndTribunalCosts>.

¹⁵⁰ HMRC internal manual: Appeals reviews and tribunals guidance: 'First-tier and Upper Tribunals: The tribunal hearing: Requests for HMRC to waive costs or fund customer's costs where there is a further appeal – Rees Practice' (Rees Practice), <https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg8670>.

¹⁵¹ Solicitor K.

¹⁵² Jackson LJ, *Review of Civil Litigation Costs: Preliminary Report* Vol.1 (May 2009) Chapter 33 'Chancery Litigation' [3.18](ii), p. 292, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Guidance/jackson-vol1-low.pdf>.

¹⁵³ Costs Review Group (December 2011), *Costs in Tribunals: Report by the Costs Review Group to the Senior President of Tribunals* [64], p. 20, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/costs-review-group-report-tribunals-dec-2011.pdf>.

¹⁵⁴ *Ibid*, [75], p. 24 (an internal footnote to this passage identifies the relevant case as *Jones v Garrett* [2007] UKHL 35).

apply for an appropriate order in defined circumstances where HMRC declines to apply the Rees practice.¹⁵⁵

10.30 Whist the Costs Review Group’s proposal has not been implemented, we note that there is subsequent case law in the UT, which suggests that that the UT has the same jurisdiction as the High Court to make protective costs orders,¹⁵⁶ although we are not aware of any protective costs orders having been made in tax cases. We consider that formalisation of the practice in the Tribunal Rules might result in more protective costs orders being made, thereby facilitating access to justice.

10.31 *We support the proposal of the Costs Review Group to recommend that the Rees practice should be formalised within the tribunal’s procedure rules, making provision for a taxpayer to apply for an appropriate order in defined circumstances where HMRC declines to apply the Rees practice.*

Pro bono representation

10.32 HMRC guidance says that it would be ‘extremely rare’ for HMRC to voluntarily fund a taxpayer’s costs but:

‘it may occasionally be beneficial for HMRC to pay the other party’s costs in order to make sure that the case is fully argued. If the customer does not contest the appeal, any decision in HMRC’s favour will have less value as a precedent as it has not been fully argued.’¹⁵⁷

10.33 Where an appeal raises a point of wider public interest, but the taxpayer either does not have the resources to pursue it, or the amount of tax in dispute makes it uneconomical for the taxpayer to pursue litigation, it is probably more frequent for the taxpayer to receive pro bono assistance from tax barristers, rather than for HMRC to fund the litigation. Such pro bono assistance was commented on by several respondents, as follows.

‘The Tribunal does try to deal with [equality of arms] at least at the UT level by asking the RBA [Revenue Bar Association] to provide pro bono counsel in technical cases, and I think this should be used more.’¹⁵⁸

‘Litigants in person often need plenty of assistance in presenting their cases. I had one client for whom I acted pro bono who had filed an appeal but had no understanding of what he would need to do in terms of preparation or

¹⁵⁵ Ibid, [75], p. 24.

¹⁵⁶ *Drummond v Revenue and Customs Commissioners* [2016] UKUT 221 (TCC), [2016] STC 1870; *Drummond v Revenue and Customs Commissioners* [2016] UKUT 369 (TCC).

¹⁵⁷ HMRC internal manual: Appeals reviews and tribunals guidance: ‘First-tier and Upper Tribunals: The tribunal hearing: Requests for HMRC to waive costs or fund customer’s costs where there is a further appeal – Rees Practice’ (Paying the customer’s costs), <https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg8670>.

¹⁵⁸ Survey response of Barrister H.

presenting his appeal to the Tribunal. It was only after I started acting for him that HMRC clarified their case and he was able to comply with all the directions with my assistance.’¹⁵⁹

‘I have experience of cases where the costs issue was resolved by my volunteering to act on a pro bono basis then making an application for each party to bear their own costs in advance of the UT hearing. But for that, the party that I represented would not have taken part in the UT. I do not consider it a fair system where that seems to be the only way to obtain costs protection for one’s clients bearing in mind that HMRC, to the best of my knowledge, have never been in such a position.’¹⁶⁰

10.34 We note that the Costs Review Group also recommended that section 194 of the Legal Services Act 2007¹⁶¹ be extended to the tribunals so that (like the courts at present), where a party to proceedings (‘P’) has a representative (‘R’) who acts free of charge in whole or in part, the tribunal would have the power to order any person to make a payment to the Access to Justice Foundation in respect of R’s representation of P.¹⁶²

10.35 We note the vital role of pro bono representation in tax cases. It obviously assists access to justice in the particular case. But, more generally, it facilitates access to justice and the appropriate development of the law, ensuring that cases that will become important precedents are properly argued. This is especially so where the taxpayer is not well resourced, or where the amount of tax in issue is insufficient to justify the costs of litigation. We consider that the availability of pro bono costs orders before the tax tribunals would encourage tax professionals to further undertake pro bono cases.

10.36 ***Accordingly, we recommend that section 194 of the Legal Services Act 200 be extended to the tribunals, so they may make pro bono costs orders.***

¹⁵⁹ Survey response of Barrister C.

¹⁶⁰ Survey response of Barrister A.

¹⁶¹ See <https://www.legislation.gov.uk/ukpga/2007/29/section/194>.

¹⁶² Costs Review Group (December 2011), *Costs in Tribunals: Report by the Costs Review Group to the Senior President of Tribunals* [175], p. 56, <https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/costs-review-group-report-tribunals-dec-2011.pdf>. With regard to pro bono costs orders, see Access to Justice Foundation, Pro Bono Costs Orders <https://atjf.org.uk/pro-bono-costs-orders>.

11 Other aspects of access to justice

Litigants in person and equality of arms

- 11.1 It was suggested by survey respondents that a lack of ‘equality of arms’ for self-representing taxpayers put them at a structural disadvantage. Some respondents cited the difficulties for litigants in person negotiating the tribunal process and presenting their case.¹⁶³
- 11.2 We note that, where litigants in person appear before the FTT, many judges do adopt a more inquisitorial approach.¹⁶⁴ We think this sensible and hope that it reduces the taxpayer’s disadvantage to some degree.
- 11.3 We note that the FTT’s website could potentially be improved to assist litigants in person. It could usefully provide a simple guide to the processes involved in making an appeal, and about what to expect on the day of a hearing. Perhaps the website could also offer litigants in person guidance as to the sort of evidence they would be expected to produce in the most common types of cases, such as penalty appeals.
- 11.4 We also consider that the FTT website might host short video guides, potentially including simulations of video and face-to-face hearings, which could help litigants in person understand what is expected of them and make the prospect of a hearing less daunting. Perhaps organisations such as the RBA or CIOT could assist with the production of such videos.
- 11.5 We also note the success of the CLIPS,¹⁶⁵ established by the Chancery Bar Association, which provides pro bono advice and advocacy to litigants in person on the day of their hearing. The scheme operates as a ‘duty’ scheme, whereby one or two barrister volunteers make themselves available at the High Court each day during the legal term. Such representation can clearly benefit the litigant as well as assisting the court, so a hearing that would last several hours can be held in a greatly reduced time. During the pandemic, the scheme has operated online, with litigants in person being directed to the scheme by the court clerk.

¹⁶³ See Appendix A [A.9.2].

¹⁶⁴ Thomas, R. (2020), ‘Chapter 14: Tax Tribunals and Justice for Litigants in Person’ in Dominic de Cogan and Peter Harris (eds), *Tax Justice and Tax Law: Understanding Unfairness in Tax Systems*, Oxford: Hart Publishing.

¹⁶⁵ See <https://www.chba.org.uk/news/clips-chancery-bar-litigant-in-person-support-scheme-launch>; see also <https://www.combar.com/members-area/clips-pro-bono-schemes/>.

- 11.6 We note that establishing and administering such a scheme for the FTT would require substantial resources, although it would be of great benefit to litigants in person. We note that a particular difficulty might be obtaining insurance for the volunteers, as this is especially costly in revenue matters. However, an advantage that any such scheme would have is that rights of audience for the FTT are not as circumscribed as for the High Court, so volunteers could include many tax professionals who are not barristers.
- 11.7 *We recommend that the FTT consider how its website can be improved to assist litigants in person. Changes might include provision of a simple guide to the processes involved in making an appeal, about what to expect on the day of a hearing and about what sort of evidence the FTT expects taxpayers to produce in the most common types of cases. Perhaps the FTT website could also host short videos simulating hearings, which may make the experience less daunting for litigants in person.*
- 11.8 *We query whether there might be professional interest in organising a ‘duty’ scheme to provide advice to litigants in person, such as the CLIPS scheme organised by the Chancery Bar Association.*

Hearings in private and anonymised decisions

- 11.9 One interviewee noted how, before the Special Commissioners, it was easier for hearings to be held in private and for an anonymised decision to be issued than it now is before the FTT. They felt that this could limit access to justice, as a taxpayer may prefer to abandon their appeal rather than expose their family arrangements to scrutiny.¹⁶⁶
- 11.10 Another interviewee had experience with a case, where the taxpayer did not want issues concerning their children to be discussed at a public hearing. The tribunal refused to hold a hearing in private, citing *Peter Andrea v HMRC*.¹⁶⁷ The interviewee thought *Andrea* to be distinguishable due to the involvement of children. The interviewee noted the tribunal’s decision potentially limited access to justice.¹⁶⁸
- 11.11 We note that there is a strong public interest in public hearings and in published decisions.¹⁶⁹ Many areas of tax law involve highly fact-sensitive judgments, anonymisation of which may reduce their value as a precedent.¹⁷⁰ This public interest

¹⁶⁶ See Appendix A [A.9.3].

¹⁶⁷ *Peter Andrea v HMRC* [2017] UKFTT 850 (TC).

¹⁶⁸ See Appendix A [A.9.4].

¹⁶⁹ *Revenue and Customs Commissioners v Banerjee (No 2)* [2009] EWHC 1229 (Ch), [2009] STC 1930 at [14] and [22], per Henderson J.

¹⁷⁰ *Revenue and Customs Commissioners v Banerjee (No 2)* [2009] EWHC 1229 (Ch), [2009] STC 1930 at [15], per Henderson J.

weighs very strongly and for a court it will only be in ‘truly exceptional circumstances’¹⁷¹ that a taxpayer’s rights to confidentiality and privacy would prevail in the balancing exercise that a court performs. However, ‘only very rarely’¹⁷² would there be the need for a decision to identify a child.

11.12 We consider that the Special Commissioners were arguably more willing to anonymise decisions than the FTT presently is, although even before the Special Commissioners the taxpayer would generally lose anonymity if the decision was appealed. We consider that this was justifiable based on case law. The public interest in the publication of a non-anonymised decision of the FTT will be somewhat lower than in the publication of the judgment of a court, because the FTT does not create binding precedent. Hence, in conducting the balancing exercise, it may be appropriate for the FTT to grant anonymity more readily than the UT.

11.13 We also note that many decisions of the FTT are not published. Some (we assume a small proportion) of those unpublished decisions appear to have decided novel legal issues.¹⁷³ Conversely, many published decisions seem to add very little of substance to the body of case law. We understand that the present approach is that a full (as opposed to summary) decision is given where the weight, complexity or novelty of the case, and the likelihood of an appeal, require it or when the decision includes points that merit being seen more widely. All full decisions are published unless a judge directs, exceptionally, that it should not be published.

11.14 *We suggest that the FTT considers issuing guidance to judges on appropriately balancing considerations of privacy and open justice, especially in cases that involve factual evidence concerning minors.*

11.15 *We suggest that the FTT considers issuing a policy on which decisions are published.*

Paper appeals and video hearings

11.16 We note that a large proportion of the FTT’s work is currently paper appeals. We consider that allowing taxpayers the alternative of a video hearing would potentially allow them to present their case more effectively and for the FTT to get a better sense

¹⁷¹ *Revenue and Customs Commissioners v Banerjee (No 2)* [2009] EWHC 1229 (Ch), [2009] STC 1930 at [34], per Henderson J.

¹⁷² *Revenue and Customs Commissioners v Banerjee (No 2)* [2009] EWHC 1229 (Ch), [2009] STC 1930 at [15], per Henderson J.

¹⁷³ See, for example, *Drummond v Revenue and Customs Commissioners* [2016] UKUT 221 (TCC), [2016] STC 1870 at [17], where Judge Sinfeld notes that whether the UT had the power to grant a protective costs order had been determined in an earlier unpublished decision, the reasoning of which he agrees with.

of the evidence. We also note that in hearings involving litigants in person the FTT often adopts – to the benefit of taxpayers – a more inquisitorial approach.¹⁷⁴

11.17 We consider that this might be feasible without unduly increasing the workload of the FTT. So on a day where a judge presently determines four paper cases, they might hold four short video hearings. Whilst face-to-face hearings might significantly encroach on taxpayers’ time (requiring them to take a day of work to contest a £100 penalty), video short hearings would not as readily impinge into a taxpayer’s day.

11.18 There are some cases that are legally complex, but involve no dispute on the facts. During the COVID-19 pandemic, it has become possible for such appeals to be dealt with on paper. Experience in foreign jurisdictions¹⁷⁵ would suggest that this can be an effective and comparatively cheap method of resolving tax disputes – although it does particularly benefit from the judge having specialist expertise. Accordingly, there may be merit in retaining this, at the option of both parties, post-pandemic.

11.19 ***We suggest that the FTT may wish to consider whether taxpayers could be given an option of short video hearings instead of paper hearings, which might allow taxpayers to present their case more effectively.***

Jurisdictional issues

11.20 The limited access to public law challenges in the FTT was also cited by a survey respondent as a limitation on access to justice:

*‘Typically where the taxpayer would have a reasonable public law challenge but where, even in the context of an appealable decision, the case law suggests that public law arguments cannot be run in the FTT. Most taxpayers are far too afraid to contemplate JR [Judicial Review].’*¹⁷⁶

11.21 We note that the Economic Affairs Committee of the House of Lords recommended that the FTT should have the power to conduct judicial review proceedings in respect of HMRC decisions, because the costs of going to the High Court are ‘prohibitively expensive for most taxpayers’.¹⁷⁷ We note that in the 1996 report on appeals, we recommended that tax judicial reviews be heard by the same High Court judges who heard statutory appeals.¹⁷⁸ However, given HM Government’s general wish to

¹⁷⁴ Thomas, R. (2020), ‘Chapter 14: Tax Tribunals and Justice for Litigants in Person’ in Dominic de Cogan and Peter Harris (eds), *Tax Justice and Tax Law: Understanding Unfairness in Tax Systems*, Oxford: Hart Publishing.

¹⁷⁵ See a Dutch national report by van Hout, D. (2020), in P. Pistone (ed.), *Tax Procedures*, EATLP International Tax Series, Volume 18, Chapter 19, Amsterdam: IBFD.

¹⁷⁶ Survey response of Barrister B.

¹⁷⁷ Economic Affairs Committee (4 December 2018), *The Powers of HMRC: Treating Taxpayers Fairly* (HL 242) [109].

¹⁷⁸ Tax Law Review Committee (2016), *Interim Report on The Tax Appeals System*, London: Institute for Fiscal Studies, [10.15], p. 98, <https://www.ifs.org.uk/comms/comm58.pdf>.

restrict judicial review,¹⁷⁹ we consider any changes to judicial review are not, at present, politically feasible.

- 11.22 The lack of jurisdiction of the FTT in PAYE matters,¹⁸⁰ specifically HMRC's discretion to choose to disapply the PAYE regulations and collect tax from the employee, was also cited as an example of a limitation on access to justice.

¹⁷⁹ Ministry of Justice (18 March 2021), 'Press Release: Judicial Review consultation launched', <https://www.gov.uk/government/news/judicial-review-consultation-launched>.

¹⁸⁰ *Hoey v HMRC* [2019] UKFTT 489 (TC); *Philip Higgs and others v HMRC* [2020] UKFTT 117 (TC). See also Richard Thomas, 'Stephen Hoey v HMRC and Philip Higgs and others v HMRC: section 684(7A) ITEPA – a load of Hoey?' [2020] BTR 283–95.

12 Digital bundles

- 12.1 Survey respondents were asked how the tribunal processes could be improved. Aside from issues related to COVID-19 (covered in Appendix D), and (hopefully) teething issues associated with technology, the major issue identified by survey respondents was that they felt the process could be improved through the use of digital bundles and an automated online filing process. It was felt that this would moderate many of the negative experiences users have with the FTT administration.
- 12.2 It is expected this will be remedied by 2022, when the Reform project should provide an online system for parties to log into.

Appendix A: report on survey and interviews

A.1 Introduction

A.1.1 The narrative survey responses detailed in this report focus on how the FTT could be improved. However, it is important to acknowledge at the outset the positive responses regarding experience of the FTT. Of the 68 respondents who answered the question ‘Do you think the pre-COVID-19 tribunal process could have been improved?’, 10 (15%) thought it could not have been improved. Indeed, even among respondents who thought the FTT could be improved, there was recognition of the difficulties it faced and how well it coped with them. Such comments included:

‘Whilst many of the comments that I have made may seem critical, it is recognised that the Tribunal is responsible for processing and managing vast numbers of appeals, which vary considerably in type, complexity and size. There are aspects of the system that I consider could be improved, but they need to be considered in that context.’¹⁸¹

‘The FTT generally provides a good forum for access to justice.’¹⁸²

‘I think there is a real attempt to produce a sense of balance and fairness.’¹⁸³

A.1.2 We note at the outset, therefore, that the views we have gathered represent a particular category of user, that is, the repeat user. The vast majority of ‘users’ will be one-time-only users (i.e. litigants in person who may well be satisfied or not accordingly to the outcome of their case). Even those who advise daily on tax (accountants, CTAs, etc.) will have only very occasional experience (and more likely none) of the FTT.

A.1.3 A major concern for the research participants was delay. Of the 50 respondents to our survey who answered the question ‘Have you experienced delay in the tribunal process?’, 45 (90%) said they had experienced delay. The respondents attributed the delays to several causes: (i) delay by tribunal administration; (ii) delay by judges in issuing decisions after a hearing delay; (iii) delay through a lack of judicial availability and listing issues; (iv) delay through poor case management; (v) delay due to the parties’ conduct; and (vi) delay due to four levels of appeal. As well as

¹⁸¹ Survey response of Solicitor K.

¹⁸² Survey response of Barrister F.

¹⁸³ Interview with Barrister R.

identifying the tribunal administration as a cause of delay, there were further concerns with how the administration functioned. Notably, FTT users identified both the lack of access to and communication from the administration team.

- A.1.4 Some tribunal users also reported issues with the conduct of hearings and decisions. In particular, respondents identified that judicial involvement in hearings could be improved if judges were more interventionalist. Many interviewees cited the lack of active participation as a problem in tribunals. Indeed, some interviewees inferred that those judges were either not prepared for the hearing or lacked the necessary skills for that case. Interviewees expressed a variety of opinions on how this could be addressed. The use of tribunal members was seen as a positive contribution by several interviewees. It was thought that tribunal members could add experience that tribunal judges might be lacking. This concern for adequate experience was repeated in discussion of the allocation of judges to cases and the recruitment of judges.
- A.1.5 Costs were cited as a major impediment to access to justice. The costs of professional fees associated with tribunal appeals was a significant concern. Some respondents suggested that the taxpayer should be able to recover costs from HMRC in the FTT if they are successful. Others cited that the cost-shifting regime in the UT acted as a deterrent to the taxpayer appealing, including in some cases encouraging taxpayers to abandon appeals where they were successful in the FTT. Likewise, respondents cited other concerns about access to justice, regarding litigants in person and anonymised decisions.
- A.1.6 Of the 40 respondents who answered the question ‘Do you think the tribunal processes introduced as a result of the COVID-19 pandemic could be improved?’, nine (23%) thought it could not have been improved.

A.2 Delay

Introduction

- A.2.1 Of the 50 respondents to our survey who answered the question ‘Have you experienced delay in the tribunal process?’, 45 (90%) said they had experienced delay. Those respondents who had experienced delay were then asked, ‘Which of the following have you experienced to be a cause of such delay?’. Respondents were given the choices of ‘HMRC’, ‘the taxpayer’, ‘legal representatives’, ‘the tribunal’ and ‘other’. Respondents were able to choose more than one category as the cause of delay. Of the 42 respondents who answered this question, 38 (90%) identified the FTT as a cause of delay, 39 (69%) identified HMRC, 14 (33%) identified the taxpayer and 12 (29%) identified legal representatives. Two respondents specified other causes of delay – but only one of these two identified that other cause, which was the COVID-19 pandemic.
- A.2.2 In addition to delay being prevalent, it was also a highly salient concern of tribunal users, as typified by the following comments.

‘The biggest concern most Tribunal users have at the moment is the time it takes for an appeal to be heard and a decision to be issued.’¹⁸⁴

‘[P]ursuing an appeal to the Tribunal is not a swift process. Delays arise at all stages of the process. For example: (i) allocation of the case by the Tribunal; (ii) HMRC filing its Statement of Case (receipt within 60 days is not the norm); (iii) listing the hearing; and (iv) release of the Tribunal’s decision.’¹⁸⁵

A.2.3 Delay was the major concern of respondents to our research participants. They suggested that delay negatively affected the ability of the taxpayer to present their case. An interviewee explained that during the time of the enquiry the taxpayer’s evidence may ‘decay’. For example, it may be difficult for them to find documentary evidence, or electronic files and photographs may be accidentally deleted. Also, a witness may become ill, become forgetful or lose material. In corporate cases, witnesses may no longer work for the company and so may not be available. As the burden of proof is on the taxpayer, this is especially detrimental to the taxpayer’s case, as the tribunal makes inferences to fill in the gaps. It is especially evident in ‘back duty’ cases, as it was in residence cases before the introduction of the statutory residence rules.¹⁸⁶

A.2.4 Accordingly, one respondent suggested that:

‘The tribunal [should] address more considerately and flexibly the difficulties of taxpayers in justifying their evidence from many years past, especially when the delay is often the consequence of slow response by HMRC.’¹⁸⁷

Delay by tribunal administration

A.2.5 A perception of the FTT administration as a cause of delay was common across all categories of FTT users who responded to our survey, who complained of the following.

‘Delays in processing paperwork, dealing with standovers and moving cases forward to a hearing.’¹⁸⁸

‘A long time to get a response to applications etc. from the Tribunal.’¹⁸⁹

‘The tribunal administration in Birmingham is like a black hole. Minor procedural [matters] can take months to be addressed, which could otherwise be determined at a short oral hearing. Vast costs have to be incurred between

¹⁸⁴ Survey response of Barrister C.

¹⁸⁵ Survey response of Solicitor K.

¹⁸⁶ Interview with Barrister R.

¹⁸⁷ Survey response of Barrister I.

¹⁸⁸ Survey response of Other Tax Professional B.

¹⁸⁹ Survey response of HMRC A.

*parties in correspondence, when a short hearing with a decision one way or the other would be more proportionate and cost-effective.*¹⁹⁰

*‘One could only contact the Tribunal via the call centre but in many instances the call centre staff could not help, insisting one contacted the Tribunal by email, which took a long time to reply.’*¹⁹¹

*‘The primary issue that arises [post-the COVID pandemic] is that of inconsistency. It is now very difficult to advise clients in relation to how long matters will take before the Tribunal. In some instances, responses are rapid. In others, they are not. Procedural matters that would routinely be addressed by the Tribunal, pre-COVID-19, in say 2–3 weeks may now be left unresolved after 2–3 months or may be resolved in a week. Without co-operation between the parties (including, for example, following draft directions agreed between the parties, but awaiting Tribunal approval), many matters would fall into abeyance.’*¹⁹²

A.2.6 A common theme was delays in the listing of appeals, as shown in the following comments.

*‘In one case HMRC requested a Case Management Hearing, which would take at least 6 months to list due to their availability and the Tribunal were not open to suggestions on how to avoid that hearing despite the majority of points being trivial.’*¹⁹³

*‘The main way in which the Tribunal process could have been improved pre-COVID-19 was in listing appeals. The Tribunal typically would not list hearings for weeks or months after it had obtained parties’ dates to avoid. They also would not check whether dates remained available when, some time later, they eventually came to list. More recently, they seemed to operate a system of asking parties to hold agreed windows. But this process was also extremely inefficient since listing the actual hearing still took some weeks or months. This then caused significant problems when frequent tribunal users (e.g. counsel) had to list other hearings. Large blocks of time would provisionally be unavailable (prep + hearing time) making it extremely difficult to give available dates for other hearings (either in the FTT or in other courts).’*¹⁹⁴

¹⁹⁰ Survey response of Solicitor G.

¹⁹¹ Survey response of Solicitor E.

¹⁹² Survey response of Solicitor K.

¹⁹³ Survey response of Solicitor N.

¹⁹⁴ Survey response of Barrister A.

A.2.7 Some respondents identified a problem to be that cases are only listed after all the preparatory steps for assembling evidence have been taken, not following filing of HMRC's SoC:

*'The Tribunal needs to list matters sooner after it takes dates, to avoid Counsel no longer being available.'*¹⁹⁵

A.2.8 Delays were also attributed to the failure of the tribunal staff to disseminate documents. One solicitor explained how in his experience, prior to the COVID-19 epidemic:

*'Too frequently were matters unnecessarily delayed or information not correctly disseminated to the parties by the Tribunal, sometimes with severe cost implications for the parties. The move to returning caseworkers to the Tribunal telephone desks would alleviate this. The online portal discussed for this would also assist and enable multiple solicitors on one appeal to receive communications simultaneously. Improvement of communications between taxpayer rep and Taylor House for hearing information and reserving consultation rooms. Better access to lead caseworkers for larger law firms to mitigate unnecessary delays and costs.'*¹⁹⁶

Another solicitor explained that, during the pandemic:

*'With people WFH [working from home], if files are not held electronically, papers or court bundles cannot be prepared, FTT staff had no or limited access to central filing, no impetus from FTT to manage delays and progress cases.'*¹⁹⁷

Delay by judges in issuing decisions after a hearing

A.2.9 Of those respondents to our survey who experienced delays that they considered attributable to the FTT, some suggested the delay was caused by the length of time it took judges to issue their decisions after the hearing:

*'Excessive delay in issuing decisions – currently over one year.'*¹⁹⁸

*'Most Tribunal judges act expeditiously in relation to releasing their decisions. Unfortunately, not all do; and one judge in particular does not, with decisions from that judge seeming to take an absolute minimum of 12 months before release.'*¹⁹⁹

¹⁹⁵ Survey response, Respondent's category unspecified.

¹⁹⁶ Survey response of Solicitor A.

¹⁹⁷ Survey response of Solicitor E.

¹⁹⁸ Survey response of Other Tax Professional A.

¹⁹⁹ Survey response of Solicitor K.

‘Decisions can take a huge period to be given. It is not uncommon to see decisions handed down 18 months or longer after the hearing.’²⁰⁰

‘The length of time taken to receive decisions needs to be significantly improved.’²⁰¹

‘Far too long to write decisions.’²⁰²

‘The Tax Tribunals regularly issue judgments more than a year after the hearing: there is a serious problem with late judgments compared to other tribunals... It has become normal for decisions to be six to nine months after the hearing and many decisions now take longer than a year... The problem with extremely late judgments has got worse over the last few years... As other courts do not regularly find it takes a year to write a judgment, there must be something going wrong in the Tribunal: either the judges are not given enough writing time, or they are approaching their task in a significantly different way to civil judges. As it is not a problem elsewhere it should be possible to solve it.’²⁰³

‘There also needs to be more general oversight as to the time it takes for decisions to be released. Whilst it is appreciated the Tribunal is busy, and some cases are complex, the delay in receiving a decision can sometimes be extensive, and clients do not understand why.’²⁰⁴

‘The time frame between the end of the hearing and the handing down of the decision is also extremely variable with several months (or more) passing in some instances.’²⁰⁵

‘Delay in receiving judgments – in two cases we waited over 15 months for a decision.’²⁰⁶

Delay due to length of tribunal decisions

A.2.10 Several interviewees commented adversely on the increased length in recent years of FTT decisions, a factor some considered might contribute to delay:

‘[The length is] totally unnecessary... a lot of the decisions are far, far, far too long. That is, in part, what seems to me to cause the delay. If there has been really lengthy contested evidence, then, yes, it’s absolutely right that the evidence should be properly noted and the facts be properly found, because

²⁰⁰ Survey response of Barrister E.

²⁰¹ Survey response of Barrister F.

²⁰² Survey response of Barrister G.

²⁰³ Survey response of Barrister H.

²⁰⁴ Survey response of Barrister I.

²⁰⁵ Survey response of Barrister K.

²⁰⁶ Survey response of Solicitor O.

*that's the job of the FTT. But what I do not think is necessary is screeds of legal argument and/or analysis. Sometimes there is very little of the Tribunal's own reasoning, you'll simply have long screeds of what each party submitted, and then "I agree with HMRC for the reasons they gave" or "I agree with the taxpayer, for the reasons they gave" with a couple of paragraphs of explanation, maybe, at the end. Other times, there will be pages of recitation and detailed analysis of numerous authorities which seems to me quite unnecessary bearing in mind the decisions are not binding on other tribunals.'*²⁰⁷

*'I do think that the length of these decisions is, in my view, often unjustifiable. It merely leads to a verbosity which gives rise to an opportunity to take points on appeal, which actually don't have a proper foundation. I think it comes from the continent. I think it's a very unfortunate development. If people are articulate, they don't need to go to that great length. If there is a technical issue which needs a lengthy description, it can be put into a schedule.'*²⁰⁸

One interviewee noted that this varied between judges:

*'It does vary judge by judge. There are certain judges who, in my view, do provide somewhat verbose decisions. You'll have many, many pages, setting out all the facts. With large parts of those facts not, actually, being particularly relevant to the decision itself. And then reams of reciting all the case law that is potentially relevant. Then a comparatively small judgment.'*²⁰⁹

Delay through a lack of judicial availability

A.2.11 Sometimes delay appears to be caused by a lack of judicial availability to hear applications:

*'Greater resource in Tribunal administration. Very often a delay was being caused by the other side. However, by the time that the Tribunal addressed it, the damage had been caused. For example, there was a case where HMRC unreasonably wanted to delay compliance with a direction for two months. The taxpayer objected and the matter was referred to the Tribunal, which said that the matter would be decided at a hearing and parties were invited to provide hearing dates for a period starting after 2 months.'*²¹⁰

A.2.12 There also appears to be substantial delay in relation to the time it takes to list hearings after notification. In an interview conducted in February 2021, one

²⁰⁷ Interview with Barrister Q.

²⁰⁸ Interview with Barrister R.

²⁰⁹ Interview with Solicitor Y.

²¹⁰ Survey response of Barrister B.

respondent²¹¹ stated he had been told by the FTT that there was no availability to list that particular hearing until the summer of 2022.

Delay through poor case management

A.2.13 Among our survey respondents, delay was also attributed to a lack of robust case management by the judiciary, exacerbating delays caused by the parties.

A.2.14 Many survey respondents suggested that judges could be more robust in case management, including requiring the parties to set out their case from the outset. Some respondents suggested that new judges with little prior litigation experience should have training on this.

*‘The Tribunal could give more robust case management directions. There is too little emphasis on Appellants who are represented being required to plead the facts they rely on and even the basic legal basis upon which they are bringing their claims. If the Tribunal process begins with that degree of formal structure, it is my view that time savings could be achieved. HMRC’s Statement of Case would then be drafted to meet the actual case being made by the Appellant and not what HMRC is guessing their case will be. It will be easier to distil agreed facts and issues, etc.’*²¹²

*‘There seem to be more firms pursuing tax litigation with more aggressive commercial tactics. This is no bad thing for taxpayers. But it does strike me that the Tribunal’s aim to provide an informal forum which does not intimidate people should be adapted for more complex cases, or cases where taxpayers are represented. There does (in my view) need to be more emphasis on proper pleading and more robust case management.’*²¹³

*‘I think that judges (in particular, newer judges who do not have much previous litigation experience) would benefit from some formal instruction/guidance on case management. There is a significant amount of variance as between different judges.’*²¹⁴

A.2.15 One respondent²¹⁵ suggested that the rules could be changed to allow cost consequences for parties who later changed their grounds of appeal.

A.2.16 Commenting on case management, other respondents suggested that the FTT was especially slow in dealing with applications and when parties failed to comply with directions:

²¹¹ Interview with Solicitor Y.

²¹² Survey response of Barrister D.

²¹³ Survey response of Barrister D.

²¹⁴ Survey response of Barrister A.

²¹⁵ Solicitor K.

‘More active case management by the FTT and attempts to minimise delays in the overall process.’ ²¹⁶

‘Delays by the Tribunal in issuing directions and dealing with applications, also with issuing decisions after the hearing. Also delays by both parties in complying with directions so that it can take well over a year for an appeal to come before the Tribunal with a long wait for a decision afterwards.’ ²¹⁷

‘Tribunal should be more critical of delays caused by HMRC.’ ²¹⁸

‘Applications take too long to resolve and Tribunal Judges can lack the forthrightness of High Court judges to deal with applications by BOTH sides quickly and efficiently. Often the Tribunal seeks to find a third way. In my experience that rarely helps.’ ²¹⁹

‘The Tribunal regularly takes long delays over applications and case management issues: even applications to the first-instance judge for permission to appeal at the time of their decision can wait for weeks, when the civil courts usually decide such applications there and then.’ ²²⁰

‘Inability to keep to timetables handed down in directions and a failure of the Tribunal to case manage effectively. Slow responsiveness from the Tribunal to applications. Parties saying that they cannot make a hearing date for periods of months and the refusal of the Tribunal to intervene in this.’ ²²¹

‘Better general oversight of the progress of cases, and applications made. Often, despite follow-up emails and calls, a decision on an application for an extension of time, for example, would not be made/received until after the original deadline so that the applying party effectively had the extension by default.’ ²²²

‘[Over the last 10 years a significant change has been] seeking to speed up matters by issuing standard directions at an early stage in the process. This approach does not always achieve its purpose. In many cases, the standard directions are not suitable and the approach of the parties seeking to agree directions between themselves, for approval by the Tribunal, is often better.’ ²²³

²¹⁶ Survey response of Barrister C.

²¹⁷ Survey response of Barrister C.

²¹⁸ Survey response of Other Tax Professional C.

²¹⁹ Survey response of Solicitor H.

²²⁰ Survey response of Barrister G.

²²¹ Survey response of Barrister E.

²²² Survey response of Barrister I.

²²³ Survey response of Solicitor K.

A.2.17 Contrary to the attitude of the last quoted respondent, one respondent²²⁴ referred to increased standardisation over the last 10 years as a good thing.

A.2.18 However, one respondent²²⁵ suggested that a significant change over the last 10 years was that there was better management of cases by the FTT.

A.2.19 One interviewee commented that too many cases go part heard, causing expense and delay for the taxpayer, as hearings are not effectively managed and poor points are made at length.²²⁶ They also commented that there are many cases where written submissions are made afterwards, including where the judge has on the day refused to allow them.²²⁷

A.2.20 One survey respondent suggested that:

‘[The] main shortcoming of the process is the “one size fits all” approach adopted following the Woolf reforms. A different and much fuller rulebook would be appropriate to complex track cases. And surely it is misconceived to use a single form for both notices of appeal and notifications of appeal?’²²⁸

A.2.21 One respondent noted:

‘A few years ago there was a huge drive to recruit judges to the tax chamber and that resulted in quicker (i.e. better) service. The quality of justice has also improved.’²²⁹

A.2.22 One interviewee also commented:

‘Quite often, you sense some judges didn’t have much litigation experience before they came to the Tribunal... For example, case management disputes can often end up generating a disproportionate level of time and costs when the Tribunal should be able to deal with them swiftly and even on the papers. Another example is that sometimes judges will allow one party to interrupt frequently when the other is making submissions or questioning a witness. That would never happen in the higher courts or tribunals. If the submissions or questioning are inappropriate, the judge should know that and intervene themselves, thereby retaining control over the proceedings.’²³⁰

A.2.23 Some respondents made suggestions on how to improve delay arising from poor case management:

²²⁴ Barrister E.

²²⁵ Solicitor M.

²²⁶ Interview with Solicitor X.

²²⁷ Interview with Solicitor X.

²²⁸ Survey response of Solicitor D.

²²⁹ Survey response of Solicitor C.

²³⁰ Interview with Barrister Q.

‘In terms of dealing with case management issues, perhaps specific days for dealing with case management applications with allocated judges for those days would help. The delay in dealing with applications produces more and more applications.’²³¹

‘[To reduce delay I suggest] expanding the role of the Registrar, both in terms of numbers and ambit. The Tribunal having procedural judges or masters who would deal with all procedural aspects of a case from registration of an appeal until it is ready for hearing by a Tribunal judge would be of considerable assistance.’²³²

Delay by HMRC

A.2.24 Of those 42 respondents to our survey who answered the question on cause of delay, 39 (69%) identified HMRC as a cause of delay. Typical comments were:

‘From HMRC, typically tactical delays dressed up in various ways.’²³³

‘We took a case which HMRC strung out for 8 years – yes 8 years – and then decided they would not go to appeal and withdrew after 8 years of standover!!!!!!!!!’²³⁴

A.2.25 One respondent stated that the situation had worsened as a result of the COVID-19 pandemic:

‘During COVID, HMRC has largely shut down. HMRC routinely breaches directions which slows the process of appeals.’²³⁵

A.2.26 Others, however, had not experienced HMRC to be a cause of delay:

‘On the whole, HMRC itself seems not to be the source of great delay in my experience.’²³⁶

A.2.27 One interviewee also noted that delay after notification to the FTT is often caused, for up to a year, in finding a suitable date for the hearing, which is very different to other areas of law. Often that delay is not caused by the FTT, but by counsel (and HMRC solicitors) not being available. However, when HMRC want something decided quickly, they seem to have better availability of dates. They felt that this is particularly an issue for the taxpayer when it involves a repayment of tax, so they are out of pocket.²³⁷

²³¹ Survey response of Barrister F.

²³² Survey response of Solicitor K.

²³³ Survey response of Barrister B.

²³⁴ Survey response of Other tax professional C.

²³⁵ Survey response of Solicitor H.

²³⁶ Survey response of Barrister A.

²³⁷ Interview with Barrister P.

Delay by taxpayer's representatives

A.2.28 One survey respondent noted that:

*'Sometimes taxpayers' representatives have been the source of delays in terms of serving documents late, making late applications, failing to comply with directions and so on. This mainly seems to arise in tax avoidance cases where it seems to be part of some overall strategy to obfuscate.'*²³⁸

Delay due to four levels of appeal

A.2.29 Interviewees were asked about the utility of rule 28 of the FTT Rules, which allows for a 'complex' case to be transferred to the UT, with the consent of both parties and the consent of the Presidents of the FTT and UT. Some respondents felt that obtaining the consent of HMRC would always be problematic:

*'We have tried on some occasions to [use rule 28] and the revenue have point blank refused to agree to it. So, on my personal experience, that's why... there's a quite limited number of cases, I would suggest, where that is appropriate. In a lot of instances you want the fact finding by the FTT. That's the platform on which the case is built and UT judges just don't have the time to look at detailed evidence.'*²³⁹

*'The revenue will not agree to leapfrog.'*²⁴⁰

A.2.30 There was some support for the rules being changed to allow the taxpayer to be able to make an application for transfer. Other interviewees thought the FTT was itself generally opposed to cases starting in the UT:

*'The Tribunal doesn't seem keen on using it at all. The earlier cases even on what was a complex case tended to make that quite narrow... I'm not really sure when I'd feel confident advising a client that it's likely to happen. Clearly there are cases, and I think they're quite a lot of these cases, everybody knows that it's not going to end at the FTT level. It does seem to me to be a bit of a waste to require everybody to go through the hoops of going to the FTT, and then the UT and then the Court of Appeal. On significant cases of that type, it would probably make a lot more sense to just go straight through to the UT. But until the tax tribunals issue guidance on that I think the tendency will be to say no you're starting in the FTT.'*²⁴¹

A.2.31 Some interviewees questioned whether it would, in principle, be desirable to start a case in the UT:

²³⁸ Survey response of Barrister A.

²³⁹ Interview with Solicitor Y.

²⁴⁰ Interview with Solicitor X.

²⁴¹ Interview with Barrister P.

‘There is an advantage to the first decision coming from a tribunal that does not create binding authority, since the tribunals are far weaker than the civil courts on pleading and enforcing procedure, so it is only very close to the hearing date when you actually understand what the party’s arguments are. So there is an argument that you would want the party’s arguments to be properly refined before you start creating binding authority.’²⁴²

‘In the UT, my impression is that the High Court judge is very much the senior party... the High Court judges [that sit in the UT]... may be good in their particular areas, but they’re generally not tax people. So if I had a choice between a case starting in the FTT, where I will have a judge with a tax background, but maybe not the right tax background, or starting in the UT, where I have very little probability of a judge with even a tax background, why would I go to the UT, unless this wasn’t really a tax case, but a sort of administrative law case?’²⁴³

However, this same interviewee supported the principle behind the rule:

‘I mean three levels of appeal is absolutely crazy. You know, we are the only country, I suspect, in the world where tax cases can be heard at four different levels.’²⁴⁴

A.2.32 Another thought that, in principle, four levels of appeal had some merit:

‘I can see the value in having the four layers of appeal with far shorter FTT decisions. I think that it’s only really become an issue because you have these really lengthy FTT decisions, with the judges pretty much trying to write a thesis on the subject. And then you think “what is the point of four layers?”. But you still have cases where the higher courts find for one or other party for the first time and that ends up being the final determination.’²⁴⁵

A.3 Other issues with tribunal administration

A.3.1 In addition to the FTT administration being identified as a cause of delay by survey respondents, as discussed above,²⁴⁶ several other concerns were identified with how it functions.

‘In a well-functioning system, legal representatives shouldn’t be surprised when the Tribunal office gets it right. The fact that we are, because we expect

²⁴² Interview with Barrister O.

²⁴³ Interview with Barrister S.

²⁴⁴ Interview with Barrister S.

²⁴⁵ Interview with Barrister Q.

²⁴⁶ See [4.8]–[4.9].

*them to get it wrong, speaks volumes. I know that there are some very capable people in the Tribunal office, and I'm grateful for all they do, but some major reforms are needed.'*²⁴⁷

*'Tribunal administration needs major improvements. Communications are frequently sent either to the wrong people or not at all; correspondence sent to the Tribunal even by email frequently got lost. It simply isn't good enough.'*²⁴⁸

*'Confusion by junior clerical workers who do not feel they have authority to correct their own errors, even when manifest and agreed by both parties.'*²⁴⁹

*'Clerks appear to struggle with cases which have similar names, or which involve the same law firm – e.g., our lawyers on one case are routinely sent correspondence on a different case in which the firm is involved.'*²⁵⁰

A.3.2 A lack of access to the administrative team and a lack of information at the call centre was identified as a major issue by FTT users:

*'I would suggest better access to the team in Birmingham so that we can follow up following the lodging of the appeal and better understand where the proceedings are. Otherwise – very happy. It's a good and accessible system.'*²⁵¹

*'Lack of listing availability, and administrative delays, lack of information for the call centre and no ability to speak directly to listing or other teams at the Tribunal... Better communication and more responsive call centre and ability to speak directly to team in listing or other areas of the Tribunal.'*²⁵²

*'Though not perfect, the Tribunal at Bedford Sq[are] had a small staff who were known to practitioners on both sides and who could act quickly to resolve problems. The administration is now faceless and, it appears from the outside, without consistency. The requirement to send documents to Birmingham and then out is painfully inefficient.'*²⁵³

*'Quicker response times from the Tribunal would be helpful, more willingness to assist at the Tribunal call centres would also be welcome.'*²⁵⁴

²⁴⁷ Survey response of Solicitor I.

²⁴⁸ Survey response of Solicitor I.

²⁴⁹ Survey response of Solicitor L.

²⁵⁰ Survey response of Solicitor L.

²⁵¹ Survey response of Solicitor C.

²⁵² Survey response of Solicitor F.

²⁵³ Survey response of Solicitor G.

²⁵⁴ Survey response of Solicitor N.

A.3.3 Relatedly, a lack of communication by the FTT administration was also identified as a concern:

‘Clearer communication to Appellants as to the judge assigned to a case, whether a hearing would go ahead, what facilities would be required for an online hearing, and communications on timings to manage client expectations.’²⁵⁵

‘More communication with the parties as to how the hearing would take place.’²⁵⁶

‘Better publicity of the various forms of Tribunal hearing, in particular the paper-based hearing.’²⁵⁷

A.3.4 Respondents often suggested that the Tribunal could be improved with more resources.

‘My impression is that resources were put into the Upper Tribunal and that the FT has been the poor relation of the HMCTS.’²⁵⁸

‘More staff and resources. The Tribunal back office is faceless and the administration slow.’²⁵⁹

‘Again greater resource in Tribunal admin staff.’²⁶⁰

A.4 Judicial preparation for and involvement in hearings

A.4.1 Due to the extent of the tax code, tax cases that involve substantive points of law will often require the judge to become familiar with legislation and cases that they may not have encountered before. As one interviewee observed:

‘One of the odd things about tax is how much law there is, and how widely it is spaced. So even on a difficult Commercial Court case, it’s going to be quite unusual for a judge to be asked to determine novel points of law based on cases that they have not even seen before... the difficulty is really going to be on the facts... if the [Commercial Court] judge has read the witness statement they will know enough to be able to engage. But [in tax on a recent case], to engage with which one of us was right about one of the three main arguments, you

²⁵⁵ Survey response of Solicitor F.

²⁵⁶ Survey response of Barrister C.

²⁵⁷ Survey response of Other Tax Professional B.

²⁵⁸ Survey response of Solicitor E.

²⁵⁹ Survey response of Solicitor H.

²⁶⁰ Survey response of Barrister B.

*need to read about 12 cases... That's just for a bit of the case and you couldn't do that in half a day's pre-reading.'*²⁶¹

A.4.2 Some respondents to our survey suggested that hearings would be improved if the judges had more opportunity to prepare in advance and review the arguments/bundles:

*'Ensuring that Tribunal judges are provided with the opportunity to pre-read the hearing bundle (or at the least the pleading and witness evidence) before the hearing would enable the lengths of hearings to be reduced and may result in decisions being released more swiftly.'*²⁶²

*'[The post-COVID pandemic Tribunal process could be improved by] Better prepared judiciary.'*²⁶³

A.4.3 One survey respondent suggested that some judges should be more interventionist during the hearings:

*'I found my experience in the County Court better – the circuit judges there are good at identifying the real issues and avoiding wasting time on unimportant matters. In the FTT a lot of them just sit and listen.'*²⁶⁴

A.4.4 Many interviewees observed that some judges were not actively involved in the hearings and some inferred from this that those judges had not prepared for the hearing.

*'What I've noticed which I think is related to [delay in writing] is that often in these difficult tax cases where you have a lot of difficult law, I've found judges just sit there and say nothing for the whole hearing. You get the feeling that they aren't really using the hearing to test the arguments, they're using the hearing to record the arguments and have a think about them later, but that almost defeats the point of having counsel there... Perhaps as so few of them are former advocates they don't like getting into an argument with counsel, whereas High Court judges do... Whereas the truth is, if they didn't follow what I'm saying it's my fault, mine not theirs... But that I think is related to [delay], during the hearing all too often they don't seem to be in a position to engage with the argument. Whether that's just because they don't have enough time pre-reading or because there's something else that's wrong about the way tax cases are set up. You feel they aren't all that much further, by the end of the hearing, than they were before they heard the arguments.'*²⁶⁵

'You quite often suspect that the judge hasn't spent much time pre-reading or understood the written arguments to any great degree. You will very frequently

²⁶¹ Interview with Barrister O.

²⁶² Survey response of Solicitor K.

²⁶³ Survey response of Solicitor N.

²⁶⁴ Survey response of Barrister L.

²⁶⁵ Interview with Barrister O.

*have hearings where not a single question is asked by the judge at all, and that just can't be right. I would have thought, even in the most straightforward of cases there must be something that the judge just wants to clarify they've understood properly. Just something. No questions at all, and then there's a long delay in some cases, over a year before a decision is produced. And you just think well "actually, what was the purpose at all of the oral hearing?" There's been a massive delay, by which time anything that was actually said at the hearing has been forgotten about. The judge might have some notes. But if there's not a transcript there's no real sense that anyone's going to go back and look at the notes. When it comes to writing the decision, you very much get the sense that the judge is simply writing the decision having looked at the matter fresh themselves, and approaching it as "what would I do if this was a client that was coming to the firm wanting advice" or "what do I think is the right answer", without actually really engaging in any of the work that the parties have done in presenting [the case], and I think that's a problem. You don't see the same at all when you're dealing with the High Court judges sitting in the UT and some of the UT judges themselves have read in a lot better... I also get the sense that a lot of the time, especially in the more complex cases, [judges] might have turned the pages on the skeleton argument, but quite often that isn't enough to really understand what's going on.'*²⁶⁶

*'If it's a complex case with many, many files of authorities and documents, you may get those sent to the Tribunal a few days in advance. The Tribunal does not have the facility to store files. So the Tribunal judge may get them a day or two in advance. He or she may, possibly, have allocated a day for reading. But by and large that will only have allowed them to do usually the minimum reading – the skeleton arguments, maybe an agreed statement of facts and issues, maybe to look at the legislation. And instead of a highly educated hearing, controlled by the judge, where the judge says: "I've read all of the documents, and I want to be addressed on this, this and this" or "these are the questions I have", the judge just sits back and just listens. Counsel then goes on and on, as counsel is wont to do, reading out chunks of cases and everything. At the end of which the judge will then have to go away, probably sometime later re-read all of the material, try to remember what was said and then try to write a judgment.'*²⁶⁷

'[One of the worst] things is the judge who simply... sits there typing in everything that you're saying. It's like talking to a brick wall. You get no questions. You get no reaction whatever. Not that I'm wanting the judge to indicate a view, but I'd like to get some sense that the judge is mentally alert and is following what I'm saying, and asking questions for clarification, because I've got no idea whether the judge is or is not understanding it. I've

²⁶⁶ Interview with Barrister Q.

²⁶⁷ Interview with Barrister S.

*often the sense that the judge is not understanding it but is just recording it with a view to try to understand it later. Maybe six months to a year later.*²⁶⁸

*‘One of the shocks of the new system was when I started appearing before the judges. They were not of the quality of the old Special Commissioners... I was shaken by [a case]... I did before the FTT when over two days I wasn’t asked a single question about this very difficult [tax]... problem... In the Court of Appeal we won and the matter was not appealed by HMRC. Sometime later I was walking into work alongside the judge who heard it in the Court of Appeal, and he immediately said “you will notice in X case I made no reference to the judgment below or in the Tribunal –it really wasn’t worth my while doing so”.*²⁶⁹

A.4.5 The advocate’s experience before the FTT was contrasted to the High Court and Court of Appeal where ‘you would expect judges to pick you up as you go along, and ask you why you thought the passage you were citing went to the point you were making, but you don’t normally find that in the FTT.’²⁷⁰

A.4.6 However, some interviewees emphasised that this varied between judges, and some judges were clearly prepared and would actively participate in the hearing.

*‘There are some very talented Tax Tribunal judges, and there are some very proactive judges who will read all the papers and understand the case and will ask some very pertinent questions, and they’re brilliant. Unfortunately, there are also some judges who don’t adopt that approach and also don’t have, in my view, sufficient expertise to deal with the type of cases that are before them.’*²⁷¹

A.4.7 One respondent suggested how they thought judges could better approach case preparation.

*‘A lot of [advocate’s skeleton arguments] suggest pre-reading where they’ll identify exactly what it is that needs to be read. If you’re the judge and you get the skeleton and you don’t have the materials, I would have thought it’s quite an easy email to tribunal admin to say “I don’t seem to have it, have they filed it? If not, can you get them to send it?”.’*²⁷²

‘I can see that a busy judge might not want to spend hours reading in if the case is going to settle. But that’s where greater communication with the tribunal and the parties would help. If I got an email, say, a week before my hearing was going to start with the judge saying “I want to start my pre-

²⁶⁸ Interview with Barrister S.

²⁶⁹ Interview with Barrister R.

²⁷⁰ Interview with Barrister O.

²⁷¹ Interview with Solicitor Y.

²⁷² Interview with Barrister Q.

reading, can the parties tell me is this likely to settle or are you definitely going to a hearing”, it would be very easy to get a sense from the parties of the chances of the hearing happening, so a couple of days’ worth of pre-reading would not be for nothing.’²⁷³

A.5 Other issues with the conduct of hearings and decisions

A.5.1 Several interviewees commented that judges had tried to control the order in which advocates called their witnesses, rather than the usual procedure of allowing advocates to call their witnesses in the order that they best considered advanced their case.²⁷⁴

A.5.2 One interviewee suggested that some judges sought to impose unnecessary formality that unsettled witnesses. For example, a judge intervening in examination of a witness to tell the witness to refer to the witness’s colleague as Mr [Smith] rather than [Steve].²⁷⁵

A.5.3 One interviewee commented adversely in relation to a draft decision, which a judge issued, that attempted to decide the matter on the basis of arguments that were not fully argued before him.

‘The worst thing is the judge who decides the case on the basis of a point that was never actually argued in front of him or her... I have heard of at least one case in the past, where a draft judgment was sent to counsel and the judge had decided the case on a point that had never actually been fully ventilated in hearing. And both counsel wrote to the judge – and that’s very unusual to get both counsel to agree – both wrote to the judge and said this point cannot be the basis for the judgment. The judge withdrew their draft judgment and issued a new one instead.’²⁷⁶

²⁷³ Interview with Barrister Q.

²⁷⁴ Interview with Barrister R and interview with Barrister U.

²⁷⁵ Interview with Barrister U.

²⁷⁶ Interview with Barrister S.

A.6 A specialist tribunal: judicial recruitment and case allocation

Introduction

Use of Tribunal members

A.6.1 Interviewees were confused about when tribunal members were used in the Tax Chamber. Several reported not having seen members in recent years. Others were unable to comment on their contribution, as they felt they had no evidence. However, several interviewees were very positive about the contributions of members.

‘Where you have witness evidence I think it’s very helpful, in that context, for there to be more than one person to evaluate the evidence. In that regard my view is that you do not have to be the most expert in tax law in order to be a member.’²⁷⁷

‘Members of the Tribunal often add experience that is lacking from tribunal judges. Particularly they understand what it is like to work in a one-man accounting firm when judging what is reasonable. Judgment involves more than technical ability.’²⁷⁸

Allocation of judges to cases

A.6.2 The basis of allocation of cases to judges, particularly where the case was a long highly technical one, was queried by some of our survey respondents. The concern was that where the judge concerned did not have the necessary technical knowledge in the area, or the technical skills, the outcome became more of a lottery.

‘Better judges, with a much better knowledge of tax law... There should be far more opportunities for matters to be decided on the papers by expert judges. At present we need lengthy oral hearings partly because of the need to inform the judges about the issues they need to decide.’²⁷⁹

‘The Special Commissioners in their last decade brought a capable and responsive approach to issues however specialist their nature. This has been lost. I sometimes have to advise against appeal to the FTT because of the low quality of the tribunal and their ability to absorb factually difficult or legally sensitive issues.’²⁸⁰

A.6.3 Some respondents thought that judges who were assigned to hear a case should be skilled in that sub-specialism of tax law.

²⁷⁷ Interview with Solicitor Y.

²⁷⁸ Interview with Barrister T.

²⁷⁹ Survey response of Barrister G.

²⁸⁰ Survey response of Barrister J.

‘I can’t guarantee clients that they will end up with a fair hearing from a tribunal that knows what it is talking about. I’m just being brought in on a matter where it’s a very, very complicated area of... taxation, one in which very few people have expertise. I’ve said to the clients, this is something that should go nowhere near the tribunals, because there is absolutely zero probability of getting a bunch of judges who will understand the issue, so it’s almost completely impossible to predict the outcome. If these clients cannot resolve this issue, they will leave the UK. They have a mobile operation that could operate from somewhere else, and if the tax issues cannot be resolved within a reasonable period of time then they will simply say “we can’t live with this uncertainty”.’²⁸¹

A.6.4 Others disagreed with this latter view (that specialist knowledge was desired).

‘When you have an adversarial system the notion that the judge’s expertise comes into it to any degree, probably isn’t great. Actually, what you want is a judge who will listen to the parties and evaluate their arguments... I would have thought most of [the judges in the FTT], if not all of them, are very capable of getting on top of these things. So not having a particular expertise isn’t something which I see as a problem; on the contrary, I think it can actually be beneficial, because you have judges approaching things with a bit more of an open mind.’²⁸²

A.6.5 However, the same respondent thought it might be advantageous where the taxpayer was unrepresented.

‘Where it might make a difference, I suppose, is where you’ve got an HMRC Inspector and a litigant in person in front of a judge and then some of the judge’s expertise is going to be helpful.’²⁸³

We note that, where litigants in person appear before the FTT, many judges do adopt a more inquisitorial approach.²⁸⁴

A.6.6 Some interviewees also felt that tax knowledge was not required for FTT judges, but they observed that the technical ability to get to grips with complex legislation and detailed case law seemed to vary among the tribunal judiciary.²⁸⁵ Accordingly, they thought such technical ability should influence which judges were assigned the more legally complex cases.

²⁸¹ Interview with Barrister S.

²⁸² Interview with Barrister P.

²⁸³ Interview with Barrister P.

²⁸⁴ Thomas, R. (2020), ‘Chapter 14: Tax Tribunals and Justice for Litigants in Person’ in Dominic de Cogan and Peter Harris (eds), *Tax Justice and Tax Law: Understanding Unfairness in Tax Systems*, Oxford: Hart Publishing.

²⁸⁵ In addition to the comments below, see the text accompanying footnotes 269 and 271.

‘There is a vast amount of procedural, mostly penalty appeals... Whereas there are other appeals, which are obviously rarer, which have significant technical difficulty.’²⁸⁶

‘[Judges] need to be good lawyers who can get to grips with the legislation, ask the right questions, read the relevant passages and understand them. And if they’re fully engaged with the hearing, the fact that they’re not a specialist really shouldn’t matter, especially if the case is being presented by counsel... I think varying technical ability and/or lack of engagement is where the problem is, I’m afraid to say.’²⁸⁷

A.6.7 One interviewee suspected, from reading reported decisions, that some judges were able to express interest in hearing particular types of cases within tax law, which they felt gave some judges too great an influence over the development of particular areas of tax law.²⁸⁸

A.7 Judicial recruitment

A.7.1 Respondents generally thought that judges should be recruited who had experience in tax.

‘You’ve got to appoint people with the existing expertise, for a number of reasons. First, you know that the issue is almost certain to relate to the law as it was five or 10 years ago. So how do you train somebody to know what the rules were five or 10 years previously? There is the whole context in which those rules operated. We do have a great advantage, in the UK, that a lot of solicitors and accountants in big firms reach retirement at a fixed retirement age in their late 50s. They’ve still got several good years in front of them. And traditionally a number of those people have been willing to become judges, but you won’t get them becoming judges, if you then ask them to handle cases that are totally outside of their expertise.’²⁸⁹

A.7.2 One interviewee made the following comment.

‘Ideally a tax tribunal judge would have significant experience of tax matters. I think what I would like to see is more established tax practitioners being part-time tribunal judges. I think that may help with the backlog.’²⁹⁰

²⁸⁶ Interview with Barrister R.

²⁸⁷ Interview with Barrister Q.

²⁸⁸ Interview with Solicitor X.

²⁸⁹ Interview with Barrister S.

²⁹⁰ Interview with Solicitor Y.

A.7.3 Several respondents indicated they knew of people who had applied to be FTT judges, who they considered to be very suitable, but who had been rejected. This was thought to have a general chilling effect on others coming forward.

‘I remember in one of the earlier rounds of recruitment, I wrote a reference for someone, and I know one of my colleagues wrote a reference for someone else. Both of whom we thought were excellent, really technically proficient. Neither of them got appointed, so it’s a bit hard to understand quite how the appointments are being made.’²⁹¹

‘I suspect it’s the approach to recruitment. It’s something of a chore and there are stories of very able people being told that they weren’t wanted, which suggests that there’s something wrong with the recruitment system.’²⁹²

A.7.3 One respondent suggested that candidates might benefit from more guidance on the approach they should take to applying.

‘I think it’s a government style of recruitment, where what they’re looking at is being able to tick boxes to say X, Y and Z is there. What that tends to do is pick out the people who are good at filling out the form, rather than necessarily the people who are good at doing [the job]. Now, obviously, there’s a reason for doing that because you’re trying to identify that this person has various competencies... but you’re going to miss out good people, not because they don’t have the competencies, but because they haven’t filled in the form to say they have, and I suspect that to be part of the problem.’²⁹³

A.7.4 One barrister suggested, historically, probably few barristers applied, as the tribunal was thought not to be a way to access the High Court. However, they thought this is now possibly changed with the appointment of Sarah Falk to the Chancery Division.²⁹⁴ We also note the appointment of Ian Huddleston, as a judge of the High Court of Northern Ireland in 2019, and that Ashley Greenbank, Jonathan Richards and Robin Vos are now Deputy High Court Judges. The interviewee also noted that given the financial rewards at the tax Bar, at any given time it is always tempting to say ‘another year’ before going to the bench. The advantage with the old system of being ‘tapped on the shoulder’, was that if you did not accept when asked, you might expect you would not be asked again. However, the present system of applying means that there is a permanent temptation to defer and so, ultimately, people may never apply.²⁹⁵

²⁹¹ Interview with Barrister Q.

²⁹² Interview with Barrister P.

²⁹³ Interview with Barrister P.

²⁹⁴ Interview with Barrister O.

²⁹⁵ Interview with Barrister O.

A.8 Costs

Introduction

A.8.1 Often respondents to our survey cited costs as a major impediment to access to justice.

*‘The cost of taking a case limits access to justice. So, a taxpayer pays the tax by default.’*²⁹⁶

*‘Most taxpayers will not take their own case, meaning they have to incur costs just to go for a hearing.’*²⁹⁷

Cost-shifting in the FTT

A.8.2 In our survey, the costs of professional fees associated with tribunal appeals was a major concern of a very large number of respondents.

*‘In ... higher value cases, costs easily spiral out of control in part due to proliferation of disclosure and in part due to subsidiary submissions and the length of submissions. Also the way costs are charged on GLO’s would merit consideration.’*²⁹⁸

A.8.3 Some respondents suggested that the lack of adverse costs in the FTT (other than in ‘complex cases’) limited access to justice. Other respondents suggested that the cost-shifting regime in the UT deterred appeals there.

A.8.4 Some respondents thus suggested that the taxpayer should be able to recover costs from HMRC in the FTT if they are successful.

*‘Allow taxpayers to get costs from HMRC, as used to be the case. HMRC now push taxpayers to appeal knowing that the no costs rule frightens [the] majority of appellants.’*²⁹⁹

*‘The cost regime as it existed under the VAT and Duties Tribunal was fairer. The Rules of the Tribunal are tilted in favour of HMRC and are unequal.’*³⁰⁰

‘[T]he Tribunal’s power to award costs being limited, primarily, to proceedings that have been allocated as complex acts as a considerable disincentive to taxpayers to pursue appeals to the Tribunal, particularly with regard to cases where the amount of tax at stake is in the region of £100,000 to £500,000 and the issues are complex, both as a matter of fact and law, but neither is sufficiently so to merit allocation of the case as complex under Rule

²⁹⁶ Survey response of Other tax professional B.

²⁹⁷ Survey response of Other tax professional C.

²⁹⁸ Survey response of Solicitor B.

²⁹⁹ Survey response of Other Tax Professional C.

³⁰⁰ Survey response of Solicitor G.

23. *I am aware of a number of cases where the amount of tax at stake is under, say, £50,000, the taxpayer's case is a reasonably strong one, but there is a degree of complexity involved that mean that the professional or legal costs involved would be a not dissimilar sum to the tax at stake. Neither the option of the taxpayer pursuing the appeal unrepresented nor the option of paying the equivalent of a significant proportion of the potential tax at stake (which cost would be irrecoverable, in any event) is a palatable one.'*³⁰¹

A.8.5 One respondent suggested that there should be cost consequences when HMRC amends its case at the tribunal.

*'In very broad terms, it is recognised in proceedings before the High Court that amending the basis on which the case is being put is likely to be permitted, but there will be a costs sanction in the form of the costs wasted by the other side in having to re-plead its case in response. Even where the case has been allocated as complex, it is rare for the Tribunal to award costs to taxpayers in such circumstances. HMRC amending its case during the course of proceedings is routine (and, indeed, it is far from unusual for HMRC to amend its case during the hearing itself). The Tribunal being able, in all standard and complex cases, to award costs to taxpayers consequent on the amendments, and exercising that power in a similar way to the way that it is exercised in the High Court would limit the costs that are occasioned by HMRC but borne by taxpayers. It may also assist in ensuring that HMRC is more expeditious in its preparation of cases, which, in turn, may help to reduce delays in the Tribunal process.'*³⁰²

Cost-shifting in the UT

A.8.6 Many respondents to our survey suggested that the adverse costs regime in the UT acted as a deterrent to the taxpayer appealing, including in some cases encouraging taxpayers to abandon appeals where they were successful in the FTT. Of the 47 survey respondents who answered the question 'Have you ever experienced a situation where a party was deterred from pursuing an appeal to the Upper Tribunal because of the potential for an award of costs to be made against them if they were unsuccessful?', 30 (64%) said they had experienced such a situation. Respondents' comments on this issue included the following.

*'An individual taxpayer whose case was a lead case was deterred from pursuing an appeal due to the potential of an adverse costs award even when he had won at first instance.'*³⁰³

³⁰¹ Survey response of Solicitor K.

³⁰² Survey response of Solicitor K.

³⁰³ Survey response of Solicitor I.

*'[T]he risk of costs has put off more than one potential applicant.'*³⁰⁴

*'My client did take the appeal, but the costs of losing were a significant concern.'*³⁰⁵

*'Many cases where the risk of uncertain HMRC costs have led to [the] taxpayer not wishing to correct a flawed FTT decision. It is often commented that some taxpayers (confident of success) are in fact put off going to the FTT for the fear of winning and then facing an HMRC appeal with the costs risk.'*³⁰⁶

*'Where the amount of money at stake is not large and who have obtained low cost representation, I have had clients who have decided not to proceed further where they could not obtain a protective costs order.'*³⁰⁷

*'I have represented impecunious taxpayers who have lost at first instance but, even though they are advised that they have a good chance of succeeding on appeal, simply cannot take the risk that they won't. I have represented taxpayers who are successful at first instance, but cannot defend an appeal by HMRC – because they are concerned about the impact of costs. In those circumstances, I consider it incumbent on HMRC to agree not to apply for costs – but it is difficult to obtain HMRC's agreement to this – even where the point is one of significant public importance.'*³⁰⁸

*'[I experienced a situation where a party was deterred from pursuing an appeal to the Upper Tribunal because of the potential for an award of costs to be made against them if they were unsuccessful, when] representing pension schemes where costs are to come from the scheme itself. For these schemes the lack of certainty around costs in the Upper Tribunal reduces the cost:benefit analysis dramatically and in some cases is prohibitive e.g. where the scheme may hold enough funds for an appeal but not to cover HMRC's costs if unsuccessful. Where this is true, the scheme administrator will be on risk to pay the shortfall and will not pursue the appeal on that risk. In this example a member liability is crystallised because even where their case may be strong because the scheme administrator will not accept any risks of costs on them.'*³⁰⁹

'I have represented taxpayers who have considered appealing decisions of the FTT, but one factor in those considerations was that they would potentially be liable to a costs order, on top of their own costs and the tax at stake; but they

³⁰⁴ Survey response of Other Tax Professional A.

³⁰⁵ Survey response of Other Tax Professional B.

³⁰⁶ Survey response of Barrister B.

³⁰⁷ Survey response of Barrister C.

³⁰⁸ Survey response of Barrister D.

³⁰⁹ Survey response of Solicitor N.

would not be in a position to request successfully a protective costs order etc.’³¹⁰

‘This situation puts most appellants off! Meaning justice is available only for the wealthy business or wealthy individual taxpayer.’³¹¹

‘The threat of costs weighs heavily on individual litigants. It is particularly unfair in cases in which HMRC is seeking to have an issue determined for its own wider purposes. HMRC often uses this to its advantage. Whereas in the past HMRC would agree to waive costs where an important point was to be determined, it no longer does.’³¹²

‘[I have] seen difficulties arise where the taxpayer has won the FTT appeal but cannot afford to defend HMRC’s appeal to the UT.’³¹³

‘This is a concern for those litigating over smaller sums of money.’³¹⁴

‘Costs always make a client think twice about bringing proceedings – it’s the same in the courts, where I also practice, and where costs are standard.’³¹⁵

Pro bono representation

A.8.7 One respondent suggested that section 194 of the Legal Services Act 2007 should be extended to tribunals, to allow the possibility of pro bono costs orders. They said it would level the playing field and it would encourage more barristers to do pro bono work if there was the possibility of a costs award.³¹⁶

A.9 Other aspects of access to justice

A.9.1 Of the 43 respondents to our survey who answered the question ‘Have you ever encountered a situation where a taxpayer did not have adequate ability to access justice through the Tribunal process?’, 22 (51%) said they had encountered such a situation.

Litigants in person and equality of arms

A.9.2 It was suggested by survey respondents that a lack of ‘equality of arms’ for self-representing taxpayers put them at a structural disadvantage. Some respondents cited

³¹⁰ Survey response of Barrister I.

³¹¹ Survey response of Other Tax Professional C.

³¹² Survey response of Solicitor H.

³¹³ Survey response of Barrister F.

³¹⁴ Survey response of Barrister G.

³¹⁵ Survey response of Barrister L.

³¹⁶ Interview with Barrister T.

the difficulties for litigants in person negotiating the tribunal process and presenting their case.

*‘The Tribunal process itself is intimidating, time consuming and not everyone is able to face it, or to commit the time it takes. I have represented taxpayers who have not pursued appeals, simply because they cannot face the Tribunal process.’*³¹⁷

*‘While theoretically straightforward, my experience was that it still needed a legal expert to manage the process vis à vis HMRC and the Tribunal with the consequent need to incur significant costs to secure justice... it remains a highly lego-technical procedure the needs expert legal input to navigate efficiently/effectively.’*³¹⁸

Hearings in private and anonymised decisions

A.9.3 One interviewee noted how, before the Special Commissioners, it was easier for hearings to be held in private and an anonymised decision to be issued than it now is before the FTT. They felt that this could limit access to justice, as a taxpayer may prefer to abandon their appeal rather than expose their family arrangements to scrutiny.

*‘It is a disincentive to the taxpayer to have sometimes highly personal matters displayed in a public forum. And it is very difficult to persuade the tribunal either that there should be an anonymised decision or that certain facts should be mentioned in an opaque way if they are not directly relevant to the decision. I think it should be much easier for a taxpayer to have the decision on an anonymised basis or the hearing in private... I have had plenty of taxpayers who are unhappy about going to the FTT, because they would be identified. Sometimes for reasons which are very personal. In a capital gains tax main residence case the taxpayer simply didn’t want to have the family and its arrangements, so to speak, described and displayed in the decision. So, in the end, they opted to pay the tax rather than go to the tribunal.’*³¹⁹

A.9.4 Another interviewee had experience with a case, where the taxpayer did not want issues concerning their children to be discussed at a public hearing. The tribunal refused to hold a hearing in private, citing *Peter Andrea v HMRC*.³²⁰ The interviewee thought *Andrea* to be distinguishable due to the involvement of children. The interviewee noted the tribunal’s decision potentially limited access to justice as:

³¹⁷ Survey response of Barrister D.

³¹⁸ Survey response of Taxpayer A.

³¹⁹ Interview with Barrister R.

³²⁰ *Peter Andrea v HMRC* [2017] UKFTT 850 (TC).

‘[the children] could have been collateral damage of a public hearing, and so the taxpayer was left with a choice will do I go ahead with this or do I leave my children at risk of being damaged somehow.’³²¹

A.9.5 One survey respondent contrasted this to the tribunal’s seemingly unprincipled approach to holding private hearings during the early stages of the COVID-19 pandemic, whereby if more than three people wanted to observe, the hearing would automatically become a private hearing.

‘The Tribunal applies strict rules when a party seeks to have a hearing in private but will do so automatically when there are too many requests to participate.’³²²

Jurisdictional issues

A.9.6 The limited access to public law challenges in the FTT was also cited by a survey respondent as a limitation on access to justice.

‘Typically where the taxpayer would have a reasonable public law challenge but where, even in the context of an appealable decision, the case law suggests that public law arguments cannot be run in the FTT. Most taxpayers are far too afraid to contemplate JR [Judicial Review].’³²³

A.10 Digital bundles

A.10.1 Survey respondents were asked how the tribunal processes could be improved. Aside from issues related to COVID-19 (covered in Appendix D), and (hopefully) teething issues associated with technology, the major issue identified by survey respondents was that they felt the process could be improved through the use of digital bundles and an automated online filing process. It was felt that this would moderate many of the negative experiences users have with the FTT administration.

‘The higher courts are moving increasingly to electronic bundles, the FTT should be doing the same.’³²⁴

‘The movement of admin etc. from local tribunal centres to central centre in Birmingham – not a good improvement as it adds logistical issues with moving documents around etc. If the Tribunal were more digital, this would not be such a problem.’³²⁵

³²¹ Interview with Barrister P.

³²² Survey response of Barrister E.

³²³ Survey response of Barrister B.

³²⁴ Survey response of Solicitor E.

³²⁵ Survey response of HMRC A.

*‘Create an online system/platform that users can log into to conduct appeals (e.g. file application, provide listing info, etc.).’*³²⁶

*‘More digital, e.g. bundles. Better ability to communicate with a casehandler at the Tribunal service.’*³²⁷

A.10.2 Conversely, one respondent thought that there should be the possibility of filing hard copy bundles.

*‘It should be possible to file documents the old way, i.e. by post or personally at the tribunal. Some of my clients resent being forced to do it by email.’*³²⁸

³²⁶ Survey response of Solicitor J.

³²⁷ Survey response of HMRC A.

³²⁸ Survey response of Barrister L.

Appendix B: outline of survey design and interviewing methodology

The survey was carried out on the online survey platform Qualtrics. A link to the survey questionnaire is available at https://lse.eu.qualtrics.com/jfe/form/SV_9RlfSVyi6ZwsIu1.

The text of the survey questions is also reproduced in Appendix C.

The survey was distributed by the Chartered Institute of Taxation in its member email and also placed on its website. The survey was also distributed by the RBA among its members. In addition, it was emailed to law firms identified as specialising in tax litigation from the legal directories.

Although the survey was accessed 99 times, it was answered by 69 respondents (some people accessed it but did not answer any questions). Of the 69 respondents, not all respondents answered the full survey. The respondents were asked: ‘When reporting the data, we wish to describe respondents as being in particular categories. Please state which category best describes your engagement with the tribunal.’ Among those who responded to this, the breakdown of responses was:

- solicitor (16);
- barrister (17);
- other tax professional (4);
- HMRC (1);
- taxpayer (1).

Nine survey respondents were selected to be interviewed: seven barristers and two solicitors. Barristers were particularly chosen for interview because: (i) at any time they will often have more cases than solicitors, so they will have a greater breadth of exposure to the work of the FTT; (ii) many represent both HMRC and the taxpayer, and so they are able to more easily see the perspectives of both sides; (iii) a greater proportion of barristers indicated they were available for interview. Particular interviewees were selected on the basis both of their initial responses and to give a diversity of views. The interviews were semi-structured open questions related to issues of delay, the conduct of hearings, case management, and judicial specialisation and recruitment. Interviews took place by Zoom or (in one instance) by telephone in February 2021. All but one of the Zoom interviews were

recorded, in all instances with the consent of the interviewees. The interviews were, generally, between 40 and 80 minutes in length.

The content of the interviews that appears in this report was shared with the relevant interviewees, for them to check and approve, prior to publication.

To minimise the likelihood of any respondent/interviewee being identified, separate subject identifiers are used for interview and survey respondents, even if they were by the same person.

Appendix C: questionnaire

This survey is conducted by the Tax Law Review Committee (TLRC) of the Institute for Fiscal Studies (IFS) into the operation of the First-tier Tribunal (Tax Chamber) (FTT). The TLRC engaged in detail when the rules and procedures of the FTT were first being established. As it is now more than ten years since the establishment of the FTT, the TLRC has decided to inquire into, and report on, the operation of the FTT, with a view to making recommendations for the operation of the FTT going forward.

As part of this review the TLRC wishes to survey tribunal users on their experience of the FTT. The text of individual responses may be published verbatim (but anonymously, as explained below) in the TLRC's report or summarised.

Participation in this study is completely voluntary. Please be aware that if you decide to participate, you may stop participating at any time and you may decide not to answer any specific question. You will be asked if you are willing to be contacted for a follow-up interview to elaborate on your responses: you will only be contacted if you so consent.

The records from this study will be kept as confidential as possible. Only the members of the TLRC involved in this project (currently Michael Blackwell, Tracey Bowler, Judith Freedman and Malcolm Gammie) and researchers assisting them will have access to the unanonymised raw data. Your data will be anonymised – unless you expressly consent your name will not be used in any reports or publications resulting from the study. The raw data will be deleted after one year.

By submitting this form you are indicating that you have read the description of the study, are over the age of 18, and that you agree to the terms as described.

If you have any questions, or would like a copy of this consent letter, please contact either of the TLRC members responsible for this survey: Michael Blackwell (m.c.blackwell@lse.ac.uk) or Tracey Bowler (tj.bowler1@btinternet.com). Details of the TLRC may be found here: <https://www.ifs.org.uk/research/TLRC>

1. Prior to the changes brought about by the COVID-19 pandemic which types of hearings had you been involved in? (You may select multiple categories).
[Categories of 'face to face' and 'paper'.]
2. Do you think the pre-COVID-19 tribunal process could have been improved? Please explain how you think the pre-COVID-19 tribunal process could have been improved.
[Question displayed only if the answer to the previous question is 'yes'.]
3. Following the changes brought about by the COVID-19 pandemic which types of hearings have you been involved in? (You may select multiple categories).
[Categories of 'face to face', 'paper', 'Virtual (Video)' and 'Telephone'.]
4. Do you think the tribunal processes introduced as a result of the COVID-19 pandemic could be improved?
5. Please explain how you think the tribunal processes introduced as a result of the COVID-19 pandemic could be improved.
[Question displayed only if the answer to the previous question is 'yes'.]
6. Have you experienced delay in the tribunal process?
7. Which of the following have you experienced to be a cause of such delay? (You may select multiple boxes.)
*[Question displayed only if the answer to the previous question is 'yes'.
Categories of 'HMRC', 'the taxpayer', 'legal representatives', 'the Tribunal' and 'other'.]*
8. Please specify the nature of the 'other' cause of the delay.
[Question displayed only if the answer to the previous question includes 'other'.]
9. Please provide more detail of what you have found to be a cause of delay in the tribunal process.
[Question displayed only if the answer to the question 6 is 'yes'.]
10. Have you ever experienced a situation where a party was deterred from pursuing an appeal to the Upper Tribunal because of the potential for an award of costs to be made against them if they were unsuccessful?
11. Please provide more context to your last answer.
[Question displayed only if the answer to the previous question is 'yes'.]
12. Have you ever encountered a situation where a taxpayer did not have adequate ability to access justice through the tribunal process?
13. Please provide more context to your last answer.
[Question displayed only if the answer to the previous question is 'yes'.]
14. Apart from the changes brought about by the COVID-19 pandemic, have you noticed significant changes in the tribunal process in the last 10 years?

15. Please provide more context to your last answer.
[Question displayed only if the answer to the previous question is 'yes'.]
16. Please add any additional observations, if any, that you may wish to make about the tribunal process.
17. Would you be willing to be contacted for a follow-up interview to elaborate on the issues raised in this survey? (Any follow-up interview will be conducted either on the phone or by video conference.)
18. Please provide your name, so we can contact you.
[Question displayed only if the answer to the previous question is 'yes'.]
19. Please provide your preferred contact details.
[Question displayed only if the answer to the question 17 is 'yes'.]
20. When reporting the data, we wish to describe respondents as being in particular categories. Please state which category best describes your engagement with the tribunal.
[Categories of 'taxpayer', 'HMRC', 'barrister', 'solicitor', 'accountant', 'other tax professional', 'prefer not to specify' and 'other'.]
21. Please specify how we should describe the 'other' category which you are in.
[Question displayed only if the answer to the previous question is 'other'.]

Appendix D: issues relating to the COVID-19 pandemic

- D.1 The COVID-19 pandemic has clearly affected the operation of the tribunal. One respondent noted the difficulties tribunal staff and users faced, but suggested all had acted in good faith doing their best.

‘Difficulty experienced by various parties with managing childcare during the pandemic. Difficulty accessing documents. Difficulty getting a hearing re-listed after the initial hearing was cancelled. But all of these difficulties were to be expected. So far my sense is that all parties involved have been doing their very best to ensure that appeals are heard, and I am happy with the efforts being made.’³²⁹

- D.2 Concerns were expressed by several respondents as to how the tribunal initially responded to the pandemic.

‘The issues surrounding cancelled face-to-face hearings are well documented, however, this really did cause severe disruption and stress for clients who had hearings listed in July. To be told a hearing is cancelled only to then have it listed a week prior to the cancelled hearing date is not acceptable. I have been impressed with the improved response time from judges in respect of applications over July and August.’³³⁰

‘There was a blunder at the outset in that the Tribunal cancelled all outstanding listings and then later purported to reinstate them, thereby giving appellants a much shorter time to prepare for a much more complex and costly procedure (depending obviously on the nature and age of the evidence. That was a one-off mistake but the Tribunal should be much more ready to accept

³²⁹ Survey response of Barrister D.

³³⁰ Survey response of Solicitor A.

traditional format hearings. The COVID [rule] are easy enough to observe in a tax hearing only slightly modified.’ ³³¹

‘The way in which stays were introduced - by vacating hearings and then reinstating them piecemeal - could have been improved and has caused dates to fall out of diaries requiring hearings to be relisted.’ ³³²

‘HMRC initially refused to hear a case by video link, and the Tribunal’s general stay caused confusion over how this interacted with different time limits.’ ³³³

- D.3 Some respondents have also clearly had negative experiences with the online video platform for remote hearings.

‘The sound gets distorted from time to time – lots of feedback which cannot be avoided even when the judge mutes everyone on the call except counsel for the parties.’ ³³⁴

‘My experiences with HMCTS’s video hearing platform to date have been terrible. The software is temperamental and unreliable. It works on some days and refuses to work on others (notwithstanding that NOTHING has changed at the user’s end in terms of how they are set up). This causes SIGNIFICANT disruption if the software malfunctions the day before the hearing because it then means that time that should be dedicated to prep has to be wasted on IT. I have to date had one Skype for Business hearing in the Court of Appeal which ran absolutely seamlessly and one FTT HMCTS video platform hearing which was a disaster. Not only were there significant issues in the run up to the hearing as I have just described but the software crashed 5 times on the day itself (at the Tribunal’s end – all users were “booted off” 5 times and received a message that it was a fault at the Tribunal end). I have another hearing coming up this week and this pattern is repeating itself. The software worked the first time I ran the self-test a few days ago, only to fail today when I tried to perform another self-test on the same machine. When there is perfectly good software available (Skype for Business) I simply cannot understand why the Tribunal persists with its own failing technology.’ ³³⁵

³³¹ Survey response of Solicitor D.

³³² Survey response of Solicitor I.

³³³ Survey response of Solicitor L.

³³⁴ Survey response of Solicitor C.

³³⁵ Survey response of Barrister A.