

## Tax Investigations - When negotiations break down

The last in our current series of how to deal with what our transatlantic brothers refer to as a “tax audit” deals with the situation where you and the Tax Inspector just can’t agree.

Fortunately, our tax system doesn’t leave us completely to the mercy of the civil servants, but allows us a right of appeal against tax assessments or determinations.

Our impression is that appeals are much more frequent in the case of VAT disputes than income tax, capital gains tax, or corporation tax disputes, and there are a couple of important reasons for this.

One is that, although the Inland Revenue and Customs & Excise are meant to have merged into one organisation called HM Revenue & Customs, they keep the old traditions of the separate agencies, and one of these is that VAT people are much more “trigger happy” in terms of allowing things to go to the VAT Tribunal rather than attempting to resolve them in correspondence, which has traditionally been the Inland Revenue approach.

The second reason is that VAT lends itself to what you might term “low level” disputes more than direct tax does. A lot of VAT disputes that end up in the tribunal are about whether a particular item fits within zero

rating or exemption on the one hand, or full variability of the other, and it can be very much a case of nit picking about words.

## **How to Appeal**

Although the structure of tax appeals is rather in the melting pot at the moment, at present the way it works, which is different between direct taxes and VAT, is as follows.

If you have received a VAT assessment, or a decision on the taxable status of a particular supply, that you disagree with, you have a set period, set out in the letter accompanying the assessment or decision, telling you how long you have to appeal. Appeals are addressed not to HM Revenue & Customs themselves, but to the VAT Tribunal, which will send you the forms in the post to complete.

The most important part of this form, probably, is the bit where you have to write in the grounds of your appeal. It is a good idea to take some thought, and if necessary seek professional advice, on how this part of the form should be worded. If you get the grounds of appeal wrong it doesn't necessarily prevent you from changing your mind later on, but this doesn't look so good as if you clearly know what you are talking about from the outset.

Appeals in direct tax cases, on the other hand, are addressed to HM Revenue & Customs, and you have a choice as to whether to appeal to the General Commissioners or the Special Commissioners.

The General Commissioners meet locally and are akin to magistrates in that they are not trained in the niceties of tax law. Often they are current or retired business people and, but for one point which we will come on to in a minute, might be expected to take a more favourable view of the taxpayer's case than the Special Commissioners, who are legally trained and meet in a small number of centres throughout the UK.

So if you have a case where the point at stake is a question of fact, and where you feel, perhaps, that common sense would come up with a different view from the bureaucratic juggernaut driven by the Tax Inspector, then the Generals might well be the place to go.

You do need to be aware, though, that the General Commissioners are used to hearing cases where the taxpayer doesn't bother to turn up. Or, if he does turn up, he doesn't know what he is talking about. So they do tend, sometimes, to come to the hearing with a preconception in favour of the taxman being right technically. If you do go to the General Commissioners, then, it is a good idea to ram home the point that you are one of those taxpayers that do actually know what you are talking about (or use appropriate professional representation if you don't!)

If what you are arguing about is a complex technical point of tax law, on the other hand, whilst it's not actually forbidden to go to the General Commissioners, a cynical view is that you would only do so if you feel that you have a weak case!

Sometimes taxpayers do get away with murder, it has to be admitted, where they take such points before what is essentially a lay tribunal.

## **The Order of Events**

The order of events is roughly the same whether you are dealing with direct taxes or VAT. As the appellant, you have the right to open the batting, and it is a good idea to try to establish some kind of rapport in your communication with the Commissioner or Tribunal Chairman at an early stage.

The best way to do this is to be straightforward and clear in your exposition, first of all very briefly explaining what the case is about, secondly setting out the facts you rely on (together with any documents) and thirdly saying what you think the law is and how it applies to your situation.

Don't hesitate to call witnesses if you feel they might have anything to say in favour of your case. For example, if the taxman is disputing your right to a deduction for a certain payment, on grounds that you haven't kept the invoice (or never had one) see if you can get the recipient of the payment to come along and admit before the Tribunal that he received the disputed amount from you. If you are claiming that a suspicious entry on the credit side of your bank account was a gift or a loan from a relation, get that relation to come and testify to that effect.

We think that Tribunals like to see witnesses called rather than the case relying on the unsupported assertion of the taxpayer him or herself. It shows that the taxpayer is taking the appeal seriously.

If you do bring witnesses into the hearing, your opponent (the taxman or a barrister appointed by HM Revenue & Customs) then has the opportunity to cross examine them, and you can ask any concluding questions arising from the cross examination. You are likely to want to do this if you feel the taxman has scored any valid points in his questions.

It is then the Revenue's turn to present their case, which they will normally do at exhaustive and even tedious length. They very rarely call witnesses.

Finally, as the appellant, you have the right to wind things up and address the Tribunal. You will, of course, use this full opportunity to rubbish as many of the taxman's points as you can.

It is very rare, except before the General Commissioners, that you will then get a verdict there and then. Even the Generals will usually ask you to leave the room for a nail biting few minutes or half hour. Cynics say this is to give them a chance to ask the clerk to tell them what to decide.

The Special Commissioners and VAT Tribunal will almost always, unless the case is a very simple one indeed, reserve judgement and send you a written judgement, sometimes a long time afterwards.

Either side has the right to appeal further against the decision of the first Tribunal, be it the VAT Tribunal or the Commissioners as the case may be. This appeal can only, technically, be on a point of law rather than a point of fact. That is, you can't appeal against the decision by the Commissioners, for example, that you never paid that £10,000 to have your office premises repaired, but you can appeal against the question of

whether repairs to your premises are allowable against tax.

Only very brave (or more frequently, very foolish) litigants conduct their own appeal at the next stage up, which is the High Court (at least at the moment). If you do decide to go through the court system, but prefer to be represented, this has to be done by a barrister: your accountant or solicitor can't do it. Decisions of the High Court can be appealed up to the Court of Appeal, where instead of one judge you get three, and Court of Appeal decisions can then be appealed in their turn up to the House of Lords, where, usually, you get five judges. At each stage it is quite frequently the case that the court refuses leave to appeal to the next court up. However, this never stops you applying to that higher court direct for leave to appeal, and this is very often granted in practice despite the refusal of the court below.

## **Two Bits of Advice**

Having talked about the actual mechanics of appealing, here are a couple of bits of advice. The first is: don't treat having to go to appeal as a "worse case scenario". The way the taxman talks, at least in direct tax investigations, is very much as if both parties wish to avoid a formal appeal hearing at all costs. This may be the case for him, because of all the red tape he has to go through to prepare for a hearing, but it certainly need not be for you! An appeal hearing is a good way to test the truth of the taxman's metal. If he is saying things which really can't be justified in the law, he is not going to want those being aired in front of people who will agree with

you. The ability to appeal is, in fact, a powerful negotiating point in the taxpayer's favour, which he shouldn't hesitate to use where appropriate.

The second piece of advice is to use the appropriate professional representation. This is particularly true to the High Court and above, but it can also be crucial at the first stage of appeal. Remember that higher courts can't disturb what the first Tribunal has found as a fact. So it is very important to get the right facts found at that stage, and to do that you need to have a clear and detailed understanding of the way the tax rules work as applied to your situation.

If you approach a professional tax adviser or lawyer to ask him to represent you in an appeal hearing, make sure that, if you win, his costs can be recovered. Whilst the fees of some advisers can be claimed as costs, others can't. You may decide to go for one of the latter group in any event, though, if you feel they are more likely to be able to win the case for you, which after all is the most important thing at the end of the day.

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