Response from ICAS to the Scottish Government consultation

Tribunals (Scotland) Act 2014

Consultation on Draft Regulations regarding:

(1) the Transfer of Functions and Members of the Scottish Tax Tribunals to the Scottish Tribunals
(2) the rules of procedure for the First-tier Tribunal for Scotland Tax Chamber, and
(3) the Composition of the First-tier and Upper Tribunals for Scotland

9 December 2016

About ICAS

1. The following submission has been prepared by the ICAS Tax Committee. The ICAS Tax Committee, with its five technical sub-Committees, is responsible for putting forward the views of the ICAS tax community, which consists of Chartered Accountants and ICAS Tax Professionals working across the UK and beyond, and it does this with the active input and support of over 60 committee members. The Institute of Chartered Accountants of Scotland ('ICAS') is the world's oldest professional body of accountants and we represent over 21,000 members working across the UK and internationally. Our members work in all fields, predominantly across the private and not for profit sectors.

2. ICAS has a public interest remit, a duty to act not solely for its members but for the wider good. From a public interest perspective, our role is to share insights from ICAS members in the many complex issues and decisions involved in tax and financial system design, and to point out operational practicalities.

General comments

3. ICAS welcomes the opportunity to comment on 'Tribunals (Scotland) Act 2014 Consultation on Draft Regulations regarding: (1) the Transfer of Functions and Members of the Scottish Tax Tribunals to the Scottish Tribunals; (2) the rules of procedure for the First-tier Tribunal for Scotland Tax Chamber and (3) the Composition of the First-tier and Upper Tribunals for Scotland' issued by the Scottish Government in October 2016.

4. We note that it is proposed that the members and functions of the existing Scottish Tax Tribunals are to be transferred into the Scottish Tribunal structure, which is a reasonable and sensible policy.

5. Generally, the proposed rules for the First-tier Tribunal replicates the existing rules of procedure, which we welcome.

6. We understand that under section 39 of the Scotland Act 2016 there is to be a transfer of functions of the UK tax tribunal that relate to reserved matters, so far as those functions are exercisable in relation to Scottish cases, and that these will be transferred to the Scottish tribunal. It is important therefore that the Scottish tribunal rules mirror those of the UK tribunals as far as possible.

Responses to Consultation Questions

7. **Part 2: Transfer of functions to the Scottish Tribunals**

Q1: Do you have any comments on the draft transfer of functions and members Regulations?

ICAS is content with the draft transfer regulations in relation to functions and to members.

Q2: Are you content with the provisions regarding transitional arrangements?

ICAS is content with the provisions regarding transitional arrangements as adequate planning appears to have been considered regarding ongoing, pending and future cases including cases being heard on the day of the transition.

It is hoped that there will be adequate communication to taxpayers who find themselves at hearings within the transitional period to explain to them what is happening and how they may be affected, if at all.

Q3: Are you content with the provisions relating to the transfer of functions and members?

ICAS considers that there is no particular issue with the provisions relating to transfer of functions and members as they appear to be like for like.

Q4: Do you have any other comments you wish to make?

In paragraph 7 of the consultation paper it states that "complex cases will be heard at first instance by the Upper Tribunal". However, this does not mirror the tribunal rules in rules 24 and 29. Nor do we think it is appropriate. It can be difficult to correctly categorise a tax case at the outset before all elements of it have been digested and so a decision to refer it to the Upper Tribunal should be at the discretion of the FTT. This would also mirror UK practice whereby a case is allocated into one of four categories by the First Tier Tribunal and then potentially remitted to the Upper Tier Tribunal if deemed complex.

Part 3: Rules of Procedure

Q1: Do you have any comments on the draft regulations on the First-tier Tax Chamber Rules of Procedure?

In Rule 10 it is not clear why it has been decided to change the rules about expenses. It would be helpful to have the policy decision behind this explained. The draft Rule 10 contains two sub-rules, (4) and (5) and if this is all that is to be retained from the existing rule these should be renumbered (1) and (2).

Rule 37 provides for a time limit of 14 days in which to request a review, which is very short and may be unrealistic in more complex cases. We suggest that the time limit for this should be set at 30 days.

Should Rule 38 state the time limit in which an appeal can be made, for clarity (i.e. 30 days per SSI 2015.184)?

Q2: Do you have any comments on the new provisions regarding review of decisions and allowing parties to be accompanied by a supporter?

Review: ICAS considers that it is appropriate for the FTT to be able to review a decision it has made before it is submitted to the Upper Tribunal. One hopes it would not be necessary, but a review and some further drafting may assist the appellant in understanding the decision and, in particular, the law on which it is based, before deciding whether to continue with the application to appeal. This is a sensible measure that may assist in decision-making about whether to ask for a new hearing in the Upper Tribunal, with the time and costs to all parties that this entails. We believe this ability to review is helpful.

Supporter: It principle, it would appear equitable for a party to be able to be accompanied by a supporter in addition to or instead of a legal adviser. However, draft Rule 11 allows for a legal representative or a lay representative and this is likely to be all that is needed. In a jurisdiction that is dealing with devolved taxes – land and buildings transaction tax, landfill tax or air passenger duty – it seems unlikely that there will be much need for someone to need a 'supporter' when there is already scope for representation, either legal or lay.

If there is to be a new rule permitting an appellant to have a lay supporter, then information should be made available to persons acting in the role of supporters to ensure they fully understand the process and will not obstruct proceedings with unnecessary commentary, objections, information or obfuscation.

ICAS is concerned to understand how the FTT will conclude that per Part 2 (11) and (12), a representative or supporter is 'unsuitable' in advance of the proceedings taking place. If proceedings have commenced, how will unsuitability be determined and what is the proposed course of action to prevent an unsuitable person from standing? What is the time limit for a further representative or supporter to be chosen? Further information should be made available in this regard and in any event, the qualifying criteria should be formulated and published for public information purposes.

Q3: Do you have any other comments you wish to make?

We do not have any further comments.

Part 4: Composition of the Scottish Tribunals

Q1: Do you have any comments on the proposals regarding the composition of the First-tier Tribunal Tax Chamber?

Q2: Do you have any comments on the proposals regarding the composition of the Upper Tribunal when hearing referrals or appeals from the First-tier Tribunal Tax Chamber?

Q3: Do you have any other comments you wish to make?

We have no comments on these questions.