

Analysis

The tax tribunals: the next ten years

Speed read

The IFS Tax Law Review Committee's report, *The tax tribunals: the next ten years*, identifies causes of dissatisfaction among FTT users to include delay, a lack of communication by the FTT administration, a lack of engagement by some judges during the hearing and the allocation of cases to judges with the appropriate knowledge or skill. Delay is the overriding concern among tribunal users surveyed, especially delay between the hearing and the release of the decision. The report also identifies existing areas of strength of the FTT, including how litigants in person are often assisted by judges taking an inquisitorial approach.



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The Tax Law Review Committee (TLRC) of the Institute for Fiscal Studies (IFS) recently published a 95-page report, *The tax tribunals: the next ten years*, examining the work of the Tax Chamber of the First-tier Tribunal (FTT), and making recommendations for improvement. The report is informed by the results of a survey and interviews of tribunal users (mostly solicitors and barristers), together with the experiences of members of the TLRC.

Delay

Delay was the overriding concern among tribunal users surveyed. Delay was attributed to a number of causes including the tribunal administration, a lack of judicial availability, late listing of cases, poor case management and the conduct of the parties (both HMRC and the taxpayer). A very major cause of concern was the time taken by judges to promulgate their decision after a hearing, which could take over one year.

It is a well-established legal principle that justice should be speedy, because 'delay is in effect a denial' (see *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51 at para 57). Prior to tribunal reform, in 2001, the time taken to deal with a case, from first receipt to final disposal was:

- for the General Commissioners, one or two months;
- for the VAT and Duties Tribunal, 35 weeks; and
- for the Special Commissioners, 20 weeks.

Recent statistics for the Tax Chamber are broken down by case categorisation. They show that, pre-pandemic, in 2019/20 the average lifespan of disposed cases was:

- 14 weeks for default paper cases;
- 33 weeks for basic cases;
- 60 weeks for standard cases (lower category);
- 84 weeks for standard cases (higher category); and

- 142 weeks for complex and missing trader intra community (MTIC) cases.

The position has, understandably, worsened following the onset of the pandemic.

A major concern is the time taken for tribunal judges to release their decision following the hearing. In a recent appeal concerning an MTIC fraud, the Court of Appeal referred to an 'unwritten rule ... that a judgment should be delivered within three months of the hearing' (*NatWest Markets plc v Bilta (UK) Ltd* [2021] EWCA Civ 680). However, this three-month rule is frequently breached by FTT judges. Looking at decisions reported in *Simon's First-tier Tax Decisions*, in 2019 39% of reported decisions were not promulgated within 100 days, and in 2020 the figure was 55%. Some judges take considerably longer, with certain judges often taking more than a year to promulgate their decisions.

As Mummery LJ has emphasised (*Connex South Eastern Ltd v Bangs* [2005] EWCA Civ 14), delay at the writing-up stage can be especially detrimental to justice:

'A tribunal's delay prolongs legal uncertainty and postpones finality. It increases anxiety in an already stressful situation. It may cause injustice. A claimant in the right is wrongly kept out of his remedy and a defendant in the right has to wait longer than is reasonable for the allegations and claims against him to be rejected.'

'It is self evident that delay may also have a detrimental effect on the quality and soundness of the decision reached. This is more likely to occur 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.'

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Such delay has also been held by the Court of Appeal to potentially undermine the loser's confidence in the decision (*Sambasivam v Secretary of State for the Home Department* [2000] Imm AR 85).

There seems nothing innate to the nature of the judicial task in the FTT that means that decision writing necessarily takes so long. It appears to be only some judges that take such a long time. Looking at decisions reported in *Simon's Special Commissioners Decisions* and *Simon's First-tier Tax Decisions*, the situation seems to have been much better in the ten years prior to 2011, when at most 4% of reported decisions were not issued within 200 days. This suggests reducing the present level of delay is not insurmountable. Since 2011 there has not been a year when less than 17% of published decisions took 200 or more days to promulgate following the hearing.

There does, however, appear to have been some improvement in recent years, especially since 2017 when Judge Greg Sinfeld became chamber president. However, such progress seems to have been set back by the covid-19 pandemic, although the tax tribunal was ahead of other

tribunals in its use of video hearings. The TLRC report notes 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.

Judicial preparation for and involvement in hearings

Many interviewees 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.

This lack of judicial participation in hearings was often identified by interviewees as associated with judges taking a long time to write up decisions. They felt that if judges were more involved, they would sooner arrive at a decision.

Typical comments by interviewees were that:

‘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.’

and:

‘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 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... 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?’... 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... 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.’

It is important to note that concern about limited participation in hearings only applied to some judges. As one interviewee commented:

‘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.’

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. It is not always necessary for judges to read all the cases listed in the skeleton arguments: normally the parties 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 issues, one 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. 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 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) would be that such findings are based on evidence that the judges reconstruct facts rather than having recorded them.

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It appears this may be a consequence of the under resourcing of the tribunal, so judges do not have sufficient paid writing time to prepare. The TLRC report recommends 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.

A specialist tribunal: judicial recruitment and case allocation

The Court of Appeal and Supreme Court have repeatedly emphasised that the FTT is a specialist tribunal and therefore: ‘Particular deference is to be given to such Tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker’ (see *HMRC v Procter & Gamble UK* [2009] EWCA Civ 407 at para 11).

However, the actual expertise of the FTT has been questioned. A common theme among the TLRC’s survey respondents and interviewees was a questioning of the expertise of FTT judges to hear the particular cases to which they were assigned. Writing in 2009, in his *Review of Civil Litigation Costs*, 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.’

He then qualified this, in a footnote, saying: ‘This point will not be correct if, in practice, First Tier Tribunal members only ever sit in chambers corresponding with their own specialist expertise.’ However, 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.

The basis of allocation of cases to judges, particularly where the case was a highly technical one, was queried by some of the TLRC's survey respondents and interviewees. 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.

Some interviewees thought that judges who were assigned to hear a case should be skilled in that sub-specialism of tax law. One commented:

'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.'

Others disagreed with the view that specialist knowledge was desirable, except that they thought it might be advantageous where the taxpayer was unrepresented. 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. One interviewee commented:

'[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.'

Accordingly, they thought such technical ability should influence which judges were assigned the more legally complex cases.

It is understood that the Tax 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 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.

Clearly, 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. It is sensible that this should be reflected in the ticketing policy. However, there seems to be no good reason why all salaried judges, irrespective of tax experience, should be automatically ticketed to hear all cases.

There appears, at present, to be a shortage of judges, leading to hearings being cancelled. 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.

Initially recruitment to the Tax Chamber was done through tax specific recruitment exercises. However, since 2014 recruitment has 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. The TLRC report notes that due to the highly technical nature of tax law, adjudication of tax disputes requires substantially different skills to many other areas of law. It therefore recommends 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.

Respondents often suggested that the tribunal administration could be improved with more resources

The JAC will soon launch another generalist competition to recruit new fee-paid judges to all chambers of the FTT, including the Tax Chamber. It is anticipated that registration for the first stage qualifying test will open on 5 October 2021 and close on 19 October 2021. Any interested readers are very much encouraged to apply.

Tribunal administration

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. This means that the administrative staff often lack 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.

A perception of the FTT administration as a cause of delay was common across all categories of FTT users who responded to the TLRC's 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

Several other concerns were identified by respondents to the TLRC's survey with how the tribunal administration functions. Survey respondents noted frequent communication failures with the FTT administration, including communications to the FTT getting lost and communications from the FTT

The TLRC's recommendations

In its new report *The tax tribunals: the next 10 years*, the TLRC set out the following recommendations for the FTT to consider:

- Increasing the overall number of sitting days.
- Ensuring that judges have sufficient paid writing and preparation days to 'realistically discharge' their duties.
- Developing a plan to reduce the backlog of unwritten decisions, which they note has already been instigated, and the publication of targets and quarterly statistics.
- Considering how to reduce the length of some decisions.
- Making case management more robust and ensure tailored case management training is available for all FTT tax judges.
- Listing complex cases at an earlier stage.
- Amending rule 28 of the FTT rules (which allows the transfer of a case from the FTT to the UT), so that the consent of both parties is not required.
- Making introductory training appropriately comprehensive on procedural matters and the conduct of hearings.
- Publishing a policy on when members are assigned to hear cases and on the allocation of judges to cases.
- Recruiting additional members to address the declining number of members in the FTT in recent year, and ensure that the appointment of judges to the FTT Tax Chamber is a tax-specific appointments exercise (rather than a general exercise), unless the judges are only ticketed to hear routine matters such as penalty appeals.
- Considering waiving the usual requirement for salaried appointments to have had previous fee-paid service in judicial office.
- Reviewing the terms and conditions of employment of administrative staff to ensure they are competitive with similar positions in the civil service.
- Implementing the Cost Review Group's recommendations to facilitate access to justice, including (i) formalising the Rees practice (whereby in very limited circumstances HMRC agrees not to seek an adverse cost award, if it is successful) with the FTT rules, enabling the taxpayer to apply for an order where HMRC does not apply this practice; and (ii) before the UT where the taxpayer was successful in the FTT, other than cases allocated to the complex category in the FTT, disapply cost-shifting unless the taxpayer chooses to elect into the cost-shifting regime in the UT.
- Improving the FTT website to assist litigants in person.
- Exploring whether there is professional interest in organising a 'duty' scheme to provide advice to litigants in person.
- Considering giving taxpayers an option of short video hearings instead of paper hearings.
- Issuing guidance to judges on balancing considerations of privacy and open justice, especially in cases that involve factual evidence concerning minors.
- Considering issuing a policy on which decisions are published.

Judge Greg Sinfield, President of the FTT's Tax Chamber, noted in the senior president's 2020 annual report that the chamber had to make fundamental changes to procedures 'and learn new ways of working in a very short time' as a result of the covid pandemic. The 2021 annual report has not yet been published. The TLRC said Sinfield welcomed its report and 'commented that, as the report states, the [Tax Chamber] has already begun to address some of the issues raised'.

being sent to the wrong people. 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. Respondents often suggested that the tribunal administration could be improved with more resources.

There are clearly substantial pressures on the public sector at the moment, as the government struggles to repay pandemic related debt. Clearly from a principled perspective the justice system should be properly funded: but such considerations sometimes weigh lightly in determining public expenditure. Pragmatically, however, like expenditure on HMRC, expenditure on tax tribunals is, in a way, revenue raising as it can reduce delay and so bring forward payments. It might therefore be hoped that properly resourcing the Tax Chamber might be regarded as an important priority for the government.

Litigants in person

Where litigants in person appear before the FTT, many FTT judges do adopt a more inquisitorial approach. Indeed, the way in which the FTT deals with litigants in person is perceived to be a particular strength of the Tax Chamber.

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The TLRC report makes several recommendations as to how the position of litigants in person could be further advantaged. For example, if the FTT were to provide a simple guide to the processes involved in making an appeal, and about what to expect on the day of a hearing. 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. 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.

Most ambitiously the TLRC report also notes a highly successful scheme (CLIPS) established by the Chancery Bar, 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. Whilst establishing and administering such a scheme for the FTT would require substantial resources, it would be of great benefit to litigants in person. The report notes that 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. ■

The author is also author of the TLRC's report but is writing here in a purely personal capacity.



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