

**EXPLANATORY MEMORANDUM TO
THE FIRST-TIER TRIBUNAL AND UPPER TRIBUNAL (CHAMBERS)
(AMENDMENT) ORDER 2009**

2009 No. 196

THE APPEALS (EXCLUDED DECISIONS) ORDER 2009

2009 No. 275

**THE TRIBUNAL PROCEDURE (FIRST-TIER TRIBUNAL) (TAX
CHAMBER) RULES 2009**

2009 No. 273 (L. 1)

THE TRIBUNAL PROCEDURE (AMENDMENT) RULES 2009

2009 No. 274 (L. 2)

1. This explanatory memorandum is prepared by the Ministry of Justice (MoJ) and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.2 The First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2009 creates a Tax Chamber in the First-tier Tribunal and a Finance and Tax Chamber in the Upper Tribunal. This Order also provides for a transitional provision in relation to the rules applying to the tax chamber.

The Appeals (Excluded Decisions) Order 2009 Order excludes certain decisions (mainly in relation to tax) from onward appeal to the Upper Tribunal or Court of Appeal.

The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 provides rules for the new First-tier Tribunal tax chamber and the Tribunal Procedure (Amendment) Rules 2009 amends the current Upper Tribunal rules to make them appropriate for tax matters. It also makes a minor amendment to the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008 to alter a definition.

3. Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None

4. Legislative Context

- 4.1 The Tribunals, Courts and Enforcement Act 2007 (the TCEA) established two new tribunals and provided the mechanics for the transfer of a number of

existing tribunal jurisdictions into the new tribunals. The transfer of tax matters into the new tribunals with effect from 1 April 2009 was made in the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.

- 4.2 This Order was prepared jointly by MoJ and HMRC and was passed by both Houses under the affirmative process and made 18th January 2008 and comes into force on 1 April 2009. The Order transfers the functions of the existing four tax tribunals into the new tribunals established under the TCEA, as well as making certain changes to the legislation governing HMRC's administration of tax appeals.
- 4.3 The Order was made under *vires* in both the TCEA and the Finance Act 2008, being respectively sections 30(1) and (4), 31(1), (2) and (9) and 38 of, and paragraph 30 of Schedule 5 to, the TCEA, and section 124 of the FA 2008.
- 4.4 **The First-tier Tribunal and Upper Tribunal (Chambers) (Amendment) Order 2009** is made under sections 7(1) and 9 and 145 of TCEA. Section 7(1) provides for the Lord Chancellor, with the concurrence of the Senior President of Tribunals, to make provision for the organisation of each of the First-tier Tribunal and the Upper Tribunal into Chambers. The Order creates a new tax chamber and finance and tax chamber and allocates functions between the two.
- 4.5 **The Appeals (Excluded Decisions) Order 2009 is made under section 11(5)(f) and 13(3)(f) of TCEA.** This provides for the Lord Chancellor to specify any decisions that are excluded from the right of Appeal to the Upper Tribunal and to the Court of Appeal respectively. This Order replaces the original Appeals (Excluded Decisions) Order 2008 listing decisions that are currently excluded from onward appeal and are to remain so in the new system.
- 4.6 Under section 22 of the TCEA, Tribunal Procedure Rules in the new tribunals are made by the Tribunal Procedure Committee (TPC). The **Tribunal Procedures (First-tier)(Tax Chamber) Rules 2009** set out the practice and procedure to be followed in the First-tier Tribunal for the newly created First-Tier Tax Chamber. The **Tribunal Procedure (Amendment) Rules 2009** amend the Upper Tribunal rules previously made by the TPC and approved by Parliament to make them appropriate for tax matters.

5. Territorial extent and application

- 5.1. These instruments apply to all of the United Kingdom.

6. European Convention on Human Rights

- 6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The Chambers Amendment and Excluded Decisions Orders

- 7.1.1 The TCEA provides for the establishment of “chambers” within the two new tribunals so that jurisdictions that will be transferred into the tribunals can be grouped together appropriately. Each Chamber is headed by a Chamber President. The Order creates two new Chambers where tax matters will be heard, and where tax judicial expertise will be concentrated and organised to ensure these matters are dealt with appropriately.
- 7.1.2 Tax legislation sets out a number of matters where there is currently no onward right of appeal. Many of these relate to matters that are subsidiary to a larger case, and where providing an onward right of appeal could encourage unnecessary litigation. This Order maintains the status quo in terms of such matters, and does not change or restrict current appeal rights.

7.2 Tribunal Procedure Rules

- 7.2.1 The First-tier Tax Chamber Rules provide, for the first time, for all tax matters to be dealt with according to one set out of procedural rules. Tax matters have, in the past, been dealt with differently depending on the nature of the tax in dispute (e.g. whether direct or indirect). This has been confusing for tribunal users and has become increasingly anomalous, particularly given the merger of HM Customs and Excise and Inland Revenue into a single department.
- 7.2.2 A distinctive feature of Tax matters are their range, in terms of size (money at stake) and complexity. The rules provide for different procedures depending on whether a case is categorised as default paper (which would normally be heard on the papers), basic, standard or complex. The new set of unified rules support the development of consistent procedures across the different types of taxation, and the development of a case management system more geared around the needs of the case.
- 7.2.3 The Upper Tribunal Rules are being amended to make these appropriate for tax. The main amendments are to provide (subject to review in a years time) for Upper Tribunal in relation to tax cases to have the full discretion to award costs within the scope of the power in section 29 of TCEA. This reflects the fact that in relation to tax, the Upper Tribunal is assuming the current appellate function of the High Court.
- 7.2.4 The other main amendment provides for proceedings to reach the Upper Tribunal without the permission to appeal stage. Most tax matters would reach the Tribunal through permission. However, there will be a small number of weighty and complex cases that transfer from the First-tier Tribunal direct to the Upper Tribunal, and the Finance Act 2008 provides for a small number of applications to be made direct to the Upper Tribunal.

8 Consultation Outcomes

- 8.1 The MoJ issued a consultation document ‘Transforming Tribunals – Implementing Part 1 of the Tribunals, Court and Enforcement Act 2007’ on 28 November 2007: the Government’s response was published on 19 May 2008. Consultation responses supported a new unified Tax Chamber, with cases heard by a unified professional judiciary and administrative support provided by the Tribunals Service.
- 8.2 The Ministry’s Consultation Document is available here <http://www.justice.gov.uk/publications/cp3007.htm> The Government’s response is available here <http://www.justice.gov.uk/docs/cp3007-response.pdf>
- 8.3 The consultation also proposed there be three chambers in Upper Tribunal, one of which would be called the Finance and Tax Chamber. There were few responses to the question of whether this structure was appropriate, and no responses specifically in relation to the Finance and Tax Chamber.
- 8.4 The draft First-tier Tax Chamber rules and draft Upper Tribunal rules were issued by the TPC for a full 12 week consultation which ended on 12 November. The TPC also worked closely with the Tax Appeals Modernisation “Stakeholder” Group, which developed the original draft rules which the TPC then consulted upon.
- 8.5 21 responses were received. The rules were amended following the consultation to make the rules clearer that they present a process whereby cases develop procedurally according to the needs of the case. The rules also have been amended to address a particular concern of stakeholders and the tax judiciary around the impact of Rule 8, “Strike Out”.
- 8.6 The Rules found broad support among the Group at the meeting of 15 January when they were shown advance drafts. The Upper Tribunal rule amendments also reflect concerns a number of respondents expressed around costs and there being a process for cases to transfer to the Upper Tribunal from the First-tier Tribunal at first instance.

9. Guidance

- 9.1 MoJ guidance is in preparation and will be available before 1 April 2009 for the launch of the new tax appeals system. The guidance being produced will provide a step by step explanation of the appeal process and will guide appellants from initially making the appeal through to its conclusion. Helpful notes have also been created to assist the appellant in completing the notice of appeal form and how to submit it to the Tribunal.
- 9.2 All guidance produced will be available on the Tribunals Service website. In addition to this, the Tribunals Service will ensure that their guidance be routinely issued to appellants at key stages of the appeal process to inform them of the next steps. Tribunals staff will also be fully trained in the new process and procedures to ensure they too can provide useful and appropriate information to appellants during the life span of an appeal.

10. Impact

- 10.1 The MoJ carried out a full impact assessment on the costs to the business and the voluntary sector for the recently passed Transfer of Tribunals and Revenue and Customs Order 2009, and this is available on the website at the following. This is available at:

<http://www.financeandtaxtribunals.gov.uk/financialServicesandMarkets/latestNews.htm>

- 10.2 The Impact Assessment identified benefits for different groups, including small business and the voluntary sector, from the case categorisation approach being developed in the First-tier Tax Chamber rules. The approach retains the informality of the General Commissioners of Income Tax where this is appropriate and ensures a fast-track and low cost means of dispute resolution. Where more formal hearing and disclosure of evidence is required, a case can be managed through categorisation as Standard or Complex.

11. Regulating small business

- 11.1 These impacts were assessed at the time of the passing of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009. The results of the assessment are available at:

<http://www.financeandtaxtribunals.gov.uk/financialServicesandMarkets/latestNews.htm>

- 11.2 The implementation of the new tax appeals system will reduce the number of hearing venues. However, this is off-set by there being over 130 Tribunals Service venues where cases may potentially be heard, the availability of the Courts estate, and the new option to consider some cases on the papers without requiring the time and travel to a hearing. The new rules support more unified procedures which should provide a saving to small business.

12. Monitoring and review

- 12.1 MoJ will keep the new tax appeals system under review and expect to assess data gathered after the first year of operation.

13. Contact

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