

**EXPLANATORY MEMORANDUM TO
THE REVENUE AND CUSTOMS APPEALS ORDER 2009**

2009 No. 777

1. This explanatory memorandum has been prepared by HM Revenue and Customs (HMRC) and is laid before the House of Commons by Command of Her Majesty. The memorandum contains information for the Select Committee on Statutory Instruments.

2. Purpose of Instrument

The draft Order makes amendments to the procedures for review and appeal of HMRC decisions contained within Schedule 7 to the Counter-Terrorism Act 2008.

It also rectifies two errors which have been identified in the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (SI 2009/56). These errors, if left uncorrected, would have resulted in removal of existing rights of further appeal.

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

Type of resolution

3.1 The draft Order is subject to the affirmative resolution procedure and must be approved by the House of Commons.

3.2 The Order is made by the Treasury in exercise of the powers granted by section 124 of the Finance Act 2008 (FA 2008).

3.3 The Order amends primary and secondary law.

4. Legislative context

4.1 General

4.1.1 The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, which comes into force on 1 April 2009, makes changes to legislation governing the administration by HMRC of appeals against tax decisions. In particular, that Order included provisions made under the powers conferred by section 124 of FA 2008 introducing an optional statutory review of HMRC appealable decisions.

4.1.2 The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 provides that the new optional review procedure will apply to all HMRC appealable decisions (except for those about restoration of seized goods) to be heard by the Tax Chamber of the First-tier Tribunal, or where determined by or under Tribunal Procedure Rules, the Upper Tribunal.

4.1.3 This Order makes equivalent changes to the procedures for review and appeal of HMRC decisions in Schedule 7 to the Counter-Terrorism Act 2008 to bring these into line with the provisions made by SI 2009/56.

4.2 EU legislation

4.2.1 This instrument does not implement EU legislation.

5. Territorial extent and application

This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Financial Secretary (Stephen Timms) has made the following statement regarding Human Rights.
- 6.2 In my view the provisions of the Revenue and Customs Appeals Order 2009 are compatible with convention rights.

7. Policy background

7.1 Tribunal reform

- 7.1.1 The changes to HMRC review processes fall against the background of wide ranging reform of the government tribunal system provided for in the Tribunals, Courts and Enforcement Act 2007 (TCEA), which received Royal Assent on 19 July 2007. TCEA provides for a new judicial and legal framework for appeal tribunals with a clearly independent judiciary under a Senior President, and creates a single two-tier national tribunal structure.
- 7.1.2 The new tribunal will replace the four existing tax tribunals which currently hear appeals against HMRC tax decisions. The new tribunal will be sub-divided into Chambers, both in the First-tier and Upper Tribunal. The Tax Chamber, in the First-tier, will consider most first instance appeals against tax decisions. Appeals against the determination of the First-tier Tribunal will be heard in the Upper Tribunal. A small number of cases involving complex legal argument may exceptionally be heard by the Upper Tribunal at first instance.
- 7.1.3 The tribunals will be manifestly independent of decision-making Government departments.

7.2 HMRC internal review

- 7.2.1 The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 modernised and aligned HMRC's administration of appeals against tax decisions where it was sensible to do so.
- 7.2.2 One important element of this modernisation was to introduce a consistent approach to internal review across HMRC.
- 7.2.3 The adoption of a common policy on review across HMRC's business is intended to provide clearer safeguards for those who dispute HMRC decisions and to help ensure the tribunal is not burdened by cases which could have been resolved by review.
- 7.2.4 The new review process will come into effect on 1 April 2009, at the same time as jurisdiction for appeals against HMRC decisions transfers to the new tribunal. This Order inserts equivalent review provisions into Schedule 7 to the Counter-Terrorism Act. It was not possible to insert the amendments to the Counter-Terrorism Act into the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 as the Counter-Terrorism Act had not received Royal Assent at the time that Order was laid.
- 7.2.5 Section 124 of FA 2008 enables the implementation of review and other changes to be made in a statutory instrument

7.3 Counter Terrorism Act

- 7.3.1 The Counter-Terrorism Act confers supervisory and enforcement functions on HMRC, including the power to impose penalties for non-compliance with directions issued to certain persons in the financial sector. Such directions may impose requirements or restrictions on business relationships with persons in countries of concern. Provision is made for review of and appeals against decisions to impose penalties.

8. Consultation outcome

- 8.1 HMRC published a consultation document “HM Revenue and Customs and the Taxpayer: Tax Appeals against decisions made by HMRC” on 9 October 2007. The consultation sought views on implementing a more consistent approach to internal review across HMRC, possible alignments of administrative matters and transitional arrangements.
- 8.2 Consultation responses overwhelmingly supported the introduction of an optional statutory review process which enables businesses to choose whether or not to have an internal review of disputes.
- 8.3 HMRC published a response document “HM Revenue and Customs and the Taxpayer: Tax Appeals against decisions made by HMRC: Summary of Responses and Future Direction” on 12 March 2008. In the document the Government announced the introduction of the optional statutory review process and also that the Government would streamline appeals handling and proceed with other proposals set out in the consultation document.
- 8.4 A draft of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 was published on 02 June 2008 with an accompanying Technical Document. The draft contained changes to the Taxes Management Act 1970 as the model for changes to direct tax provisions and changes to FA 1994 and VATA 1994 as the model for indirect tax changes. Paragraphs 2.7 and 2.8 of the Technical Document made it clear that these changes would be applied to the other direct and indirect tax regimes and invited comment on this basis.
- 8.5 To coincide with the publication of the draft Order HMRC has published a separate document “HM Revenue and Customs and the Taxpayer: Tax Appeals against decisions made by HMRC: Summary of Technical Responses” summarising the comments made and responding to them. This document is available from the HMRC website.
- 8.6 Six written responses were received and 3 meetings held with attendees from 18 representative bodies and professional firms. In addition, some of the issues raised were discussed at the MoJ’s Tax Appeals Modernisation Stakeholder Group.
- 8.7 Most of the comments related to the proposed review process. Responses again welcomed the statutory but optional approach adopted and concentrated on ensuring that review was robust and in particular that it contained sufficient legislative safeguards.
- 8.8 In response to this, the revised review provisions contain additional safeguards: these include extending appeal time limits where HMRC notify review conclusions later than intended; the provision of reasons for HMRC’s review conclusions; and for review to apply in relation to all appealable matters. (Paragraphs 3.12 to 3.49 of the summary of technical responses refer.)

9. Guidance

HMRC guidance products, for both staff and customers, are in preparation and will be available, as needed, before 1 April 2009.

10. Impact

No additional Impact Assessment has been prepared in respect of this instrument. Full impact assessments of the effect that the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 will have on the costs of business and the voluntary sector are available at <http://www.hmrc.gov.uk/ria/index.htm> and

<http://www.financeandtaxtribunals.gov.uk/taxAppealsModernisation.htm>. These are attached to the Explanatory Memorandum for that instrument, which is available alongside the instrument on the OPSI website.

11. Regulating small business

- 11.1 The changes apply to small businesses that wish to challenge HMRC decisions under the Counter-Terrorism Act. The replacement of the existing mandatory review with an optional process is expected to produce benefits for small business as it enables them to choose whether to have a review (and therefore possibly avoid the need for litigation) or whether to proceed directly to litigation if this is their preference.
- 11.2 As the optional review process provides safeguards for customers, it would be wrong to exclude small firms. Representative bodies and agents of small firms were invited to take part in the HMRC consultation on review. Agents said they would recommend use of the review process to small firms and expected them to benefit.

12. Monitoring and review

Implementation will be closely monitored. HMRC will carry out an initial assessment of data collected by the end of year two.

13. Contacts

Helen Latham at HM Revenue & Customs can answer any queries regarding the HMRC administrative changes arising from the instrument.

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ANNEXE

GENERAL

Overview of the draft Order

The draft seeks to provide for review of appealable decisions made by HMRC under the Counter-Terrorism Act.

NOTES ON DETAIL

Note: this annexe does not generally include comments on straightforward consequential changes.

ARTICLE 1 – Citation and commencement

This article sets out the name of the Order and provides for it to come into force on 1 April 2009.

ARTICLE 2 – Amendment of the Oil Taxation Act 1975

This article substitutes paragraph 14(11) of Schedule 2 to the Oil Taxation Act 1975 with provision that tribunal penalty decisions are final and conclusive subject to the onward appeal rights in TCEA, Tribunal Procedural Rules and any provision of Schedule 2 to the Oil Taxation Act (including any provision applied by paragraph 1 of Schedule 2).

ARTICLE 3 – Amendment of the Social Security Contributions (Transfer of Functions etc) Act 1999

This article inserts new section 13(2A), which provides that regulations under section 13(1) may provide for sections 11(2) and 13(2) of the TCEA (further appeals) to apply with such modifications as may be specified in the regulations.

ARTICLE 4 - Amendment of the Counter-Terrorism Act 2008

This article explains that the Schedule contains amendments to the Counter-Terrorism Act 2008.

ARTICLE 5 – Amendment of the Social Security Contributions (Transfer of Functions etc) (Northern Ireland) Order 1999

This article provides for a new paragraph 12(2A) to be inserted after paragraph 12(2). Paragraph 12(2A) provides that regulations under paragraph 12(1) may provide for subsections 11(2) and 13(2) of the TCEA (further appeals) to apply with such modifications as may be specified.

ARTICLE 6 – Amendment of the Social Security Contributions (Decisions and Appeals) Regulations 1999

This article substitutes Regulation 12 of the Social Security Contributions (Decisions and Appeals) Regulations 1999. Paragraph 12(1) provides for section 56 of the Taxes Management Act to apply to appeals from the tribunal under Part II of the Social Security Contributions (Transfer of Functions etc) Act 1999 ('the Transfer Act') and Part III of the Social Security Contributions (Transfer of Functions etc) (Northern Ireland) Order 1999 ('the Transfer Order'). Paragraph 12(2) provides that for the purposes of Section 11(2) and 11(3) of the TCEA a party to a case includes, the appellant, HMRC,

- and in the case of appeal's against a decision relating to a person's entitlement to statutory sick pay, statutory maternity pay, statutory paternity pay or statutory adoption pay, the employee or the employer concerned; and
- in any other case, any other person named in the decision.

This ensures that from 1 April 2009 relevant persons affected by a tribunal or court decision or judgement will have equivalent rights of appeal as they enjoyed before that date.

ARTICLE 7 – Amendment of the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009

This article omits paragraph 74(7) of Schedule 1, and paragraph 67 of Schedule 2 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009.

Paragraph 74(7) of Schedule 1 substituted paragraph 14(11) of Schedule 2 to the Oil Taxation Act with provision preventing onward appeal of tribunal penalty decisions under Schedule 2. This substitution was made in error. Article 2 makes the correct substitution.

Paragraph 67 of Schedule 2 provided that section 56 of the Taxes Management Act ('TMA') (payment of tax where there is a further appeal) should apply to appeals from the Tribunal under Part II of the Transfer Act and Part III of the Transfer Order.

Prior to 1 April 2009, section 56 of TMA dealt with further appeals from decisions of the General Commissioners. Regulation 12 modified the effect of section 56 so that the term 'a party' for the purposes of further appeals under that section included appellant, HMRC and certain other persons affected by the decision. Paragraph 67 made no equivalent provision, so unintentionally removing the right of appeal decisions affecting the specified persons. Rights

of further appeal against First-tier and Upper Tribunal decisions are provided in sections 11 and 13 of the TCEA, which are not covered by the existing regulation making powers.

Articles 3 and 5 of this Order make relevant amendment to the regulation making powers in Social Security Contributions (Transfer of Functions) Act 1999 and Social Security Contributions (Transfer of Functions etc) (Northern Ireland) Order 1999 respectively, and article 6 makes the correct substitution of regulation 12.

SCHEDULE

Counter-Terrorism Act 2008

Schedule 7 to the Counter Terrorism Act is amended to provide for an optional review of appealable decisions by HMRC.

Paragraph 26 is amended to replace the existing right to require HMRC to review the decisions in question with a new right of appeal to the tribunal. In addition, it defines the tribunal as the First-Tier Tribunal or, where so provided by Tribunal Procedural Rules, the Upper Tribunal and it applies Section 85 of the Value Added Tax Act 1985 (settling appeals by agreement).

Paragraphs 26A – 26F are inserted after paragraph 26 of Schedule 7.

Paragraph 26A (Offer of review)

This paragraph provides that HMRC must offer reviews of decisions which are appealable under paragraph 26 when the decision is notified to a person (P). The paragraph does not apply to the notification of the conclusions of a review.

Paragraph 26B (Review by HMRC)

This paragraph provides that HMRC must review a decision if they have offered a review under paragraph 26A and the offer has been accepted within 30 days. HMRC are not required to review decisions where P has appealed to the tribunal under paragraph 26F:

Paragraph 26C (Extensions of time)

This paragraph provides for HMRC to notify an extension of time to appeal or ask for review if they are asked to do so within the review offer acceptance period. In such cases, the 30 day time limit for appealing or asking for review begins again on the date of the notice or from a date set out in the notice or a further notice.

Paragraph 26D (Review out of time)

This paragraph provides that HMRC must review a decision after the review acceptance period if they are asked to do so and are satisfied that P had a reasonable excuse for not accepting the offer within the period, and that P made the request without unreasonable delay after the excuse had ceased to apply.

HMRC are not required to review any matter where an appeal has been made in respect of the decision.

Paragraph 26E (Nature of review etc)

This paragraph provides for the nature and extent of the review. Sub-paragraphs (1) to (6) mirror the provisions in TMA s 49E.

Where HMRC fail to give notice of the review conclusions within the time set out in (6) or any period subsequently agreed, the decision is to be treated as upheld (sub-paragraph (8)) and HMRC must notify the party who accepted the review offer of this (sub-paragraph (9)).

This provision finalises the review in such cases, ensuring that the person may appeal to the tribunal once that period of time has passed, and provides a basis on which to do so.

Paragraph 26F(5) gives the time limit for making an appeal in such cases.

Paragraph 26F (Bringing of appeals against decisions of HMRC)

This paragraph provides a time limit for making an appeal under paragraph 26. Appeals may be made by notifying the tribunal within 30 days of the date of the decision to which the appeal relates. Where the time limit for appeal has been extended under paragraph 26C an appeal may be made within the period provided for under that paragraph (sub-paragraph (1)).

In cases where HMRC are required to undertake a review, an appeal may not be made until the conclusion date. In such cases any appeal is to be made within 30 days beginning with the conclusion date (sub-paragraph (3)).

In cases where HMRC are asked to undertake a review out of time under paragraph 26D an appeal may not be made until HMRC have decided whether or not to undertake a review. If HMRC decide to undertake a review an appeal may not be made until the conclusion date. In such cases any appeal is to be made within 30 days beginning with the conclusion date. If HMRC decide not to undertake a review an appeal may be made from the date on which HMRC so decide (sub-paragraph (4)). The conclusion date is the date of the document notifying HMRC's conclusions (sub-paragraph (7)).

If HMRC do not notify their conclusions within the review time limit, the time limit for appealing starts at the end of the review time limit and ends 30 days after the conclusion date (subparagraph (5)).

An appeal may be made after the end of the period specified in sub-paragraph (1), (3)(b), (4)(b) or (5) if the tribunal gives permission to do so (sub-paragraph (6)).