Costs in the Upper Tribunal

Management of taxes

01 December 2018

The CIOT has written to the President of the Upper Tax Tribunal and Chancery Chamber setting out some concerns we have about the costs regime in the Upper Tribunal.

We think there is still an appetite to explore further the recommendation by the Costs Review Group in its Report to the Senior President of Tribunals in December 2011 (see https://tinyurl.com/ybqca47l) that where the taxpayer has succeeded at the First-tier Tribunal (FTT) and the case is not complex, they should be able to choose whether to be inside or outside the costs-shifting regime.

The CIOT had written to the then Senior President of the Tribunals, Sir Robert Carnwath, in January 2012 to express our support for this and other conclusions of the Report by the Costs Review Group. In particular:

> a) The recommendation at paragraphs 75 and 76 that the Rees Practice (under which HMRC agree in certain circumstances not to pursue costs if successful) be formalised;
> b) The recommendation at the start of paragraph 123 and in paragraph 132(a) that in non-complex cases a taxpayer who is successful before the FTT should be able to opt for the continuance of the no-costs regime; and
> c) The other conclusions at paragraph 132 regarding complex cases.

We heard at the time that our letter was well received by the Tribunals Service. However, we note that despite the reforms to costs discussed in the above report, nothing appears to have changed as a result in the meantime.

In our latest letter we give some examples illustrating that a taxpayer who has won in a no-costs regime such as the FTT (and who therefore must have, by definition, at least a good arguable case) may well be deterred from defending their case in the Upper Tribunal (UT) by concerns about the costs of the appeal. This is why, in our

view, the recommendation at paragraph 123 of the report should be adopted.

We are also concerned about the risks of an adverse costs order in the UT acting as a deterrent to some taxpayers even appealing adverse HMRC decisions to the FTT in the first place: although they are confident of success in the FTT, they are worried about the costs risks in the event that the case goes further. We note that the Rees Practice is rarely applied by HMRC and the UT considers itself unable to order HMRC to apply it. Accordingly, we question whether the current costs rules give the UT sufficient flexibility to ensure that justice is served in all cases.

Our recent letter can be found on the CIOT website.