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8 October 2016

Dear Sirs,

"Check, challenge, Appeal – Reforming Business Rates Appeals" – Response to consultation on statutory implementation

Thank you for offering the opportunity to respond to the consultation paper on the statutory implementation of "Check, challenge, appeal". This letter is my response to the questions raised in the consultation.

Blake Penfold is an independent consultancy specialising in business rates advice. I have nearly 40 years' experience as a rating consultant in private practice and has been involved with rating appeals in respect of all types of property throughout the United Kingdom and in the Irish Republic, the Channel Islands, and the Isle of Man. As well as appeals before Valuation Tribunals and the Upper Tribunal (Lands Chamber), I have been involved with appeals to the Court of Appeal and House of Lords on matters of rating law. I have also appeared before Local Valuation Appeal Committees in Scotland and as an expert witness in the High Court, at County Court, and in Magistrates' Court proceedings in respect of business rates.

I began my career with H Brian Eve and Company (later Wilks Head & Eve) before joining Hillier Parker (now CBRE) and, most recently, headed the Business Rates team at GL Hearn for ten years. I am a former Chairman of the RICS Rating and Local Taxation Panel and represent RICS on the Valuation Tribunal for England Tribunal User Group and elsewhere, including giving evidence to the Parliamentary Scrutiny Committee on the Business Rates Supplements Bill. I am a past President of the Rating Surveyors' Association and a former member of the Valuation Standards Board of the Royal Institution of Chartered Surveyors.

I have expertise in all aspects of business rates from legislation to liability and all types of property. I also have experience from throughout the United Kingdom, and in respect of property tax systems elsewhere.

I preface my response to the questions in the consultation paper with some comments regarding the business rates appeals system that I regard as relevant to the statutory implementation of a

new appeals process for the business rates system, drawn from my experience and knowledge of the system.

Background comments

All the independent studies of which I am aware show that the United Kingdom has amongst the highest levels of property taxes of all developed economies. In particular, the levels of recurrent (annual) property taxes in the UK are shown by OECD studies to be the highest amongst OECD nations surveyed. The Uniform Business Rate multiplier for larger businesses this year (2016/17) is 49.7 pence – a tax rate of nearly 50%. For most businesses, business rates represent the highest rate of corporate tax that they pay in the UK, and for most international businesses business rates in the UK represent the highest level of property tax that they encounter anywhere in the world.

For these reasons business rates liabilities will always be subject to close scrutiny in the UK – whether that scrutiny takes the form of a "proposal", a "challenge", or an "appeal". I do not anticipate changes to the process, whether they be those set out in the consultation or others, resulting in lesser scrutiny of business rates liabilities. Evidence from other jurisdictions shows a clear and direct relationship between tax rates and appeal rates. Whilst the tax rate for business rates in the UK remains above that of other UK corporate taxes, and above annual property taxes in other competing economies, there will continue to be more challenges to business rates assessments in the UK than in other jurisdictions where liabilities are less.

Consultation responses

Question 1. Do you agree that the draft Regulations put in practice the agreed policy intention as set out in the Government policy statement?

The key element identified in the document "Reforming Business Rates Appeals – Government Response to Consultation", published in July 2016, is set out at paragraph 8: *"The Government shares the view of respondents that the availability of sufficient, tailored information, earlier than under the current system, will provide the basis for early and meaningful engagement between the VOA and ratepayers. This is the key to resolving appeals in a more efficient manner and is at the heart of the package of incentives and requirements in these reforms"*.

The draft Regulations fail to put this into effect, by virtue of introducing a requirement on the ratepayer (who **has not** made the assessment) to provide, not only, grounds of challenge, but also, evidence in support of the challenge and how that evidence supports the challenge. All this is required to be provided by the ratepayer before the Valuation Officer (who **has** made the assessment) provides any evidence to the ratepayer. Even then the evidence provided by the Valuation Officer will only be provided if the Valuation Officer ("VO") considers it reasonable to do so and will be restricted to a response to the particulars of grounds. This does not, in my view, represent making available to the ratepayer *"sufficient, tailored information"* as to how his or her assessment has been arrived at so as to provide a basis for "*early and meaningful engagement between the VOA and ratepayers*". This failure is likely to be particularly acute in the case of

smaller businesses, lacking the resources to seek expert advice. Instead, there should be some duty imposed on the assessing body to explain to the taxpayer what is the assessment made by the VOA and the evidence on which that assessment is based.

I also consider that replacing a two-stage process (the current "proposal" and "appeal") with a three-stage one ("Check", "Challenge" and "Appeal") will not achieve the policy aspiration set out at paragraph 8 to *"resolve appeals in a more efficient manner"*. Instead I consider that the "check" stage should be removed. This is for a number of reasons. Most disputes regarding rating assessments involve both questions of fact (in the consultation dealt with at the "check" stage) and questions of valuation (in the consultation dealt with at the "challenge" stage). So it does not make sense to separate the two questions. Any factual discrepancies that are of significance to value will become apparent as part of the challenge stage in any event. Because the "check" stage deals only with factual matters it is unlikely to triage out a large number of disputes from reaching the challenge stage. Again, it also seems likely to put a burden on businesses, especially smaller businesses, and to force them towards taking professional advice to complete this process. I am concerned that unscrupulous operators may take advantage of smaller businesses and seek to take commercial advantage of the complexity of an additional stage introduced into the process.

Question 2. We would welcome your views on the approach to implementing fees for the appeal stage.

The consultation suggests that the purpose of these fees is to *"increase the incentives for early and full engagement and help reduce the large number of speculative appeals"*. Early and full engagement would be best ensured by the VO, as the party who has made the assessment, providing details of the assessment made and the evidence on which it is based. Whilst fees may, indeed reduce the numbers of appeals, there is a clear concern that fees will be a barrier to access to justice, particularly for smaller businesses; even allowing for the fee reductions proposed for small businesses. The VTE is, at present at least, a lay tribunal, and I know of no other lay tribunal where fees are payable in the manner proposed.

The definition of small businesses is also a puzzling one and I comment on this in my response to question 4.

Question 3. We would welcome your views on the approach to implementing penalties for false information.

As set out in the consultation, and in the draft regulations, this appears to be an unnecessary complication. The VOA already has extensive powers to call for information to enable it to maintain the rating list and those powers are reinforced by a civil penalty regime for failure to return information or for returning false information.

I have two further concerns about this proposal. The first is that it imposes a further burden on businesses, particularly on smaller businesses, even with the reductions proposed for small businesses. My second concern is that there are likely to be disputes over the application of such

penalties, for example in the case of what one party regards as an innocent mistake and the other regards as provision of false information *"knowingly, recklessly or carelessly"*. The concern is that parties, including the Valuation Tribunal, are likely to expend significant time and money arguing over a penalty of £500. The information complained of may not even be information that turns out to be germane to the issue of valuation. This is not an efficient use of anybody's time and does not go towards resolving the substantive question – what is the correct assessment.

If this provision is to be included then it must be hoped that it will be exercised sensibly so as to avoid large numbers of penalty disputes in addition to challenges to assessments.

Question 4. We would welcome your views on implementing the package for small businesses and small organisations.

It seems odd to adopt a definition of "small businesses", for the purposes of appeal fees and penalties, which is entirely unrelated to the definitions used for small business rate relief. I see significant practical difficulties for the VOA and the Valuation Tribunal for England in implementing the proposed definition, because they will not have access to information to determine the headcount, turnover, or balance sheet of individual businesses. I suggest that it would be much simpler to tie this definition to the property concerned and this would fit more logically with the application of small business rate relief.

I am also puzzled by the suggestion that the term "small proposer" should be applied to ratepayers who are not businesses. If I understand this proposal correctly then all ratepayers that are not businesses would be treated as "small proposers". This would therefore include central and local government bodies that are not businesses. If that were the case it could lead to the rather surprising conclusion that HM Treasury should be treated as a "small proposer"! Applying the package to smaller hereditaments would do away with the need to define "businesses".

Question 5. We would welcome your views on the approach to dealing with Material Change in Circumstances.

Whilst it is not explicit in the attached draft regulations, it appears that the proposal is to amend the Material Day Regulations, so as to make the material day the day on which the check is submitted or validated. This will mean that many protective checks will be submitted in circumstances where ratepayers do not know how long a change of circumstances may continue for, nor the effect that the change may have on their property.

It will also oblige ratepayers to complete an entire check process, which could be a very substantial undertaking for a large or complex property, when the circumstances affecting the property may be wholly external to the hereditament (for example roadworks outside the property) and have no effect on the matters being checked.

I suggest instead that the amendment to the material day regulations should be to make the "material day" for a ratepayer's challenge to be the "the day the circumstances giving rise to the

alteration first occurred", which is equivalent to the definition of "material day" for a rating list alteration made by a Valuation Officer. This would allow not oblige ratepayers to enter protective challenges and would have the effect of making the whole process simpler for all parties – ratepayer, VOA and VTE.

Question 6. We would welcome your views on the amended approach to determining appeals against valuation.

I consider that the amended approach is unfair to ratepayers and should not be adopted. In this respect I have already written to the Secretary of State to set out my objections to this thoroughly unfair proposal. I am attaching to this response a copy of that letter. To reinforce the objections set out in that letter:

- This proposal is wholly unfair to ratepayers. I can think of no other tax jurisdiction in which an independent tribunal could determine that a tax liability was unfair, but then be prohibited from giving effect to that determination.
- It will leave ratepayers further convinced that the business rates system is not "fit for purpose".
- It is likely to lead to more litigation, not less, because every determination of a Tribunal will be subject to potential appeal on two grounds – firstly as to the amount of value determined, and secondly as to the application of the phrase "bounds of reasonable professional judgement" in the case concerned.
- The whole concept of limiting the powers of an independent Tribunal (the VTE) could be the subject of legal challenge under human rights laws.
- The proposed amendment will also be counter to the duties of professionals appearing before the VTE (and indeed the Upper Tribunal) as expert witnesses. The Courts have established an independent duty of an expert witness to the Tribunal. This proposed approach runs counter to that and will bring Valuation Officers and ratepayers advisors into conflict with their professional duties.
- It was not put forward on the original consultation proposals for "Check, challenge, appeal" and an earlier equivalent proposal was rejected by Government after consultation in respect of the Green Paper "Modernising Local Government Finance".

The whole proposal is alien to a Tribunal system in a democracy and should be removed from the draft regulations.

Question 7. We would welcome your views on the role of local authorities in the reformed system.

I consider that the proposed changes set out in draft regulations represent a fair balance between the need for local authorities, under business rates retention, to be aware of challenges and to be informed about them, and the need to avoid creating a three-way appeals process. I suggest that there should be a requirement for the VOA to disclose to the ratepayer any information supplied to

the local authority in respect of their property under the Enterprise Act 2016 and any information received from a local authority in respect of a challenge in relation to their property.

Other relevant matters not specifically addressed in the Consultation

The check process could become complex in cases where more than one party seeks a check in respect of the same property – for example both a landlord and an occupier. There should be a requirement on the VOA to disclose to the ratepayer when a check is made by a party who is not the ratepayer and the details of information provided in the check.

I am very concerned that the amendment set out in Paragraph 6 of The Non-Domestic Rating (Alteration of Lists and Appeals) (England) (Amendment) Regulations, amending Regulation 4 of the existing regulations, is unduly restrictive. There could be circumstances in which a ratepayer disputes both factual and valuation matters and where the VOA agrees with the ratepayer in respect of the factual matters, but not the valuation issues, and makes an alteration to the rating list to give effect to the new facts. The ratepayer would then be prohibited from making a proposal against the Valuation Officer's alteration, because that alteration *"was made as a result of a proposal relating to that hereditament"*. The wording as drafted could also prohibit others, for example a new occupier or owner, from making a proposal.

I understand the need to end the rather peculiar position whereby, under the current regulations, a ratepayer may make a proposal against an alteration made by the Valuation Officer giving effect to a figure that the ratepayer has agreed with the VO, but the proposed amendment, presumably designed to correct this, is unduly restrictive and unfair. Instead, I suggest that the amendment should read *"was made as a result of an agreement between the IP and the Valuation Officer relating to that hereditament"*.

I confirm that I have no objection to this consultation response being made public. I am happy to amplify or explain anything contained in this response.

Yours faithfully

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