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2 January 2016

Dear Sirs,

"Check, challenge, Appeal – Reforming Business Rates Appeals" – Response to Consultation Paper

Thank you for offering the opportunity to respond to this consultation paper. This letter is my response to the questions raised in the paper.

Blake Penfold is an independent consultancy specialising in business rates advice. I have more than 37 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 consultation, 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 will next year (2016/17) be 49.9 pence – effectively a tax rate of 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.

One of the major problems of the current system of "proposal" and "appeal" is that the vast majority of proposals automatically become appeals by effluxion of time, regardless of whether they need to or not. For this reason I propose that the trigger point from "challenge" to "appeal" should be controlled by application of the parties, rather than by a time limit. I set out details of this in response to questions 8 and 12.

Consultation responses

Question 1. We would welcome views on the overall approach set out in this consultation paper.

I consider that the overall approach set out in the consultation paper does not improve the transparency of the system to the ratepayer. This is not a self-assessed tax, but is one where the assessments are made by an assessing body (the Valuation Office Agency "VOA"). Because of this 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. The nub of this unfairness is neatly expressed at paragraph 32 of the consultation which says: *"The substantive reasons for the challenge must set out why the ratepayer believes that the assessment is not correct (for example, that the Valuation Office Agency has not taken into account specified relevant evidence)"*. But, under the proposed procedure, at this stage the ratepayer will not even **know** what evidence the VOA has taken into account! I consider that transparency will only be improved when there is some initial requirement on the VOA to set out not only its valuation, but also an anonymised summary of 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”) is a retrograde one and will not streamline nor speed up the system as envisaged in paragraph 11 of the consultation. 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. 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. What are your views on when “relevant authorities” should be involved in the process?

As a preface, I note that “relevant authorities” are not defined and consider that it must be clarified whether this is to include only billing authorities, or whether precepting authorities also fall into this category. I consider that relevant authorities should be able to become an interested party at the “challenge” stage by giving notice to the ratepayer (and any other challenger) and to the VOA. The requirements upon a “relevant authority” as a challenger should be the same as those for any other challenge.

Question 3. We will consult further on the detail of these penalties, but in the meantime, would welcome general views on implementation and the likely disincentive effect of this measure.

I consider this proposal 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, and unnecessary, burden on businesses, particularly on smaller 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. Parties, including the Valuation Tribunal service, are likely to spend thousands of pounds of time and money arguing over a penalty of hundreds of pounds. This is not an efficient use of anybody’s time and does not go towards resolving the substantive question – what is the correct assessment.

Question 4. We will bring forward end-of-list proposals in due course, but in the meantime would welcome general views.

I suggest that there should be an amendment to the material day regulations to make the "material day" for a ratepayer's challenge to be the "the day the circumstances giving rise to the challenge first occurred", which is equivalent to the definition of "material day" for a rating list alteration made by a Valuation Officer. This would allow for challenges to continue after the end of a rating list and would also go some way to resolving the question of how to deal with temporary material changes of circumstance set out in response to question 5 below. Doing away with the "check" stage and incorporating it into the "challenge" process, as I propose in my response to question 1, would also help resolve this difficulty.

Question 5. What arrangements should apply to temporary material change of circumstance cases under the new system?

I suggest that removing the "check" stage, and amending the "material day" provisions as I have set out above would enable the new process to cope with temporary material changes of circumstance in a way that is fair to all. Amending the material day provisions in this way would also be likely to produce a more considered response from ratepayers to temporary changes, as there would no longer be an urgent need to make a "proposal" or "challenge", simply to capture the circumstances at a particular date, and ratepayers could wait to see the effects of a change before making a challenge. This could have the effect of reducing the number of purely protective challenges.

Question 6. What are your views on the trigger point for check stage?

As I have explained, I consider that the check stage is an unnecessary delay that is unlikely properly to resolve substantial numbers of cases. I recommend doing away with it and incorporating factual matters into any challenge.

Question 7. What are your views on the time limit for a complete challenge, following the check stage?

As I have explained, I see no real merit in the check stage and recommend its removal. Despite this, my comments below are on the basis that the check stage is retained.

I consider that, if there were some initial requirement on the VOA to set out not only its valuation, but also an anonymised summary of the evidence on which that assessment is based, then a four month time limit would be reasonable one within which to require the ratepayer to make a challenge.

If there is no such requirement on the VOA then I consider that it would be reasonable to allow ratepayers 6 months from completion of the check stage in which to make any challenge. This is to allow ratepayers time to prepare the material set out in paragraph 31 of the consultation.

Question 8. What are your views on the trigger point for challenge stage?

I consider that a fixed time limit for this trigger point is unlikely to prove satisfactory. A period of 18 months may be too short for the valuation of a major property (for example, a major motor manufacturing works whose valuation runs to thousands of lines), but may well be too long for the valuation of a much simpler property, (for example, a lock-up garage).

Instead I propose that the parties should determine the trigger point for the challenge stage. If both parties approach the VTE with a request that a challenge should triggered to the appeal stage, that should be treated as a trigger. If one party makes such a request and the other does not object, then that, too, should be treated as a trigger. If one party requests a trigger but the other objects, then the VTE should determine whether to trigger the appeal stage based on written representations. This would mean that matters would move forward when the parties agreed that there was no realistic prospect of the matter being resolved at the challenge stage. It would also have the benefit of giving the VTE some discretion over which cases should move to the appeal stage in the event that the parties cannot agree.

Question 9. Do you agree that these requirements for a challenge are the best way to ensure early engagement on the key issues?

I do not agree. As I have explained, I consider that, to improve transparency, there should be initial requirement on the VOA to set out not only its valuation, but also an anonymised summary of the evidence on which that assessment is based.

The process set out in the consultation puts an unreasonable onus on the ratepayer, who **has not** made the assessment, to show that the assessment is incorrect, without any explanation by the VOA, which **has** made the assessment, of the evidence upon which that assessment is based.

I do not accept the issues of commercial confidentiality that are alleged to be a problem preventing this. Firstly, RICS and other bodies have presented the VOA with a comprehensive legal opinion from leading Counsel showing that the Commissioners of Revenue and Customs Act 2005 does not apply in this respect in the way the VOA maintains. And secondly, in response to an earlier consultation, RICS and other professional bodies put forward a way of presenting such information in an anonymised manner.

Question 10. Do you agree that this process allows the ratepayers to make their case in a fair and efficient way?

I do not agree. For the reasons I have already set out I consider that there should be an initial requirement on the VOA to set out not only its valuation, but also an anonymised summary of the evidence on which that assessment is based.

It would then be for the ratepayer to present its case to the VOA in the manner set out in the consultation.

Question 11. What are your views on whether straightforward appeals could be determined on the papers, without the need for a hearing?

The VTE already has powers to consider written representations. There are, no doubt, some cases where this might be satisfactory but this should be on the application of the parties, or at the discretion of the VTE in the event of dispute. This should not be used in such a way as to restrict ratepayers' access to justice, but is an approach could be appropriate in some cases with the consent of the parties.

Question 12. What are your views on the time limit for submission of an appeal, following challenge stage?

For the reasons set out in my response to question 8 I consider that the trigger point for challenge stage should be an application, by one or both parties, that a matter should move from challenge to appeal stage. Once a matter has reached appeal stage I suggest that an appeal must be submitted within 6 months of that date.

Question 13. How should we best ensure that the appeal stage focuses on outstanding issues and, as far as possible, is based on evidence previously considered at challenge stage?

This question seems to me to be fundamentally misdirected. The role of any independent tribunal hearing a matter on appeal is one of the correct determination of the subject matter of the appeal – in this case determination of the correct rating assessment. Professional representative appearing before a tribunal, whether on behalf of the ratepayer, or the VOA, or any other party, owe a duty to the tribunal to give their correct and complete professional opinion and to assist the tribunal in the administration of justice. This does not allow for the exclusion of relevant evidence or the failure to take account of relevant considerations, whether previously considered or not.

Question 14. We will consult further on the details of these fees, but in the meantime, would welcome general views on implementation.

I am unclear as to the purpose of such fees. Are they intended to contribute towards the cost of the VTE? If that is the case, it would be logical to introduce appeal fees and a costs-shifting regime as in the Upper Tribunal (Lands Chamber) but this seems inappropriate for a lay tribunal.

Whatever their purpose, I have significant reservations regarding the introduction of appeal fees. 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. I am also concerned that fees would be, for smaller businesses especially, likely to be a barrier to access to justice. Finally, I am concerned that disputes over appeal fees may be disproportionate and may distract from the substantive dispute – which is the correct assessment of the property concerned.

An example of this last point might be an appeal to seek a split of an existing assessment. Is that appeal said to have "succeeded" if the assessment is split, or only if the appellant's proposed rateable value is determined? This seems likely to end in the parties spending more in disputes over appeal fees than the amount of such fees themselves.

Question 15. We would welcome general views on whether changes to appeals to the Upper Tribunal (Lands Chamber) would be beneficial.

I would urge strongly against any change to appeals to the Upper Tribunal (Lands Chamber) at least until the changes proposed in the consultation have properly bedded in and been seen to work. I also suggest that whilst the VTE remains a lay tribunal and does not form part of the first-tier tribunal it would be inappropriate to impose any restrictions on rights of appeal to the Upper Tribunal (Lands Chamber) and that such appeals should remain as *de novo* hearings.

I would prefer to see any new system in action and to gain a sense of its effectiveness before commenting on the question of a direct route of appeal to the Upper Tribunal rather than to the VTE.

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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