



ICAEW REPRESENTATION

TAXREP 39/10

SCALE OF COSTS IN SUCCESSFUL COURT ACTIONS FOR DEBT

Comments submitted in September 2010 by the Tax Faculty of the Institute of Chartered Accountants in England & Wales to HM Revenue & Customs in response to the technical discussion paper *Scale of costs in successful court actions for debt* issued on 1 July 2010.

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INTRODUCTION

1. In this document we present the comments of the Tax Faculty of the Institute of Chartered Accountants in England and Wales (ICAEW) on the technical discussion paper *Scale of costs in successful court actions for debt* issued by HM Revenue & Customs on 1 July 2010.
2. We are pleased to have the opportunity to respond to this consultation. We would be happy to discuss any aspect of our comments and to take part in all further consultations on this area.
3. Information about the Tax Faculty and the ICAEW is given below. We have also set out, in Appendix 1, the Tax Faculty's ten tenets for a better tax system, by which we benchmark proposals to change the tax system.

WHO WE ARE

4. The Institute operates under a Royal Charter, working in the public interest. Its regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the Financial Reporting Council. As a world leading professional accountancy body, the Institute provides leadership and practical support to over 132,000 members in more than 160 countries, working with governments, regulators and industry in order to ensure the highest standards are maintained. The Institute is a founding member of the Global Accounting Alliance with over 775,000 members worldwide.
5. Our members provide financial knowledge and guidance based on the highest technical and ethical standards. They are trained to challenge people and organisations to think and act differently, to provide clarity and rigour, and so help create and sustain prosperity. The Institute ensures these skills are constantly developed, recognised and valued.
6. The Tax Faculty is the focus for tax within the Institute. It is responsible for technical tax submissions on behalf of the Institute as a whole and it also provides various tax services including the monthly newsletter *TAXline* to more than 11,000 members of the Institute who pay an additional subscription, and a free weekly newswire.

KEY POINTS SUMMARY

7. Our key comments on this consultation are as follows:
 - We have no objection to HMRC's proposal to seek costs in successful court actions for debt with reference to a scale of costs which does not seek to be more generous than costs which can be claimed by litigants in person.
 - HMRC should use discretion in deciding whether to seek costs from those who genuinely cannot pay. It will be particularly important to consider the impact of charging costs in court actions for tax credit overpayments.
 - HMRC will retain the ability to depart from the fixed costs scale in cases where legally-qualified or paralegal staff are used. We are concerned that in such cases debtors may find themselves facing much higher costs than the fixed scale they might have expected, simply because HMRC has chosen to use legally-qualified staff. We recommend that HMRC should consider the impact of charging higher costs where it decides to use legally-qualified staff, particularly if the debtor is vulnerable or in the 'can't pay' category or if it is a test or lead case. A suggested approach would be to use the fixed costs scale for all debts below a certain level, regardless of which staff HMRC use, and to depart from the fixed scale where legally-qualified staff are used only for debts above that level.

SPECIFIC COMMENTS

The current proposal

8. We responded to the November 2008 consultation on these proposals in TAXREP 9/09. In particular we said:

41. We have no objection to HMRC recovering reasonable court costs in a successful action against a debtor in the 'won't pay' category.

42. The proposal that costs should be charged on a fixed scale, linked to the size of the debt, is a reasonable one. The scale must be published.

9. HMRC has now decided to go ahead with the proposal to seek costs in successful court actions for debt, with reference to a scale of costs which is two-thirds of the scale for solicitors and does not seek to be more generous than costs which can be claimed by litigants in person. In line with our previous comments, we have no objection to this.

Treatment of those who can't pay

10. We made the point in our earlier response that it would be reasonable for HMRC to recover costs from those in the 'won't pay' category. We are concerned that HMRC should exercise discretion in the case of those in the 'can't pay' category, where adding on costs would simply add to the burden of debt with little benefit to the public finances. Supporting those who cannot pay while coming down hard on those who won't pay has been a principle underlying the reform of HMRC's powers in the Payment, Repayment and Debt strand of the powers review.

11. Although HMRC will have the power to charge costs, it will not be obliged to do so. However, the discussion paper (at paragraph 18) suggests an automatic approach:

The aim is that, unless the court orders otherwise, fixed costs should be awarded based on the total value of HMRC's claim for unpaid debt once judgment is entered.

12. **We recommend** that in applying this power HMRC uses discretion in deciding whether to seek costs from those who genuinely cannot pay.

13. It will be particularly important to consider the impact of charging costs in court actions for tax credit overpayments.

Costs where legally-qualified staff are involved

14. Paragraph 26 says that HMRC will retain the ability to depart from the fixed costs scale in cases where legally-qualified or paralegal staff are used, in which case HMRC may claim costs with reference to the extent and complexity of the work done.

15. We understand from HMRC that debt recovery cases involving legally-qualified staff would be exceptional, and we appreciate that in some complex cases may need to use a legally-qualified advocate. However, we are concerned that debtors may find themselves facing much higher costs if they lose the case than the fixed scale they might have expected, simply because HMRC has chosen to use legally-qualified staff. HMRC's choice of staff is outside the taxpayer's control.

16. HMRC has indicated that one situation where they might use legally-qualified staff would be a lead case involving a novel or important point of law or principle, the outcome of which might affect many other taxpayers in a similar situation. It would seem potentially unfair for one debtor should bear the brunt of HMRC's legal costs in such a case.

17. **We recommend** that HMRC should consider the impact of charging higher costs where it decides to use legally-qualified staff, particularly if the debtor is vulnerable or in the 'can't pay' category or if it is a test or lead case.
18. To give clarity and certainty for the debtor, one approach would be to use the fixed costs scale for all debts below a certain level, regardless of which staff HMRC use, and to depart from the fixed scale where legally-qualified staff are used only for debts above that level. The cut-off could be £300,000 (the top of the costs scale).
19. HMRC's practice in this area should be published, including making clear the circumstances in which legally-qualified staff might be used.
20. Also, debtors should be made aware at the earliest opportunity that HMRC will be seeking costs in excess of the fixed scale, and what these are likely to be.

JMM

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APPENDIX 1

THE TAX FACULTY'S TEN TENETS FOR A BETTER TAX SYSTEM

The tax system should be:

1. **Statutory:** tax legislation should be enacted by statute and subject to proper democratic scrutiny by Parliament.
2. **Certain:** in virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs.
3. **Simple:** the tax rules should aim to be simple, understandable and clear in their objectives.
4. **Easy to collect and to calculate:** a person's tax liability should be easy to calculate and straightforward and cheap to collect.
5. **Properly targeted:** when anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system by targeting it to close specific loopholes.
6. **Constant:** Changes to the underlying rules should be kept to a minimum. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
7. **Subject to proper consultation:** other than in exceptional circumstances, the Government should allow adequate time for both the drafting of tax legislation and full consultation on it.
8. **Regularly reviewed:** the tax rules should be subject to a regular public review to determine their continuing relevance and whether their original justification has been realised. If a tax rule is no longer relevant, then it should be repealed.
9. **Fair and reasonable:** the revenue authorities have a duty to exercise their powers reasonably. There should be a right of appeal to an independent tribunal against all their decisions.
10. **Competitive:** tax rules and rates should be framed so as to encourage investment, capital and trade in and with the UK.

These are explained in more detail in our discussion document published in October 1999 as TAXGUIDE 4/99 (see <http://www.icaew.com/index.cfm?route=128518>).