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BUSINESS RATES

Gerald Eve's Business Rates Update

November 2015

'Check, Challenge, Appeal' – the Government's planned appeals regime for 2017

In our **October Rating News Update** we expressed our concern with the clauses in the Enterprise Bill relating to the business rates appeals system in England. It seemed that the Government was planning the 'stick' approach to reducing them, by making it more difficult and expensive to appeal rates assessments, rather than adopting the carrot approach of sharing with ratepayers the rental evidence which underlies their individual valuations.

The Government has now published a **consultation paper** and it is already clear, unfortunately, that the appeals regime which will accompany the 2017 rating revaluation will comprise an obstacle course to be navigated, with new obligations and fees encountered on the way to reduced rateable values.

Responses to the consultation are requested by 4 January 2016 but we are already engaging with relevant Government departments and trade bodies endeavouring to influence a more appropriate system.

Reducing the volume of rating appeals

The problem which the Government is attempting to overcome is the large number of appeals made against rates assessments – more than 850,000 so far challenging the 2010 rateable values. Not only is this a substantial number requiring considerable resources to handle but the Government asserts that many are unnecessary, or even frivolous, given that it is claimed that 70% of appeals lead to no change in assessment.

As we explained in our **October Rating News Update**, we believe that these 'unnecessary' appeals are mostly made as this is the only method to extract from the Valuation Office Agency (VOA) the evidence it has relied on in setting rateable values. If the VOA shared this data up front, these appeals would truly be unnecessary as ratepayers would mostly be satisfied with the clarification they have received.

And we're not alone in considering this approach unfair and inappropriate. You may have seen the fascinating interview in **Estates Gazette** with Professor Graham Zellick CBE QC, recently retired President of the Valuation Tribunal for England.

> "The problem, he explains, is that the ratepayer is never given the full explanation for the valuation. As a result, every time there is a new rating list, ratepayers initiate a challenge – partly to protect their position but chiefly to "flush out" more information.
>
> Unless information is given up front, the system will remain defective and unsatisfactory and unjust. I don't know any other tax that can be levied where the taxpayer doesn't understand in full down to the last detail the basis on which the taxman has calculated the tax due. It's unprecedented, it's unique and it's wrong."

Yet the Government doggedly refuses to require the VOA to help businesses in this way. Instead its proposals shift the entire burden of proof onto businesses and include an administratively cumbersome series of required steps, with targets and timescales on the way, failure to meet any of which could invalidate the appeal.

The proposed three stage appeals process

A three phase process is proposed – Check, Challenge and Appeal – which will have to be undertaken in this sequence and one cannot proceed without concluding the preceding step.

Stage 1 – Check

The Check stage, which we believe ought to be the stage when businesses can check the evidence the VOA has used, will instead require ratepayers to validate relevant facts and agree them so far as possible. The Check can be instigated just once and it will enable access to VOA data and entail an obligation on the ratepayer to agree or correct it.

The only facts that the consultation paper indicates will be provided by the VOA are 'information about the property and the current occupier's rent'. Given that the ratepayer owns or occupies the property, he will possess information about it, will already have access to the floor areas calculated by the VOA and will also know the rent he is paying, so it is unclear as to why the Government believes this will be a helpful stage.

It could potentially identify floor area disputes at an early stage, albeit this would require the property to be fully referenced at the outset, but we are concerned that the VOA has inadequate resources to quickly resolve floor area disputes. Our present experience is that VOs usually only have time to inspect in the days immediately before a tribunal hearing, even if floor area differences have been flagged years previously. The intention is that a property can remain in 'Check' stage for up to 12 months (unless extended by agreement), so there is clearly no expectation of resolving even straightforward factual issues at an early stage – and the ratepayer cannot proceed to Stage 2 until the Check stage is concluded.

Stage 2 – Challenge

The Challenge stage can only be instigated by the ratepayer within 4 months of the conclusion of Stage 1, with a further 18 months allowed to conclude the Challenge. It could therefore be just short of 3 years from starting the process until any decision is made by the VOA. This surely is not the efficient appeals system that businesses have called for and the Government claims to be delivering.

Whereas at present an appeal can be instigated simply by claiming an assessment to be excessive and seeking a reduction to an unspecified value without providing supporting evidence or argument, the future challenge system will be radically different and far more onerous for businesses.

The ratepayer will be required to set out:

a) grounds for the challenge
b) substantive reasons for the challenge, backed by supporting evidence, and
c) an alternative valuation which is supported by the evidence provided.

The onus will be on the ratepayer to prove the VO's valuation to be incorrect even though no explanation is to be given as to the VO's evidence or argument. Mere assertion that the assessment is excessive will be inadequate.

Rather amusingly (or it would be if it wasn't so serious) the paper 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).
>
> It has clearly been lost on the author of the paper that there is no way a ratepayer could know that the VOA has not taken certain evidence into account when he is not to be given any indication of the evidence the VOA has relied upon!

Another example of muddled thinking is what happens if the VOA believes a challenge is incomplete. Here the paper says

> “Where a challenge does not set out the grounds for the challenge, substantive reasons and an alternative valuation, backed by evidence, it is not complete and will not be accepted by the Valuation Office Agency. When an incomplete challenge is received, the ratepayer will be notified of what is missing, and will have an opportunity to provide the missing material and resubmit the challenge, provided that they do so within the original 4-month limit for challenge.

There is a clear risk of the VOA taking its time to decide whether a challenge is complete thus leaving little of the initial 4 month challenge window in order to correct any omissions. One would be forgiven for thinking that this is all part of a master plan to ensure that as few challenges as possible are accepted.

Following acceptance of a challenge the VOA will respond to the arguments and evidence in a ‘proportionate way’, i.e. by providing some of the evidence it holds which it considers is adequate to respond to the issues raised by the ratepayer.

The entire process and timetable is to be controlled by the VOA. It will decide when the ratepayer needs to respond to the VOA, it will decide whether to accept any further evidence in response to that supplied by the VOA, and it will decide unilaterally when the discussions have come to an end.

Once they have come to an end, the VOA will issue a decision notice which will include

a) a summary of agreed matters, including any amendments to the challenge

b) the Valuation Office Agency’s decision on the challenge and any amendments to the rating list

c) the reasons for the decision, addressing all remaining disputed matters and indicating what evidence and arguments have been relied on in reaching the decision.

That latter point seems to indicate to an intention to end the way rating advisors and the VOA have engaged for decades, by way of face to face or telephone negotiations. The new process seems intended to become a battle by e-mail and document exchange so that everything can be recorded and provided to the Valuation Tribunal, if necessary, at Stage 3.

Stage 3 – Appeal

Ratepayers will have up to 4 months following the issue of the VOA’s decision notice to make a formal appeal to the Valuation Tribunal – for which a fee will become payable, refundable if successful. The fee is likely to be between £100 to £300, possibly at a flat rate or variable linked to the rateable value under appeal.

In what seems likely to be another barrier to justice, the consultation paper states that

> “The Valuation Tribunal for England will consider the Valuation Office Agency’s decision in respect of the challenge, based on the evidence which was before it at that stage, and will decide whether the decision was correct.

In other words it seemingly won’t hear expert witness evidence or argument but will rely on that set out in the original challenge document. If so, that document takes on huge importance and will need to be almost a proof of evidence, rather than a summary of the evidence and arguments. This would be totally disproportionate, especially since the VOA will not previously have shared any of the evidence it has used. The proposals paper says there would be only limited circumstances when new evidence could be admitted at Stage 3.

And if there was any pretence remaining of an appeals system which is fair to ratepayers, this is blown away by the suggestion that, in future, appeals to the Upper Tribunal (UT) would be restricted to points of law only – not in respect of valuation disagreements as presently. The Government says the existing approach is ‘inconsistent with onward appeals in the First Tier, including tax, where most appeals to the Upper Tribunal are on a point of law only’. It may well be, but the rating system bears no comparison with all other tax disputes and Valuation Tribunals (VT) are not part of the First Tier Tribunals system.

In all other taxes the taxpayer is in possession of all the relevant facts which determine his or her tax liability. Not so with business rates where one taxpayer’s liability is dependent upon rents on other properties of which he has no information, is not provided with them and has no easy means of obtaining them.

The VT is the only tribunal whose members are lay, not professionally qualified, and it would be manifestly unjust to deny appeals to the UT on valuation issues. One only has to see the considerable numbers of valuation related appeals where the UT has recently overturned VT determinations to recognise how inequitable such a change would be.

To summarise

The introductory paragraph to the consultation paper states that

> Businesses need to have a better understanding of how their properties have been valued. They need to be confident that valuations are correct and that they are paying the right amount of business rates. Where this is not the case, it needs to be put right more quickly – businesses need refunds which are due to them as soon as possible. The system needs to be clear and easy to navigate so that businesses of all sizes can easily use it.

As you will have realised from our critical comments in this update, we do not believe that the consultation proposals achieve these laudable aims. The proposals

- **will not** provide businesses with a better understanding of how their properties have been valued,
- **will not lead** to businesses being confident their valuations are correct,
- **will not lead** to valuation errors being put right more quickly, and
- rather than being easy to navigate, the proposed system would be a labyrinth requiring professional assistance and associated additional costs to navigate successfully.

Responding to the consultation paper

Responses to the Consultation Paper should be submitted to ndr@communities.gsi.gov.uk by 5pm on 4 January 2016, following which the Government plans a further consultation on the details before laying regulations. We'd be happy to assist you with your responses to Government.

We will be discussing our concerns with DCLG Ministers and officials as well as the VOA, lobbying for changes to the relevant clauses in the Enterprise Bill as it continues its passage through Parliament, as well as responding formally to this consultation.

Gerald Eve's UK office network

Gerald Eve is the pre-eminent business rates adviser. We currently advise a quarter of the FTSE100 companies on rating matters. We have saved our clients occupying over 70,000 properties throughout the UK more than £1.9bn in rates liabilities over the last five years.

We are very keen to tell you more about our approach and how we can assist you, so please contact **Jerry Schurder** on **+44 (0)20 7333 6324**, **jschurder@geraldeve.com** or your usual Gerald Eve contact to find out more.

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