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## The Personal Tax Planning Review

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# DISCOVERY BEFORE THE TAX COMMISSIONERS

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Tax litigation is, as P G Wodehouse might have said, a very rum business. The best tax lawyers do not become so by being experienced in heavy commercial litigation; they are *advisors* rather than (perish the thought) *gladiators*. Yet from time to time they do venture onto the field of Mars to do battle, often donning (or at any rate affecting to don) their battle armour with a certain gentlemanly reluctance. Another singular feature of tax litigation is that the taxpayer's opponent is invariably one of a very few government agencies: the Inland Revenue (subdivided into a number of departments) or the Customs & Excise. Not for them the infinite variety of the ordinary litigator. A third curiosity is that the litigation itself consists almost always of an appeal by the taxpayer against an assessment or other administrative decision by the tax authority concerned which, for all its binding qualities if unappealed, usually has less chance of being accurate than it has of winning the Betty Trask Award for Romantic Fiction. But the oddest of all the oddities is the strangeness of the tribunals before which the clash of arms takes place. The General Commissioners are composed of laymen, like magistrates' courts. The Special Commissioners are half barristers, half civil servants.

Procedurally, as well as personally, the tax tribunals stand out amongst their peers in the judicial system<sup>2</sup>. The purpose of this short article is to highlight the procedural strangeness by means of an outline of the Special and General Commissioners' procedures relating to the discovery of documents.

As is well known, discovery is an important - even vital - aspect of civil litigation, enabling parties by compulsory means to obtain production of all relevant and non-privileged material in the hands of their opponents. So long as our adversarial legal system puts the onus on the *parties* to find evidence and prepare their own cases, in advance of the single lengthy trial, rather than rely on a judge or tribunal to investigate the matter with full inquisitorial power, then for so long will it be

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<sup>2</sup> See generally, Potter and Prosser, *Tax Appeals*, 1991.

necessary to provide means for such parties to extort the critical information from the other side<sup>3</sup>. It should not matter if the opponent is a private citizen or a government department: as Thomas Fuller said, "Be you never so high, the law is above you".

This simple view appears to have been overlooked in relation to the Commissioners, however.

As readers will know, the Special and General Commissioners deal with a wide range of tax appeals concerning income tax, capital gains tax, corporation tax and (Special Commissioners only) inheritance tax. Some matters are reserved to the Special Commissioners, but otherwise it is a matter of choice by the taxpayer as to which tribunal deals with the appeal. Procedure before the Commissioners is governed by the primary statutory provisions in Part V of the Taxes Management Act 1970. Some aspects of appeals in relation to capital gains tax are governed by the Capital Gains Tax Regulations 1967<sup>4</sup>, made under s.57 of the 1970 Act. The Lord Chancellor had power from 1984 to make rules governing the procedure of the Special (but not the General) Commissioners under s.57B of the Act, but this power was never exercised, and it has now been repealed, to be replaced (by the Finance (No 2) Act 1992) by a new s.56B since 1992 applying to both Special and General Commissioners (but which likewise has not so far been exercised, although it is understood that draft rules have been produced).

The currently available procedures by which parties to a tax appeal may obtain relevant documents from each other differ significantly according to whether it is the taxpayer or the Revenue that is seeking the discovery in question. The taxpayer's options are very limited. He can of course ask the Revenue to provide voluntary discovery and production of relevant documents, and in many cases this may be sufficient. He may also issue a Crown Office subpoena duces tecum<sup>5</sup> on the appropriate Revenue official, but this suffers from the usual disadvantage that the taxpayer has no opportunity to see the documents before the hearing at which they are produced<sup>6</sup>. There is no other means for a taxpayer to obtain relevant documents from the Revenue, a position which, as will be seen, stands in stark contrast to that of the Revenue vis-à-vis the taxpayer, and also to the general position before VAT tribunals, where more general discovery is available<sup>7</sup>. It is unclear why the taxpayer's hands are so tied. It may be that it was considered that

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<sup>3</sup> See Zweigert & Kotz, *An Introduction to Comparative Law* (2nd ed. 1987), Vol 1, Chap 20, V.

<sup>4</sup> SI 1967/149.

<sup>5</sup> See RSC Ord 38 r.14.

<sup>6</sup> See, e.g., *Re S L (A Minor)* [1987] 2 FLR 412.

<sup>7</sup> See the Value Added Tax Tribunal Rules 1986, SI 1986/590, rr.20-22.

the Revenue would not normally have documents which the taxpayer might need to assist him. True or not (and frankly one doubts whether any empirical study was ever carried out beforehand), it is difficult to see why the *possibility*, in appropriate cases, of some even slightly more meaningful discovery obligation on the Revenue was excluded.

The Revenue, on the other hand, possess a veritable battery of powers to obtain documents and information, both from the taxpayer and from third parties. They can also seek discovery voluntarily or issue a subpoena duces tecum, but the existence of their other powers means that the former is usually taken very seriously, and the latter is simply unnecessary. The only power which is specifically designed for use in connection with tax appeals is however conferred, not on the Revenue, but on the Commissioners themselves, and is contained in s.51 of the 1970 Act. This section permits the Commissioners, at any time before the determination of an appeal, to give notice (usually called a "precept") to the appellant or other party (not being the Revenue) requiring him to deliver specified particulars and to allow inspection by them or the Revenue of "all such books, accounts or other documents in his possession or power as may be specified or described in the notice, being books, accounts or other documents which, in the opinion of the Commissioners issuing the notice, contain or may contain information relating to the subject matter of the proceedings"<sup>8</sup>. There is power for the Commissioners or Revenue to take copies of such documents<sup>9</sup>.

The power under s.51 is usually exercised by the Commissioners at the request of the Revenue, though it is not so limited. A s.51 precept is normally issued only after an interlocutory hearing at which the appellant may appear to object<sup>10</sup>, although this is not a legal requirement<sup>11</sup>. But if the precept is issued, he can challenge it only by way of judicial review, and not, for instance, by originating summons in the Chancery Division<sup>12</sup>. There are financial penalties for non-compliance with a precept<sup>13</sup> (though with a right of appeal in each case<sup>14</sup>), and in addition the Commissioners on the hearing of the appeal may draw adverse

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<sup>8</sup> s.51(1)(b).

<sup>9</sup> s.51(2).

<sup>10</sup> *R v IRC, ex p Taylor (No 2)* [1989] STC 600 at 606.

<sup>11</sup> *R v IRC, ex p Taylor (No 2)* [1990] STC 379, CA.

<sup>12</sup> *Parikh v Birmingham North General Commissioners* [1976] STC 365.

<sup>13</sup> Taxes Management Act ("TMA") 1970 ss.53(1), 98, 100; see, e.g., *Toogood v Bristol General Commissioners* [1976] STC 250, *Galleri v Wirral General Commissioners* [1978] STC 216.

<sup>14</sup> TMA ss.53(2), 100.

inferences<sup>15</sup>. However, a precept under s.51 cannot require a person to supply documents or particulars which would disclose the contents of communications covered by legal professional privilege<sup>16</sup>. It is not clear whether the same applies to the privilege against self-incrimination, but the better view is that it does<sup>17</sup>.

In addition to s.51, the Taxes Acts contain a large number of other powers for the Revenue to obtain information and documents, both from taxpayers and those with whom taxpayers have dealings. Some of these powers are designed for use in specific fact situations<sup>18</sup>; others are for general use in certain relationships<sup>19</sup>. However, the most general powers, and the ones most commonly met in practice, are those in s.20 of the 1970 Act. These permit an inspector<sup>20</sup> or the Board<sup>21</sup> to require the taxpayer to supply both documents in his "possession or power"<sup>22</sup> and "particulars"<sup>23</sup>. In addition, an inspector can require a third party to supply documents relevant to the taxpayer's liability, but not particulars<sup>24</sup>. The inspectors' powers are not exercisable in respect of documents or particulars "relating to the *conduct* of any pending appeal"<sup>25</sup>, are exercisable even once an appeal has been lodged, and the Revenue are not then obliged to resort to the Commissioners' power to order a precept under s.51, or even to weigh up the merits of using s.20 and s.51 before serving notice under s.20<sup>26</sup>.

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<sup>15</sup> E.g., *Boulton v Poole General Commissioners* [1988] STC 709.

<sup>16</sup> So assumed in *R v IRC, ex p Taylor* [1989] STC 600, DC.

<sup>17</sup> See Potter and Prosser, *op cit*, para 2.26.

<sup>18</sup> E.g., transfers of assets abroad (ICTA 1988 s.745).

<sup>19</sup> E.g., employer/employee (TMA s.15), banker/customer (TMA s.17).

<sup>20</sup> TMA s.20(1).

<sup>21</sup> *Ibid*, s.20(2).

<sup>22</sup> *Ibid*, s.20(1)(a), (2)(a); note the omission of "custody".

<sup>23</sup> *Ibid*, s.20 (1)(b), (2)(b); "particulars" means "information" (*Essex v IRC* [1980] STC 378), but probably does not require the taxpayer to carry out calculations or any researches to obtain the information sought: cf *Clinch v IRC* [1970] STC 155.

<sup>24</sup> *Ibid*, s.20(3).

<sup>25</sup> TMA s.20B(2) (emphasis supplied).

<sup>26</sup> *R v IRC, ex p Taylor (No 2)* [1990] STC 379, CA.

The difference between the inspector's powers under s.20 and those of the Board is that an inspector must first obtain the consent of a General or Special Commissioner, who must first be satisfied that in all the circumstances the inspector is justified in proceeding under s.20<sup>27</sup>. This implies a duty on the inspector to put before the Commissioner all the information he has on the relevant circumstances, including information unfavourable to the Revenue's case<sup>28</sup>. The application to the Commissioner is *ex parte*, although it may be that the Commissioner has power to invite the taxpayer to make representations<sup>29</sup>, and, if the taxpayer has already recorded his objections to the inspector in writing, the inspector will in practice have to place these before the Commissioner<sup>30</sup>. The validity of a notice under s.20, whether issued by an inspector or by the Board, may be challenged by way of judicial review<sup>31</sup>.

Finally, there is the impact of privilege on s.20 notices. So far as concerns legal professional privilege, it must first be noted that an inspector has no power to serve a s.20 notice on a barrister, advocate or solicitor<sup>32</sup>: only the Board may do that. If the Board does so, to require documents from the lawyer relating to his client's affairs, the lawyer is not obliged to disclose any document covered by legal professional privilege without the client's consent<sup>33</sup>. If the notice requires documents or information relating to the lawyer's own affairs then he must comply<sup>34</sup>, although the lawyer cannot thereby be required to disclose privileged information or documents relating to his clients' affairs. If a "third party" notice is served on a "tax adviser" (as defined)<sup>35</sup>, he is not obliged to disclose documents consisting of "relevant communications" (also as defined)<sup>36</sup>. Lastly, if the notice, whether "taxpayer" or "third party", is served on one who is neither a (UK) qualified lawyer nor a tax adviser, he cannot resist disclosure of documents

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<sup>27</sup> TMA s.20(7).

<sup>28</sup> *R v IRC, ex p TC Coombs & Co* [1991] STC 97, HL.

<sup>29</sup> Cf *R v Epsom Justices, ex p Bell* [1989] STC 169.

<sup>30</sup> *R v IRC, ex p TC Coombs & Co*, above.

<sup>31</sup> *R v IRC ex p Goldberg* [1988] STC 524; *R v IRC, ex p TC Coombs & Co*, above; *R v IRC, ex p Taylor (No 2)* [1990] STC 379; for a discussion of the possible grounds for a challenge, see Potter and Prosser, *op cit*, paras 2.19-2.21.

<sup>32</sup> TMA s.20B(3); the words "barrister, advocate or solicitor" refer to lawyers qualified under English, Scots or Northern Irish law; foreign lawyers are not included.

<sup>33</sup> *Ibid*, s.20B(8).

<sup>34</sup> As in *R v IRC, ex p Taylor* [1988] STC 832.

<sup>35</sup> TMA s.20B(9).

<sup>36</sup> *Ibid*, s.20B(10); see SP 5/90 in relation to accountants' working papers.

or information on the grounds of legal privilege. Turning to the privilege against self-incrimination, it has been held that the powers to require documents and information under s.20 override that privilege<sup>37</sup>.

### Conclusion

There is no doubt that our tax tribunals have improved considerably in recent years - both in quality of personnel and in attempts to provide a better service. The LCD and the Inland Revenue not long ago produced a consultative document on procedure before the Commissioners and, as mentioned, draft rules of procedure have been prepared, although it is not known how far these contain discovery procedures. Whatever may have been the position in the past, reliance on voluntary discovery from a government agency is not appropriate in the modern world, particularly when proper discovery is available in judicial review proceedings even against the government. Is it too much to hope that Something will be Done about Discovery?<sup>38</sup>

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<sup>37</sup> *B & S Displays Ltd v Special Commissioners* [1978] STC 331.

<sup>38</sup> Much of the material for this article was drawn from the authors' book *Discovery*, published by Sweet & Maxwell Ltd in their *Litigation Library* series in December 1992.