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Check, Challenge, Appeal

Response to DCLG Consultation on Business Rates Reform

Q1: We would welcome views on the overall approach set out in this consultation paper.

A1: Whilst an improved and more efficient appeal system would be welcomed by ratepayers other interested parties and their advisors, the check, challenge, appeal system set out in this consultation will achieve none of the stated objectives without significant amendment. It is likely to be unwieldy, lengthy and unfairly biased against ratepayers.

The arguments against the proposed system were cogently set out in the House of Lords debate in respect of amendments to the Enterprise Bill on the 25th November 2015.

A two stage process, i.e. challenge and appeal would be simpler, easier to administer and less time consuming. It would also be welcomed by ratepayers as it does not automatically lead into an appeal. In addition, it should significantly reduce the number of appeals listed for Tribunal Hearing.

For bulk class properties, i.e. those where the summary valuation is available on the Valuation Office (VO) website, the owner, occupier or other interested party can readily check the facts, i.e. floor areas used by the VO. However, it should be noted that it is often not possible to correlate the VO's areas with those found at the property, making a formal check or challenge difficult for ratepayers or advisors to be specific as to why the VO's facts are incorrect. Streamlining the process by requiring the VO to explain the source of floor areas and provide referencing details on an informal basis would be a more practical outcome and would avoid the currently proposed one year delay before the ratepayer can challenge the Rateable Value. This could be achieved by adding a further paragraph to Schedule 9 Local Government Finance Act 1988 allowing an interested party (as currently defined by Regulation 2 Non-domestic Rating Alteration of Lists and Appeals) (England) Regulations 2009 (the Appeal Regulations)), to request sight of this information together with a detailed breakdown of the valuation.

It should be noted that in many cases there will be no factual dispute, especially where properties are unchanged and have been appealed in previous rating lists. Therefore, the proposed check stage will simply delay the inevitable challenge and cause unnecessary work for the interested parties and VO.

Properties valued by reference to receipts or contractor's method valuations do not have summary valuations on the VO website and under the current proposals the check stage would not enable the ratepayer, or other interested parties to consider how the VO has arrived at the Rateable Value, making the check procedure irrelevant. As advisors to clients with such properties, we have direct experience of becoming aware, after the current appeal process was well in hand, that the VO had incorrectly included, or excluded, properties from the valuation which had a material effect on the relevant facts, the appropriate value and the validity of the grounds of the proposal. The current proposals set out in the consultation document would exacerbate and not rectify this problem. However, if the rights of an interested party are strengthened as proposed above and extended to include a right to inspect or be provided with an electronic copy of the VO's valuation and any supporting plans or referencing details held by the VO, without the need for a formal check procedure, then this would enable the accuracy of the VO information to be checked without taking up the VO's limited resources and without the ratepayer having to draft a copious enquiry to ensure that a full response is received. Under the current proposal and appeal process, the VO frequently withhold information and evidence because the ratepayer did not specifically refer to it. This exacerbates the situation and leads to more hearings listed at the Valuation Tribunal as being the only way in which the interested person (IP) can exert pressure on the VO to provide a response.

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Q2: What are your views on when 'relevant authorities' should be involved in the process?

A2: As 'relevant authorities' (RA) are now recipients directly or indirectly of business rates income, it is important that the RA can challenge the VO with regard to creating new entries in the Rating List increasing assessments after material changes, or to correct identified errors causing a barrier to effective billing. However, the definition of RA should be restricted to the Billing Authority as defined by the Local Government Finance Act 1988.

The RA currently has a reporting procedure requiring disclosure of changes to properties in their area to the VO, and leads to the provision of Billing Authority Reports (BARs). An enhancement of this system with improved reporting facilities between the RA and the VO should adequately deal with the need for maintenance of the Rating List to account for new or improved hereditaments creating additional Rateable Value.

The appeal regulations currently permit the relevant authority to make proposals. There is therefore no requirement to incorporate additional rights for the RA in the few instances where their normal reporting procedure is inadequate.

The stated aims of the consultation is to "provide a streamlined and efficient system" introducing rights for RA to become parties to appeals made by IP's would have the opposite effect. If the aim of the system is to provide a means to address errors, inaccuracies and unfairness, then this is best left between as few parties as possible. The VO are currently operating to "defend" the Rating List creating an antagonistic system with the VO acting as the agent for the Treasury to protect revenue. If the RA are dissatisfied with this service, this would be better addressed through their reporting procedures with the VO and not by increasing the complexity of the appeal process and increasing the likelihood that challenges or appeals will not be settled by agreement thereby increasing the workload of the Valuation Tribunal for England.

Involving the RA at the Challenge stage could often result in an unwieldy three cornered debate. If the RA is to be involved in the Challenge process, it might be better to conclude discussions with the ratepayer and then pass the proposed outcome to the RA. Alternatively, perhaps the RA should be placed in a similar position to the ratepayer and invited to tender submissions at the outset of the Challenge process, and be limited to those submissions. The present proposal would do nothing to create a more streamlined and efficient system. On the contrary, it would complicate things further.

We note that S22 of the Enterprise Bill already includes provision for the VO to share information with the relevant authority which should enable greater transparency when reporting to them. It is unfortunate that the same level of transparency is being denied to the ratepayers and owners. Please refer to the House of Lords discussion noted above.

Q3: 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.

A3: Any information provided by IP's, IP's representatives, VO's or RA should be truthful and as accurate as the parties are able to make it. The VO are already authorised by paragraph 5 Schedule 9 LGFA 1988 to require provision of information from owners and occupiers subject to penalties for non-compliance and the usual rules regarding fraudulent statements.

Qualified professional advisors are members of professional bodies such as IRRV, RICS or Law Society and therefore bound by codes of ethics and subject to disciplinary procedures. However, the legislation does not restrict the role of IPs representatives to qualified professionals and there are a large and ever changing number of unqualified firms and individuals practicing as rating advisors. These unregulated firms and individuals are a source of unwarranted appeals and often misleading, whether intentionally or otherwise, advice and information.

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Setting a minimum requirement for professional representatives would be more effective in dealing with the provision of accurate information than threats of sanctions and would protect ratepayers who unwittingly appoint unscrupulous representatives.

Additional penalties levied against ratepayers due to the actions of unregulated third parties will simply provide another barrier to ratepayers making reasonable challenges to the entry in the Rating List on which their tax is based.

"Accuracy of Information" is in itself an imprecise phrase. It is possible to provide information, in good faith, believed to be accurate which is later shown to be inaccurate. This affects both the IP's, the IP's representatives, the VO and the RA. For example, parties may rely on rental evidence which under closer examination is found to be flawed and therefore inaccurate. Alternatively, the parties may agree a rent but disagree on the analysis of that rent and therefore dispute the accuracy of the devaluation used in the challenge or defence of a Rateable Value. There should be no penalty imposed due to such discrepancies.

In short therefore, the problem of inaccurate information could be significantly reduced by regulating the individuals or firms acting as professional representatives.

Penalties should only apply to the fraudulent provision of information in the normal manner and be levied, in the first instance, on the person providing that information and should apply equally to IP's, IP's representatives, VO and RA.

Q4: We will bring forward end-of-list proposals in due course, but in the meantime would welcome general views.

A4: As noted above in A1, the proposed check process is an unnecessary complication and will make the system slower, less efficient and more resource intensive for all parties. If there is no dispute over floor areas or other factual matters recorded in the Rating List and summary valuation, the check process is irrelevant and will merely delay the appeal process.

The check process will also confuse issues such as material day provisions (essential in matters involving MCCs) making the system inefficient. An informal check not directly connected to the appeal process would be of assistance but only if there is full disclosure of the information relating to the make-up of the Rateable Value by the VO. This process should be available from publication of the draft Rating List (i.e. 30th September 2016 for the 2017 Rating List) which would enable correction of factual errors in the List before it comes into force.

In the case of challenges based on the current proposal grounds, in Regulation 4 of the Appeal Regulations, the check process would not be relevant for most challenges made in respect of:-

4(1)(b) Material Change

4(1)(c) Amendment of Classes of Plant and Machinery

4(1)(d) Alterations to the List by the VO

4(1)(e) Decisions of Tribunals or Higher Courts.

4(1)(f) Incorrect effective date

4(1)(g) New Entry

4(1)(h) Deletion

4(1)(i) Partially residential or exempt

4(1)(j) Not partially residential or exempt

4(1)(k) Merger or reconstitution

4(1)(l) Splits or reconstitution

4(1)(m) Incorrect address

4(1)(n) Incorrect description

4(1)(o) Omission of relevant statements

Therefore the check procedure would only have relevance to one ground, i.e. the compiled list entry and for current IP's at the start of the list it would be more efficient for an informal checking process to be put in place prior to the commencement of a new List obviating the need to enter any formal process if the only concern is factual. Similarly, it would be helpful if matters covered by grounds 4(1)(c), 4(1)(g), 4(1)(h), 4(1)(i), 4(1)(j), 4(1)(k), 4(1)(l), 4(1)(m), 4(1)(n) and 4(1)(o) could be addressed before the commencement of the Rating List by way of disclosure of facts and evidence by the VO.

Q5: What arrangements should apply to temporary material change of circumstances cases under the new system?

A5: The issue of material changes falls into two distinct categories, i.e. temporary and permanent. The greatest difficulty surrounds the temporary changes. Under the current appeal system, a proposal must be lodged during the period to which the material change applies.

The current material day rules (Non-Domestic Rating (Material Day for List Alterations) (Amendment) (England) Regulations 2005), prevent IP's from making appeals for material changes that have ended but allow the VO to do so.

If a material change is taking place then using when the check is submitted to set the material day will exacerbate this issue, making it more difficult for the IP's to obtain a reduction in their rateable value which they may be entitled to. This is because the check is to validate relevant facts. A material change proposal made under current procedures is usually to reduce a rating assessment because of that material change. Therefore, IP's should be able to immediately proceed to a challenge of the Rateable Value (make an appeal in current terminology) and should be able to deal with a series of linked changes (including historic changes) in a single challenge, thereby reducing the number of challenges required and improving the efficiency of the appeal system. In other words, if there has been a previous material change(s) to the one that is current, a challenge can cover one or more material changes.

The evidence required to substantiate a ratepayer's challenge, due to a temporary material change, is often not available at the time that the proposal needs to be submitted to comply with the material day rules. This will need to be recognised in any revised procedure.

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Q6: What are your views on the trigger point for check stage?

A6: Having regard to the statement in paragraph 24 of the consultation that "check stage will be a quick process"; there is reason to believe this is inaccurate. The current staffing levels of the VO Agency makes this unlikely and this will become even more difficult following the proposed round of office closures and funding reviews for the VO.

In effect, the proposed long stop date of 12 months from initiating the check stage is a recognition of this.

A 12 month long stop date is likely to set the norm with regard to response times from the VO and thereby will introduce delays into an already slow and overloaded system irrespective of any service level agreement that does not greatly increase the resources of the VO. The time limit should therefore be no more than 6 months.

Without full disclosure of the facts used by the VO in determining the Rateable Value, this stage will provide nothing other than a delay before a challenge can be submitted.

As noted above, it would be more efficient if informal checks are allowed and properly supervised by a service level agreement and by changes to Schedule 9 LGFA 1988 from publication of the draft Rating List onwards.

Q7: What are your views on the time limit for submission of a complete challenge, following check stage?

A7: As noted above, the challenge should be the first part of any formal process. Challenges should be able to be submitted in the same manner as the current proposals in accordance with Appeal Regulations, except challenges based on Valuation Tribunal or other higher court decisions.

If the proposed check process is implemented, then the IP should be allowed not less than 6 months in which to make a challenge.

Q8: What are your views on the trigger point for challenge stage?

A8: For the reasons set out in A6 above, the proposed 18 month long stop will inevitably become the norm. Meaning that the first 2 stages proposed by the consultation will require 2½ years to elapse before reaching the appeal stage. This is an unacceptable delay, especially as the ratepayer is required to make payment of rates liabilities in full based on a disputed Rateable Value. This can lead to financial hardship and potential closure of a business due to an inefficient system.

Where there is a clear case of hardship, the maximum response period should be 6 months. In all other cases, the period should not be more than 12 months.

Q9: Do you agree that these requirements for a challenge are the best way to ensure early engagement on the key issues?

A9: The statement at paragraph 36 of the Consultation can only be achieved if the ratepayer is fully informed, before making the challenge, of the way in which the Rateable Value has been derived, specifically with regard to the reasoning behind unit prices, percentages of turnover, etc applied by the VO.

The emphasis is being placed on the IP to provide detailed argument against a Rateable Value with supporting evidence in the face of a lack of transparency from the government body responsible. The proposed check stage will not disclose relevant information about how the Rateable Value has been derived.

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Under the proposed system, there will be no disclosure from the VO in respect of the way in which unit prices, percentages or other relevant valuation factors have been determined. For bulk classes of properties, there may be reference to a VO Valuation Scheme. A Valuation Scheme will set out a range of unit prices for a particular class of properties in a particular location. A copy of a typical scheme is attached referring to a range of unit price from £90/m² to £145/m² with no evidence or justification for that range. The price applied to a specific property may be stated to be £100/m² within that scheme but the individual line entries in the valuation may range from £80/m² to £120/m² with no explanation given for the adjustments to the unit price or how the price of £100 has been arrived at from the overall range. This renders the scheme effectively meaningless for the ratepayer.

As a professional advisor, a chartered surveyor will be able to provide a valuation which disregards entirely the VO's summary valuation and Valuation Scheme and also provide relevant evidence to explain that valuation. Unrepresented IP's would not have the resource or ability. However, the Chartered Surveyor will still not be able to address specific issues that may be considered relevant by the VO at the commencement as the VO's evidence is not available for checking. It is profoundly unfair that ratepayers and their agents are kept in the dark, and then restricted to argument that is put forward from what is effectively a handicapped position.

The argument may involve properties for which there is no body of rental evidence or the property may belong to a non-bulk class valued by reference to receipts or contractor's method and again the IP or the IP's representative at the challenge stage will not have any information from the VO in respect of the basis of the Rateable Value. Details of non-bulk class properties are not made available on the internet, and ratepayers currently have the right to request copies of the VO's valuations. It is important that they retain the right to do so, and that any such request is not regarded as falling within the proposed Check stage. Provision of the VO valuations should provide the factual background specific to individual properties.

This would be similar to HMRC refusing to disclose how they arrived at a net taxable income figure for income tax purposes before applying the appropriate percentages to calculate the tax liability. Such behaviour by HMRC would not be countenanced, and yet these proposals consider such an approach to be reasonable for a property tax.

Professor Zellick, former President of the Valuation Tribunal for England, expressed similar dissatisfaction with the current appeal process. In an interview with Estates Gazette published on 24th October 2015, Professor Zellick made a number of well-informed comments including the following:-

"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."

These comments are based on his direct experience as President of the Valuation Tribunal England.

Until the VO discloses evidence and puts forward reasoned argument in support of the Rateable Value or an alternate figure, the IP or IP's representative will be unable to put forward his entire case as the initial challenge will not have addressed the VO's evidence and argument. It is often the case that evidence held by the VO is flawed due to being inaccurate, incomplete or incorrectly analysed; such issues cannot be addressed in an initial challenge, unless previously disclosed.

Current proposals deliberately use all-inclusive generalised wording to enable a full discussion of all possible

aspects of the Rateable Value within the context of the grounds of appeal. This is a direct response to both case law and the refusal of the VO to discuss matters not covered by the proposal even if pertinent to the unit of assessment, level of value, description of the property and so on.

Therefore, it is not agreed that these requirements for a challenge are the best way to ensure early engagement in key issues. The most efficient way to deal with queries in respect of the level of value would be for full disclosure of facts and supporting evidence by the VO to the IP, enabling the IP to make a clear and concise challenge if the VO were able to persuade them that the Rateable Value is fair and reasonable. Full disclosure would substantially reduce the number of formal challenges required.

Q10: Do you agree that this process allows the ratepayers to make their case in a fair and effective way?

A10: Paragraph 36 of the Consultation paper is incorrect. For the reasons given above at A9, no challenge made without disclosure by the VO will be complete as it will need to cover all potential reasons for dispute without the required information needed to identify the causes for the dispute.

Paragraph 37 provides the VO (a party to the appeal and in effect a representative of the recipient of the rates levied) with discretion to accept or reject new evidence. This is contrary to Section 41(1) LGFA 1988 which requires the VO to "compile and then maintain lists". Refusal by the VO to consider all evidence and argument could be a refusal to carry out the duty to maintain the List by the VO. Any discretion to disregard evidence should only apply to the extent that this evidence does not impact on the accuracy of the list.

At paragraph 39, the VO is allowed to only respond to direct argument and evidence whilst being enabled to withhold relevant information and evidence gathered using statutory powers. There is legal opinion from Mr David Holgate QC (now Mr Justice Holgate) that sets out why the Commissioner for Revenues and Customs Act 2005 is not applicable and should not be used to withhold the evidence from the ratepayer or interested person.

Paragraph 40 places the VO in control of timetables, as is currently the case. However, these timetables only have regard to VO staffing and no regard to the ratepayers circumstances.

Therefore, in direct answer to the question posed, the proposals for the challenge will deny the IP a fair and reasonable opportunity to challenge the Rateable Value. The bias is entirely in the favour of the VO who have a duty to the Treasury and not to the ratepayer.

Q11: What are your views on whether straightforward appeals could be determined on the papers, without the need for a hearing?

A11: The question, as posed, is restricted to only the issue of determination of appeals on paper submissions. It fails to raise the question of whether the proposed appeal process is fair and reasonable. The challenge stage is seriously flawed, primarily due to a lack of transparency enabling a fully detailed challenge, therefore an appeal to Valuation Tribunal should be a de novo appeal. At this stage, a detailed Statement of Case should be provided by the ratepayer. However, if the VO has failed to provide evidence at the challenge stage, or to agree facts, then the IP will again be faced with a difficulty.

In direct response to the question set, simple matters which have been fully discussed, where written submissions can properly identify the dispute, should be disposed of without a hearing. However, the Tribunal members would need to be adequately qualified to weigh the issues. In effect, this process should be dealt with as an arbitration in place of a hearing.

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Q12: What are your views on the time limit for submission of an appeal, following the challenge stage?

A12: In view of the intention to charge a fee for the appeals, the IP should be given not less than 6 months in which to decide whether or not to appeal a decision, or lack of decision, by the VO.

Q13: 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?

A13: Prior to appeal stage, the parties should have identified all areas of dispute. However, this is dependent upon full disclosure of evidence by the VO at an entry stage.

We agree that the appeal should set out the reasons for the appeal and should identify all evidence brought forward by both parties at challenge stage. The VO should have no authority to bar evidence brought forward during the challenge process in response to VO arguments or evidence.

New evidence coming to light after the challenge process commenced, such as: settlements of other appeals or challenges, or; rental evidence being brought to the IP's attention for the first time; should be permitted. However, the VO should be barred from bringing forward fresh evidence at appeal stage which has been in the knowledge and control of the VO during the challenge stage.

The appeal should be similar to the current Statement of Case as set down in the Valuation Tribunal Procedures Practice Statement A7. This is a well tried process and understood by the professional representatives. However, the Statement of Case should also seek to identify those matters which have been agreed during the challenge stage.

The appeal should not be limited to the grounds of the challenge but should encompass all issues raised during the challenge stage, which may therefore refer to different grounds. For example, if at the challenge stage it is not known by the interested party that the Rateable Value includes areas of land or buildings which do not form part of the hereditament, then the appeal should be able to deal with any splits, mergers or reconstitutions required to correct that error.

The above restrictions should ensure that the appeal process is focussed only on the areas of actual dispute between the parties but also allow proper consideration of the fair and reasonable level of value and unit of assessment entered into the Rating List.

Q14: We will consult further on the details of these fees, but in the meantime, would welcome general views on implementation.

A14: The introduction of a fee at Valuation Tribunal will deter many unrepresented ratepayers from making appeals, even if they have a good case for a reduction. Those who are professionally represented, especially if represented by qualified professionals, will already face a cost of their expert's appearance and the imposition of a further cost for an informal Tribunal may make the appeal uneconomic therefore deterring the IP and allowing an incorrect entry to stand, potentially having an adverse effect on a number of other appellants. Therefore any fee should be set at a minimal level.

There should be no fee if the appeal is made in the absence of a decision in respect of the challenge, or the fee should be payable by the VO.

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If the appeal is upheld (in whole or in part), the fee should be reimbursed.

Q15: We would welcome general views on whether changes to appeals to the Upper Tribunal (Lands Chamber) would be beneficial.

A15: Appeals to Upper Tribunal are very costly due to the need for barristers, solicitors and expert witnesses in most cases. Therefore, the primary consideration of an IP in appealing against a decision of Valuation Tribunal for England is the cost benefit of the appeal

The VTE is a lay Tribunal and not an expert Tribunal unlike the Upper Tribunal (Lands Chamber). Most valuation principles derived from case law have been provided by the Lands Tribunal (now Upper Tribunal (Lands Chamber) and therefore depriving the IP and VO the opportunity to challenge decisions on valuation to the Upper Tribunal (Lands Chamber) would be detrimental and not in the interests of the IP, VO, or fair maintenance of the List.

The majority of appeals to UT (LC) have wider implications than the assessment of the appeal property. From the viewpoint of the ratepayer, it is the impact on value, whether in respect of method of valuation, analysis of evidence, or point of law, which is paramount. From the viewpoint of the VO it is the clarity needed for maintenance of the List which should be paramount. Depriving the ratepayer of the opportunity to take an appeal before a formal expert Tribunal other than on a point of law would be a detrimental step not in the interests of justice.

Therefore, there should be no change to the Upper Tribunal procedures, other than extending the current 28 day period for appeals to 3 months allowing both parties to give more detailed consideration to the benefit of an appeal.

CONCLUSION

The proposed Check, Challenge, Appeal procedures set out in the Consultation as currently drafted, would slow down the appeal process, unfairly prevent full and proper discussion of ratepayer's concerns regarding Rateable Values and reinforce the VO's current stance on defending rather than maintaining the Rating List and withholding information and evidence required to determine whether the Rateable Value is fair and reasonable. The complexity and labyrinthine nature of the process would deter many rate payers from pursuing valid appeals.

A change to a 2 step process, with an informal check stage when required, would be quicker, cheaper and simpler but only if there is improved transparency from the VO at the outset of the process.

It is notable that the VO's withholding of tenure information is directly contrary to the changes to the Land Registry information which now records sale prices, etc. This refusal to disclose is also a driver to the need for appeals to be made in the first instance.

A comparison can also be drawn with rent review negotiations and third party determinations. The party who initially sets out the requested rent is the party who, in the first instance, is required to put forward evidence in support of that request. Rental evidence is freely shared between the parties at the outset of the negotiations, and is provided to the parties to the dispute by other landlords and tenants or their agents. If either party withholds evidence negotiations will fail, or will result in an incorrect level of rent being agreed. When referred to an Arbitrator, the Experts on both sides are required to disclose, and where possible, agree all relevant evidence of which they are aware.

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In a rating context, the VO are putting forward their opinion of Rental Value and should therefore be required to provide the evidence on which that valuation is based at the outset.

These proposals are the reverse of normal market and other tax assessment procedures. requiring the ratepayer to guess why the VO has arrived at the Rateable Value and having to set out a Challenge in such a way that all relevant evidence held by the VO may be drawn out during the challenge process but with no certainty that all of the “right” questions have been asked.

For and on behalf of Lambert Smith Hampton

4 January 2016