

It needn't be taxing...

Michelle Sloane and Alexis Armitage provide an overview of the tax tribunals system

The legislative basis for the system of tax appeals in the UK for both direct and indirect taxes is found in the Tribunals, Courts and Enforcement Act 2007 (TCEA). Part I of TCEA provides for a unified tribunal system with two tiers, which for tax appeals are the First-tier Tribunal (Tax Chamber) (FTT) and the Upper Tribunal (Tax and Chancery Chamber) (UT).

The FTT is a fact-finding tribunal which makes a decision by applying the relevant law to the facts of the case as found. The UT has jurisdiction to reconsider on appeal a decision of the FTT on a point of law only. Although an appeal on a point of law may involve issues of fact a decision of the FTT may be overturned by the UT where “*the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal*” (see *Edwards (HM Inspector of Taxes) v Bairstow and Harrison* (1954) 36 TC 207).

Both the FTT and the UT have extensive case management powers to regulate the conduct or disposal of proceedings which can be exercised on the tribunals' own initiative or on application by either party to the proceedings. The rules in relation to the FTT are found in the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the FTT Rules). The rules relating to the UT are found in the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules). In the exercise of its powers the FTT and UT must have regard to the 'overriding objective', which is to deal with a case “fairly and justly” (see Rule 2 of the FTT Rules and the UT Rules).

The Tax Tribunals not only hear substantive appeals relating to the underlying dispute between a taxpayer and HMRC, but also other matters, such as applications:

- i. by a taxpayer for permission for an appeal to be made 'out of time' (i.e. outside of the normal statutory limitation period)
- ii. by HMRC to issue an information notice under either paragraph 1 or 2, Schedule 36, Finance Act 2008 (see Practice note: How to respond to an information request – Schedule 36, Finance Act 2008)
- iii. by a taxpayer to compel HMRC to issue a closure notice in respect of an open enquiry (see Practice note: Obtaining a Closure Notice)
- iv. by a taxpayer that payment of VAT would cause 'hardship' and so the VAT should not be paid pending determination of the appeal
- v. by either a taxpayer or HMRC for a case management direction requiring, for example, specific disclosure from the other party.

The FTT has jurisdiction to hear and determine tax appeals. It does not have “general supervisory jurisdiction”, or jurisdiction to consider the exercise by HMRC of its discretionary powers. The exercise of such powers can generally only be challenged on public law grounds by way of an application for judicial review.

Judicial review is a type of court proceeding in which a judge reviews the lawfulness of a decision or action made by a public body. In other words, judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached. Judicial review may be pursued in circumstances of illegality (for example, if HMRC has acted beyond its powers, or has abused its powers), irrationality (for example, if HMRC makes a decision that is so unreasonable that no reasonable authority in its position could have made such a decision) and where there has been some procedural impropriety (for example, where HMRC has not followed the relevant statutory procedure, or has failed to give reasons or to consider representations, or has failed to observe rules of natural justice). Whilst the above is not an exhaustive list of grounds for Judicial Review, where HMRC has acted in a way that seems manifestly unfair it is worth considering and taking legal advice on whether an application for judicial review should be made.

Jurisdiction of the tax tribunals

The jurisdiction of the FTT and the UT encompasses both direct and indirect taxes.

Direct taxes include:

- corporation tax
- income tax
- capital gains tax
- inheritance tax
- national insurance contributions
- stamp taxes
- income tax collected under PAYE
- the construction industry scheme
- annual tax on developed dwellings.

Indirect taxes include:

- Value Added Tax
- insurance premium tax
- landfill tax
- climate change levy
- aggregates levy
- excise duty
- air passenger duty
- alcoholic liquor duties
- tobacco products duty.

Precedence value of decisions of the tax tribunals

A decision of the FTT is not binding on another judge of the FTT. However, a decision of the FTT does constitute persuasive authority which would normally be followed by the FTT in a later appeal (see *Ardmore Construction Ltd v HMRC* [2014] SFTD 1077 at [19]). The FTT is bound by decisions of the UT (see *BPP Holdings v HMRC* [2016] EWCA Civ 121 at [25]), High Court, Court of Session, Court of Appeal and Supreme Court.

A decision of the UT is not binding on the UT (see *Raftopoulou v HMRC* [2018] STC 988 at [24]). However, as a tribunal of coordinate jurisdiction, a later UT would be expected to follow the earlier UT decision unless it was convinced that the earlier decision is wrong (see *Gilchrist v HMRC* [2014] STC 1713 at [94]). The UT is not bound by a decision of the High Court in the way the FTT is bound (see *SoS for Justice v RB* [2010] UKUT 454 (AAC) at [40-41]); this is because specialised tax issues arise before the UT and it may, in a proper case, decide not to follow a decision of the High Court if there is good reason not to do so (see *Total Ltd v HMRC* [2014] UKUT 485).

The UT is bound by decisions of the Court of Appeal and the Supreme Court on issues of law. The Court of Appeal is bound by decisions of the Supreme Court.

In relation to appeals from specialist tribunals, the Higher Courts are mindful of their expertise. In *AH and others (Sudan) v Secretary of State for the Home Department (United Nations High Commissioner for Refugees intervening)*, [2007] UKHL 49, Baroness Hale said at [30]:

“This is an expert Tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert Tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the Tribunal will have got it right: see Cooke v Secretary of State for Social Security [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirection’s simply because they might have reached a different conclusion on the facts or expressed themselves differently.”

In relation to appeals against case management decisions of the FTT, the appeal court will be slow to interfere with the decision (see *Goldman Sachs International v HMRC* [2009] UKUT 290 (TCC) at [23] – [24] and *HMRC v Ingenious Games* [2014] UKUT 62 (TC), at [56]).

Top tips

As with any litigation, consider Alternative dispute resolution (ADR). The aim of ADR is to resolve the issues between the taxpayer and HMRC (or as many of them as possible) without recourse to litigation, and with a view to saving time and expense for all concerned. ADR is not a statutory process, and both the taxpayer and HMRC have to be willing to engage in ADR before it can be adopted. Neither party can be compelled to participate in the ADR process if they do not wish to. Provided that both HMRC and the taxpayer agree that the dispute is suitable for ADR, the parties can engage in it while an enquiry is in progress and once an appeal has been filed (in which case an appropriate direction for a stay of the appeal to enable the ADR process to take place can be sought from the FTT). Rule 3(1) of the FTT Rules, requires the FTT to “bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute” and, “if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure”.

If ADR is not a viable option or is unsuccessful, consider the facts of the case early on and consider whether the FTT is the appropriate forum and whether judicial review proceedings should be commenced. If judicial review is a potential option in a case, consider it as early as possible as be mindful of the deadline in which to bring a judicial review claim. A significant proportion of

applications for judicial review fall at the first hurdle (the permission stage) not because of any weakness in the application itself but because they are out of time. An application for judicial review of a decision must be filed *“promptly ... and in any event not later than 3 months after the grounds to make the claim first arose”* (Civil Procedure Rules (CPR) 54.5(1)).

Familiarise yourself with the FTT Rules and the UT Rules and consider how it would be best to utilise them in order to ensure effective case management of any appeal.

Consider legal costs. The approach to costs in tax litigation differs to that which generally applies in civil litigation. In particular, the principle that costs follow the event does not apply in the FTT, with each party generally bearing their own costs regardless of the outcome of the case. Section 29(1) and (2) of the TCEA, provide that, subject to any tribunal procedure rules, the costs of and incidental to all proceedings in the FTT and UT, are in the discretion of the two tribunals which have full power to determine by whom and to what extent the costs are to be paid. Although both the FTT Rules and the UT Rules provide a discretion to award costs, they do not offer any guidance as to how that discretion should be exercised. In practice, the tribunals follow the principles contained in the CPR relating to costs and are guided by their previous decisions.

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