

DECISIONS, DECISIONS: CHALLENGING A DECISION OF THE TAX TRIBUNAL

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Appealable decisions

Readers of this Review will already be familiar with the structure of the new tax appeals system which took effect from 1 April 2009. In the broadest of outlines, the key structural changes (there are other important changes too) are as follows:

- The First-tier Tribunal (or rather its Tax Chamber) takes over from the Special Commissioners, General Commissioners, VAT Tribunal and certain other tax tribunals.
- The Upper Tribunal (or rather its Finance and Tax Chamber) takes over from the High Court on hearing appeals on points of law from first instance tribunal decisions. Permission to appeal is needed. (In certain cases, a case which has been designated as “complex” may however start in the Upper Tribunal – such cases are likely to be few and far between however.)

The path that, say, an appeal against an HMRC assessment might now follow is set out in diagrammatic form at the Appendix to this note.

Un-appealable decisions by the First-tier Tribunal

There are however a number of decisions which the First-tier Tribunal might make which are not capable of challenge under the appeals route set out in the Appendix.

Decisions within this category include:

- decisions on a point of law which are “excluded decisions”, that is to say, decisions which would otherwise benefit from the appeals process set out but which have been excluded from it under the Appeals (Excluded Decisions) Order 2009¹. This would include a decision by the First-tier Tribunal under s138(4) TCGA 1992 (procedure for clearance in advance) and certain decisions relating to an inspector’s ability to call for documents (previously under s20 TMA 1970 but now contained in Schedule 36 FA 2008²).
- decisions on a point of law against which there is stated to be no right of appeal. An example is a decision in relation to an application under s55 TMA 1970 to postpone payment of the tax shown as charged by an assessment until the appeal against the amount has been heard. S55 has been amended³ and s55(6A) now states that “...the decision of the tribunal shall be final and conclusive”.
- certain other decisions which are not on a point of law. Within this category would fall a decision

not to give permission to appeal and most case management decisions. The concept of appealing a case management decision might be thought of as surprising. Why bother? Because such decisions can be important, both in terms of cost and case strategy⁴. By contrast, under the Civil Procedure Rules, it is possible to appeal a decision of the High Court, including a case management decision, if it is wrong (which it may be if the court erred in law or in fact or in the exercise of its discretion), or if it is unjust because of a serious procedural or other irregularity.⁵

What are the taxpayer's remedies in relation to the various types of un-appealable decisions of the First-tier Tribunal set out above? There are three avenues to consider.

1. Request a review

The First-tier Tribunal may, of its own volition or on an application by the aggrieved party, review its decision in certain cases.

Unfortunately, it is not, without more, possible to ask the First-tier Tribunal to review a decision which is not subject to a right of appeal. That appears to follow from the fact that the Tribunal may only undertake a review of a decision made by it where it has received an application for permission to appeal (which must be read as a valid application for permission to appeal).⁶

However, the First-tier Tribunal may set aside a decision it has made which “disposes of proceedings” if there has been a procedural hitch.⁷ And the First-tier Tribunal can be made to re-consider a case management decision by an aggrieved party applying for a fresh case management decision which reverses the offending one. It is not clear in either case whether it will be the original decision-maker who will be doing the reconsidering.

2. Judicial review of the First-tier Tribunal by the Upper Tribunal

Suppose reconsideration by the First-tier Tribunal of its decision fails to achieve the intended effect or is not available?

The power of the High Court (as successor to the old Court of King’s Bench) to conduct a judicial review of public bodies, including tribunals which are not superior courts of record, derives from the common law (although it is now reflected in statute⁸). A “synthetic” judicial review function has been granted to the Upper Tribunal under the Tribunals, Courts and Enforcement Act 2007 (the “2007 Act”)⁹. Most of the powers exercisable by the High Court have been granted to the Upper Tribunal and the statute provides that, in deciding to grant the various remedies sought, the Upper Tribunal “must apply the principles that the High Court would apply”.

The heads of judicial review are often cited as illegality, irrationality (unreasonableness) and procedural impropriety (or unfairness).¹⁰ It is often said, particularly

in the context of the first of these heads, that a judicial review is not concerned with the correctness of the decision under review, but rather whether the public body decision-maker has acted within the bounds of the powers conferred on it. However the distinction has become blurred as the field of judicial review has developed. A decision of the First-tier Tribunal may be capable of challenge where, on a proper construction of the relevant statute, the decision maker has failed to take account of relevant considerations or has taken into account irrelevant considerations¹¹. It may also be the case that a decision of the First-tier Tribunal can be challenged where it contains an error of law – although there is perhaps still a question as to whether this must be on the face of the record in order to be subject to judicial review, particularly where the decision is stated to be final.¹²

Judicial review is unlikely to be capable of fully being ousted unless the wording is very clear. Even the wording contained in s55(4) TMA 1970 mentioned above, to the effect that the decision of the tribunal is to be “final and conclusive”, is unlikely to be fully effective. The supervisory jurisdiction of the High Court is not readily excluded and it seems likely that this would also be true of the jurisdiction of the Upper Tribunal¹³.

The supervisory jurisdiction of the Upper Tribunal does not however extend to “excluded decisions” (the first of the three categories of un-appealable decision set out above) unless, that is, the High Court transfers the

matter to the Upper Tribunal¹⁴. That is a deliberate limitation in the Upper Tribunal's judicial review powers under the 2007 Act.

3. Judicial review of the First-tier Tribunal by the High Court

There appears to be no reason why, if judicial review of a decision of the First-tier Tribunal by the Upper Tribunal is not available because the decision of the First-tier Tribunal is an "excluded decision", an application for judicial review cannot be made, and succeed, in the High Court in the usual way. The High Court may decide to refer the matter to the Upper Tribunal which would then have the ability to conduct a judicial review)¹⁵, but it may decide to conduct a judicial review of the tribunal's decision itself. (Where by contrast judicial review by the Upper Tribunal is available, the High Court is likely to refuse permission or transfer the matter to the Upper Tribunal, unless there are very good reasons why it should not.)

Un-appealable decisions by the Upper Tribunal

Suppose it is a decision of the Upper Tribunal which it is sought to challenge? Judicial review of the Upper Tribunal is not possible, be it "synthetic" judicial review under the 2007 Act or traditional judicial review by the High Court (since the Upper Tribunal is a superior court of record¹⁶ and therefore not subject to judicial review). The only option then, in relation to a decision of the Upper Tribunal which does not benefit from the

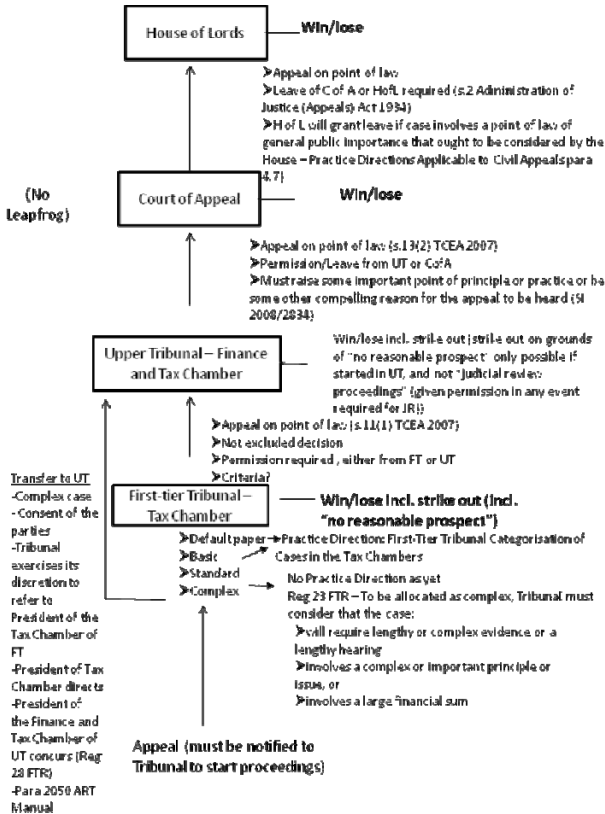
appeals process set out in the Appendix, is to rely on a review.

This makes certain decisions of the Upper Tribunal less capable of challenge than a decision of the High Court. The 2007 Act only permits an appeal from a decision of the Upper Tribunal to the Court of Appeal on a point of law. By contrast, the Civil Procedure Rules do permit an appeal against a decision of the High Court if the decision is wrong or if it is unjust because of a serious procedural or other irregularity.

Conclusion

From experience, it seems that the fact that apparently un-appealable decisions can be challenged through a judicial review is often missed. Failure to mention judicial review in the TMA 1970 does not help to highlight the availability of the remedy. Nor does wording in the TMA 1970 which states a decision to be final, when in fact it may be capable of challenge. Needless to say, being aware of the supervisory jurisdiction of the Upper Tribunal and the High Court can be a valuable weapon in the tax advisor's armoury.

APPENDIX



¹ SI 2009/275

² S17(2) Interpretation Act 1978 provides that: “Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears, (a) any

reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted....” Under s23 “enactment” is extended to include subordinate legislation.

³ By the Transfer of Tribunal Functions and Revenue and Customs and Appeals Order (SI 2009/56)

⁴ For an example see *Davies & Anor v Revenue and Customs* [2008] EWCA Civ 933.

⁵ Rule 52.11(3) CPR. Additional considerations arise where the decision is a case management decision. See Practice Direction—Appeals PD 52 para 4.5.

⁶ Regulation 41 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273)

⁷ Regulation 38

⁸ See for instance s30 Supreme Court Act 1981

⁹ Under s15 of the 2007 Act

¹⁰ *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410/411 per Lord Diplock

¹¹ See by analogy *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223 at 229

¹² See for recent discussion *R (Sivasubramaniam) v Wandsworth County Court* [2003] 1 WLR 475 at 486-489

¹³ S15(4) and s15(5) of the 2007 Act (Upper Tribunal to apply the same principles as the High Court) might be argued as the basis for this

¹⁴ S18 and s19 of the 2007 Act

¹⁵ S19 of the 2007 Act.

¹⁶ S3(5) Tribunals, Courts and Enforcement Act 2007