Appeals from the Upper Tribunal to the Court of Appeal

General Features

02 February 2021

The CIOT responded to the Ministry of Justice consultation on ‘Reforms to arrangements for obtaining permission to appeal to the Court of Appeal’. The proposals are designed to limit the extent to which an unsuccessful litigant is able to ask the Court of Appeal to reconsider the decisions made in the Upper Tribunal in order to reduce resource pressures on the senior judiciary.

If the Upper Tribunal refuses permission to appeal to the Court of Appeal, it is proposed that the losing party may only apply directly to the Court of Appeal for permission to appeal ‘for reasons of exceptional public interest’.

We are concerned that the proposed stricter and narrower test of ‘reasons of exceptional public interest’ for applications to the Court of Appeal for permission to appeal from the Upper Tribunal will disproportionately affect taxpayers seeking to appeal HMRC decisions. Although the proposed test will apply equally to taxpayers and to HMRC where permission is sought to appeal, in practice HMRC will have access to data and government resources in making a case for exceptional public interest that is simply unavailable to taxpayers. The proposal has the potential to create an imbalance between the powers of tax collectors and the rights of taxpayers.

The evidence for resource pressure in the consultation document derives solely from the Immigration and Asylum Chamber. No data is provided for appeals from the Upper Tribunal Tax and Chancery Chamber. It is therefore unclear whether tax appeals follow the same pattern, in particular whether tax appeals have a greater percentage of success before the Court of Appeal or subsequently before the Supreme Court. It is not possible to evaluate the proposal without that data. We suggest the data is published for appeals from all four chambers of the Upper Tribunal.

Moreover, there are factors that distinguish tax appeals from the Tax and Chancery Chamber from other appeals from the Upper Tribunal Chambers. Firstly, there is no legal aid funding for tax appeals. Secondly, HMRC will usually require tax in dispute to be paid before the appeal is heard in all cases, subject to hardship, so there is no obvious benefit in tax litigation from appealing a weak case simply to delay the final determination. These factors already operate to reduce the possibility of applications for second appeals for cases that stand little prospect of success.

The proposed new test appears to be more stringent than the ‘general public importance’ test before the Supreme Court. That seems wrong in principle.

The full response is at: www.tax.org.uk/ref743.