Decisions, decisions

Management of taxes



29 November 2021

Hui Ling McCarthy QC considers the different types of decision that can be made by a First-tier Tribunal, and whether advisers can benefit from unpublished decisions

Key Points

What is the issue?

The First-tier Tribunal may issue a ‘short decision’, which simply records the decision and sets out any right of appeal. Otherwise, a decision notice must include either a summary of the findings of fact and the tribunal’s reasons; or full written findings of fact and reasons.

What does it mean for me?

As only full written findings are published, to what extent can parties rely on unpublished decisions?

What can I take away?

Provided that your client agrees, and you are not contravening a privacy direction issued in the appeal, there are various options to make a summary decision more widely known.

A recent question from a CIOT m ember to the Tax Tribunal User Group prompted a discussion about the different types of decision that the First-tier Tribunal might release. This in turn raised issues about the publication of decisions, confidentiality and the extent to which others might rely on unpublished First-tier Tribunal decisions. This article addresses decisions which finally dispose of the appeal (different rules apply in relation to case management directions).

Different types of decision

First, it is useful to set out what the First-tier Tribunal (Tax Chamber) Rules (SI 2009/273) tell us. Rule 35 deals with decisions.

The tribunal may give a decision orally at a hearing (rule 35(1)). Usually, however, decisions are reserved and are communicated to the parties in a written decision notice some time after the hearing. If the parties agree, the tribunal may issue a ‘short decision’, which simply records the decision and sets out any right of appeal. Otherwise, a decision notice must include either a summary of the findings of fact and the tribunal’s reasons (which I shall call a ‘summary decision’) or full written findings of fact and reasons (which I shall call a ‘full decision’) (rule 35(3)).
If a party receives only a summary decision, they may apply for a full decision and must apply for a full decision before making an application for permission to appeal (rule 35(4)). Such an application must be made within 28 days of the First-tier Tribunal sending the summary decision (rule 35(5)). If a party wishes to seek permission to appeal, they have 56 days after the First-tier Tribunal sends its full written reasons (rule 39(2)(a)).

The First-tier Tribunal’s practice

Short decisions

There is no published guidance on the different types of decision that the First-tier Tribunal may issue. However, I understand that short decisions are encouraged in any case lasting a day or less, where the issues have been explored and the decision has been explained at the hearing. Parties will typically agree to a short decision if they accept the outcome of the appeal and neither side intends to appeal further. Short decisions are never published by the First-tier Tribunal – so this may be an incentive for a taxpayer in particular to consent.

If the parties do not agree to a short decision (or if the matter requires further consideration), it is up to the judge whether to issue a summary or a full decision. There is no rule one way or the other – it is a matter of judicial discretion.

Summary decisions

Summary decisions are useful in a case with straightforward issues of fact or law, which are unlikely to be appealed or to be of wider interest. For instance, a routine, low value penalty appeal where HMRC succeeds on a straightforward application of the law might be the sort of case which warrants a summary decision.

There is no rule that default paper cases (or any other proceedings decided on the papers) should attract only a summary decision, but it will typically be appropriate in that type of case. Like short decisions, summary decisions are also never published by the First-tier Tribunal.

Full decisions

Full decisions (as the name suggests) will usually be more detailed than summary decisions. They will typically be issued in more substantial or complex cases, if an appeal seems likely and/or if the point is of wider interest. All full decisions are published by the First-tier Tribunal unless the judge directs (very exceptionally) that it is not to be.

Publishing HMRC’s losses

In the writer’s view, the tribunal should think carefully before issuing a summary (and thus an unpublished) decision in any case that HMRC has lost. If one HMRC officer has an incorrect view of the law, it is unlikely to be an isolated incident.

Although First-tier Tribunal decisions are not binding, a published decision will be of material assistance to taxpayers with similar issues who are in correspondence with

HMRC. If the issue is simple, HMRC should get things right without the need for taxpayers to have to appeal. If HMRC disagrees with the outcome, its solution should be to appeal – not to carry on as if the loss never happened (which is easier to do if nothing is in the public domain).

It seems to me that the merits of publishing HMRC losses outweigh any counterarguments. First, it might be said that a summary decision protects the taxpayer's privacy. But taxpayers have no expectation of privacy when appealing to the tribunal (apart from those rare cases where the tribunal directs a private hearing under rule 32 and/or makes some other order prohibiting disclosure or publication under rule 14).

Secondly, it might be said that a full decision is too time consuming if there is unlikely to be an appeal. But if it means that other taxpayers can settle their disputes with HMRC more efficiently, thereby reducing the total number of appeals before the First-tier Tribunal, then this is an overall saving of tribunal time (not to mention, of litigants' costs).

Finally, HMRC may be more likely to appeal a full decision than a summary decision, as it has been published. But as a summary decision should contain the most significant aspects of the tribunal's reasoning, further detail should be unlikely to impact materially HMRC's views about an appeal. HMRC should not be basing appeal decisions on whether its loss is in the public domain.

Incidentally, there is also a view that full decisions are becoming overly lengthy. A recent summary decision was 56 paragraphs long, which can be considered 'full' on any interpretation.

Relying on unpublished decisions

Can a party rely on an unpublished decision of the First-tier Tribunal? There is no express rule on this either way.

In Ardmore v HMRC [2014] UKFTT 453 (TC), the First-tier Tribunal prohibited HMRC from relying on an unpublished decision of a Special Commissioner.

The tribunal noted at [19] that although decisions of the Special Commissioners were not binding, they did constitute persuasive authorities which would be expected to be followed by the First-tier Tribunal. However, as HMRC would always

be a party to a tax appeal (and so would have access to all decisions whether published or not), the tribunal considered it would be unfair to permit HMRC to rely on an unpublished decision not freely available to the general taxpayer.

Ardmore, however, tells us nothing about whether it would be appropriate for a taxpayer to rely on an unpublished decision, were a helpful decision to be brought to his attention. Where the decision is truly just a ‘summary’, it is questionable what, if any, weight a future First-tier Tribunal might place on it, given its lack of detail. A fuller ‘summary’ decision, however, may well contain sufficient analysis to be of assistance in a later case.

Sharing success

What then can advisers do to bring useful summary decisions to the attention of the wider profession? Bearing in mind that summary decisions are never published by the First-tier Tribunal, the main advice is two-fold:

- Make sure there is no privacy direction in place (under either rule 14 or rule 32).
- Do nothing without your client’s consent.

Provided that your client agrees, and you are not contravening a privacy direction issued in the appeal, there are various options to make a summary decision more widely known:

- There is nothing to prevent you from writing an article about it. For example, the unreported decision in A Blue (UK) Ltd (TC/2019/00187) has prompted (at least) two articles about the VAT treatment of sale and leaseback transactions following the CJEU’s decision in Mydibel v État Belge (Case C-201/18) (see Tax Journal articles by Julie Green (2 September 2021) and Chris Nyland (15 October 2021)).
- There is also nothing preventing you from sharing a copy of the summary decision itself; e.g. on your firm’s website or on LinkedIn.
- However, if your client has won it is not advisable to apply for a full decision, which will in turn be published by the First-tier Tribunal. This will in effect give HMRC extra time to decide whether or not to appeal. It is also possible that the content of a full decision might change HMRC’s mind about appealing.

To be on the safe side, it is best not to write about or share a summary decision in your client’s favour until the time for HMRC to appeal has expired. Needless to say,

your client will not thank you if you take a step which inadvertently prompts HMRC to change its mind and appeal when it would not otherwise have done so!