A new approach to tax disputes

Management of taxes



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Dr John Avery Jones considers one aspect of the Supreme Court's decision in *Pendragon*

Key Points

What is the issue?

The Supreme Court decision in Pendragon has widened the possibility of the Upper Tribunal upsetting a First-tier Tribunal decision

What does it mean to me?

All is not lost if the First-tier Tribunal decision is against you on the evaluation of the facts, so long as you can obtain permission to appeal

What can I take away?

One may expect more appeals to the specialist Upper Tribunal and for more tax issues to be settled there than by the higher courts

Anyone reading this will no doubt think that tax is fascinating. If you are a judge in the Court of Appeal or Supreme Court you will probably think otherwise. So what should the higher courts do when faced with a difference of view between the First-tier (FTT) and Upper Tribunals (UT), both of which are specialist tax tribunals? Should they concentrate on whether the FTT, as the fact-finding tribunal, had made an error of law, or whether the UT had done so in the decision that is appealed against? We all know that there can be an appeal only on a question of law, but what are the real differences between questions of fact and of law?

Fortunately, when answering these questions, we have some important guidance from the judgment of *Lord Carnwath in HMRC v Pendragon* [2015] UKSC 37. Until moving to the Supreme Court, Lord Carnwath was the Senior President of Tribunals and the person who had overseen the tribunal reforms of 2009. This note will not deal with the VAT aspects of that decision but only on the relationship between the courts and the tribunals.

Lord Carnwath's judgment in *Pendragon* was agreed to by all the other justices, although early case reports omit this detail.

The difficulty about the distinction between fact and law is that, although clear at each end of the spectrum, there is a large grey area in between, usually described as the evaluation of the primary facts. This might include whether the primary facts of who did what, when and why amounted to carrying on a trade.

The classical approach of the courts has been that the evaluation of the facts is a matter for the tribunal that heard the evidence and is therefore best placed to evaluate it. The courts would intervene only if, in the words of Lord Radcliffe in *Edwards v Bairstow* [1955] 3 All ER 48, the facts found were 'such that no person

acting judicially and properly instructed as to the relevant law could have come to the determination under appeal', or, in his preferred formulation, 'the true and only reasonable conclusion contradicts the determination'.

As a matter of policy one wants the UT to be able to give guidance that would assist future FTTs, which they would be hampered from doing if they always had to respect the FTT's findings on the evaluation of the primary facts. Fortunately, the law that established the UT is wide enough to enable it to do its job in the way one would wish. TCEA 2007 s 12 provides that, if the UT 'finds that the making of the decision concerned [by the FTT] involved the making of an error on a point of law' it may re-make the decision. In doing so it:

> '(a) may make any decision which the First Tier Tribunal could make if the First Tier Tribunal were re-making the decision, and
> '(b) may make such findings of fact as it considers appropriate.'

Some of us (including myself) thought that this was a power for the UT to make obvious findings of fact if the FTT had failed to do so due to a misunderstanding of the law. It now turns out that it is much wider. Lord Carnwath said:

> '50. …Having found errors of approach in the consideration by the First Tier Tribunal, it was appropriate for them to exercise their power to re-make the decision, making such factual and legal judgments as were necessary for the purpose, thereby giving full scope for detailed discussion of the principle and its practical application. Although no doubt paying respect to the factual findings of the First Tier Tribunal, they were not bound by them…
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> 51. …Indeed, given the difficulties of drawing a clear division between fact and law, discussed by Lord Hoffmann, it may not be productive for the higher courts to spend time inquiring whether a difference between the two tribunals was one of law or fact, or a mixture of the two.'

In other words, when the UT asks the question whether the FTT made an error of law it is not bound to respect the FTT's evaluation of the facts on *Edwards v Bairstow* grounds. It is free to come to its own decision and for this purpose use its power to re-make the decision and find other facts as appropriate. This is a major change from the traditional approach, which still applies to the Court of Appeal's consideration of the UT decision.

One can regard this as treating the FTT and UT as a single specialist black box. The higher courts need not be concerned with what goes on inside the box but only on what comes out (UT's decision), to which they will apply the traditional approach of respecting the UT's evaluation of the facts. This is a good outcome: the courts can distance themselves from tax disputes, and the UT, as a specialist tribunal, can give guidance for future cases in the FTT, which is also a specialist tribunal. It may require one to say that what is an 'error of law' has two different meanings depending on the circumstances but so what if the result is desirable.

In *Pendragon* itself, the FTT had found that neither of the two tests in *Halifax plc and others v CCE* [2006] STC 919 for there to be an abuse of law was satisfied; the UT said they were; and the Court of Appeal that they were not, on the basis that the FTT's evaluation of the facts should have been respected. In the Supreme Court, Lord Sumption, with whom all the other justices agreed, took the traditional approach of looking at the FTT decision and deciding that it had made an error of law by approaching the decision with too high degree of generality. On the other hand, Lord Carnwath's approach, with whom the other justices agreed, was to say that the UT's decision should be respected on traditional grounds, and it was free to reconsider the FTT's decision on wider grounds. Lord Carnwath's approach is likely to be followed in future.

There seem to be some rough edges in all this. Suppose that the UT did re-make the FTT's decision: there must come a point when the Court of Appeal should say that it went too far in doing so. In saying that, it is applying the wider meaning of error of law applicable between the two tribunals. But if the court does not think that the UT went too far it is impliedly using a narrower meaning of error of law that respects the UT's evaluation of the facts. And what if the UT did not re-make the FTT's decision but the Court of Appeal – applying the wider meaning of error of law applicable between the tribunals – thinks it should have done? In that case it would have to remit the case to the FTT because the Court of Appeal did not have the power to re-make the decision.

What would the consequences of this change be? In effect, both the taxpayer and HMRC would have a greater chance of upsetting an FTT decision. One would expect this to lead to more applications for permission to appeal and potentially to more appeals to the UT. But if the UT does re-make a decision of the FTT it is more likely that the final answer will be reached by a tribunal that understands tax than by a

court that does not.

Congratulations

Dr John Avery Jones, together with Professor Dr Jürgen Lüdicke, were the first ever winners of the IBFD Frans Vanistendael Award for International Tax Law for their publication ‘The Origins of Article 5(5) and 5(6) of the OECD Model’.

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