How fair can the FTT be?



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Alexander Goldsmith sets out the issues and questions whether the recent negative treatment of Oxfam in the Upper Tribunal is justifiable

Key Points

Traditionally, the FTT and its predecessors had been held to have a jurisdiction limited to the statutory grounds of appeal In 2009, Sales J held in *Oxfam* that the FTT might have a limited public law jurisdiction, giving taxpayers an easier way of challenging irrational decisions by HMRC which do not have a statutory appeal route Although it is arguable whether the recent UT cases of *Hok* and *Noor* were correctly decided, these cases have essentially prevented the FTT from following *Oxfam* in future

The First-tier Tribunal (Tax) (FTT) and Upper Tribunal (Tax and Chancery) (UT) were set up as part of a self-contained system dealing with specialist areas of the law. The rationale behind the system was to ensure that, at first instance and at the appellate stage, statutory appeals in specialist areas, such as tax, would be dealt with by tribunals operating under a common system of rules and expert in the law in question. However, not all matters of dispute between HMRC and taxpayers are necessarily decided by the tribunals. For instance, taxpayers may allege that HMRC has behaved unfairly in some way, such as by breaching taxpayers' legitimate expectations, or abusing the power which it enjoys. Classically, this type of complaint would have been dealt with by judicial review (JR). JR cases are decided on public law grounds, and are brought before the Administrative Court, a Division of

the High Court of Justice. Recent cases have blurred the distinctions separating JR cases from other cases, as well as calling into question the effectiveness of the FTT to give justice to its users. The point is of significance to taxpayers whose disputes with HMRC come to court, but also more widely to all who litigate before specialist tribunals in other fields of law.

In this article, I comment briefly on the problems taxpayers currently face in relation to potential JR disputes and on the proposed expansion of the FTT's jurisdiction. I then outline the objections to this expansion which have been raised by the UT, and question their validity when confronted with the approach taken by other tribunals, the demands of EU law, and the interests of justice itself.

The place of JR in tax appeals

As noted above, whether or not JR can be applied for depends on the type of decision appealed. This can lead to confusion and overlap with non-JR arguments. JR will also, in many cases, be less attractive since taxpayers will: (a) spend additional time, costs and court fees in preparing an additional set of proceedings; (b) be exposed to additional costs by raising JR proceedings, since the exemption from paying the winning party's costs which is standard in the FTT is absent in JR; and (c) most likely be out of time, since JR applications must be made promptly and in any event within three months of the grounds arising (CPR 54.5(1)). Since JR and non-JR arguments are not always heard together, a taxpayer may invest in JR only to find that the argument falls away, or is not used because of the way in which the non-JR issue has been decided. These factors will particularly discourage unsophisticated, unrepresented taxpayers from using JR. Recent political promises to make access to JR more difficult may, if brought into law, deter still more taxpayers. Finally, it should be noted that since JR is a discretionary remedy, a claimant will generally be required to have first pursued any other available remedies before the JR claim may be brought.

Oxfam

Because tribunals are creatures of statute alone, it had traditionally been understood that they could only hear claims which were within the jurisdiction strictly set out by statute, and not claims which engaged public law issues. This understanding was questioned by ***Oxfam* [2009] EWHC 3078 (Ch)**. Oxfam and

HMRC had agreed a method of attributing input VAT to taxable intra-group supplies. Subsequently, it was held that fundraising activity for voluntary donations could be attributed to taxable activity. If the method agreed between Oxfam and HMRC were varied accordingly, Oxfam would be better off. It therefore sought to vary the agreement with retrospective effect. HMRC resisted.

Oxfam argued that: (a) it had entered into a binding agreement with HMRC; and (b) HMRC had created a legitimate expectation as to how Oxfam's input VAT would be treated. Argument (a) was advanced in the FTT; and argument (b) was made by way of an application for JR, since Oxfam reasoned that it would not be within the FTT's jurisdiction. Sales J found against Oxfam on both grounds. However, he then went on to state that Oxfam need not have raised the legitimate expectation argument by way of the separate claim that Oxfam had issued for JR, since issues of 'general public law' were within the FTT's jurisdiction.

As noted by Sales J, this went beyond what had previously been regarded as the boundary of the jurisdiction of the FTT and its forerunners, as set by cases such as ***JH Corbitt (Numismatists) Ltd* [1981] AC 22**. In that case, Lane LJ had held that 'if it had been intended to give a supervisory jurisdiction … to the tribunal one would have expected clear words to that effect' in the relevant legislation governing appeals. Making an analogy with other areas of law, where courts may have regard to public law principles, Sales J distinguished Oxfam's case from the position set out by Lane LJ. His reasons were twofold: (a) although the FTT was not entitled to exercise a supervisory jurisdiction, this did not mean that it could not entertain public law arguments; and (b) such arguments would especially be within the FTT's jurisdiction where they were relevant to an appeal which itself fell within its purely statutory jurisdiction.

FTT and UT treatment of *Oxfam*

Reactions in the FTT to Sales J's ruling have been mixed, and the outcome of cases involving the principles in *Oxfam* has, unfortunately, depended on the composition of the tribunal hearing them. Broadly, however, the FTT has made use of the expanded jurisdiction advocated by Sales J following Oxfam. Taking into account the wider circumstances and HMRC's behaviour, it has the potential of securing better outcomes for taxpayers.

Oxfam has fared less well in the UT, where it has been considered in two recent cases, ***Hok Limited* [2012] UKUT 363 (TCC)** and ***Noor* [2013] UKUT 071 (TCC)**. Both cases were heard by a tribunal composed of Judge Bishopp and Warren J.

Hok and *Noor*

In *Hok*, the first UT case concerning *Oxfam*, the UT overturned an FTT decision allowing an appeal against late filing PAYE penalties. The FTT found that these penalties had been charged by HMRC having 'neither acted fairly nor in good conscience', using a new penalty system as a 'cash generating scheme'. In the FTT's judgment, HMRC had behaved unfairly; this was a public law argument of the sort admitted by *Oxfam*; and on that basis the penalties were cancelled.

In addition to disagreeing with the FTT's factual findings, the UT took a more restrictive interpretation of Oxfam than had been followed at first instance in *Hok* (and in a number of other FTT cases). The UT suggested that the principles set out in *Oxfam* could only be applied where the underlying issue itself came within the jurisdiction of the FTT. The issue in *Oxfam* was how much VAT was to be collected, whereas the issue in Hok was whether HMRC should be able to levy penalty charges at all. The UT found that the latter issue was not within the FTT's jurisdiction. To an extent, this echoed the reasoning of the Court of Appeal, which drew a distinction in ***Thorpe* [2010] EWCA Civ 339** between *Oxfam* as a case which dealt with the application of public law to a statutory right of appeal, and claims (like *Hok*) where there was no statutory right of appeal. However, this distinction is not altogether convincing; if a public law argument is advanced outside the technical arguments on liability, it will always, strictly speaking, be outside the statutory right of appeal afforded by the legislation. Carried to its conclusion, this would mean that no new public law arguments would be admitted, and the argument is therefore incompatible with *Oxfam*.

By taking this position, Judge Bishopp and Warren J undermined the position adopted by Sales J in *Oxfam*, although they did not directly criticise his reasoning. In their February 2013 decision in *Noor*, the same UT judges changed tack and launched what was described subsequently by counsel for HMRC as 'a pretty comprehensive demolition of the reasoning of Sales J' in *Oxfam*. *Noor* concerned whether or not a taxpayer could rely on advice given over the telephone regarding his effective date for registration for VAT. The judgment presents a number of arguments against

Oxfam; the crux is that (a) admitting JR in the FTT cannot have been intended by parliament because it did not expressly legislate to that effect; and (b) Sales J did not demonstrate why he was not bound by previous case law on the topic. The criticism of Oxfam is accompanied by a debate on whether those parts of Sales J's judgment concerning the FTT's jurisdiction over public law issues were *obiter*, ie whether they would be binding on subsequent decisions of the FTT. The UT was not able to conclusively determine this subsidiary issue, but in any case held the issue to be unimportant because Sales J was wrong on the wider point of whether public law issues were within the FTT's jurisdiction.

As a High Court judgment, *Oxfam* is not binding on the UT; Judge Bishopp and Warren J were entitled to hold a different position on the issue (cf. ***SSJ v RB* [2010] UKUT 454 (AAC)**). As a matter of judicial comity, however, a judge will nonetheless generally not depart from the position of another judge of the same level unless, as in the present case, he or she strongly disagrees with the other's conclusions. Given that *Noor*: (a) presents detailed arguments against *Oxfam*; (b) has been delivered by two judges more closely associated with the tax tribunal system than Sales J; and (c) is stated to bind the FTT on this point, it is very unlikely that it will not be followed by the FTT. Since *Noor* will most likely not be appealed, it will now require the Court of Appeal to rule on a new case raising these points for there to be a return to the position fleetingly adopted by some FTT tribunals, and advocated for in *Oxfam*.

Having noted *Noor's* important effect on future cases brought in the FTT, the remainder of this article will make three points about *Noor*. First, it is surprising that its arguments were not raised in *Hok*, which was heard by a panel consisting of the same two judges. It is ironic that *Oxfam* was criticised in *Noor* for not being consistent with previous case law, while *Noor* and *Hok* – both decided by the same two judges – are arguably inconsistent with one another in their treatment of *Oxfam*. Second, one of the key arguments against *Oxfam*, namely that Sales J must have been wrong because parliament did not legislate for the FTT to carry out JR, distorts Sales J's position. He was careful to advocate a jurisdiction which would include public law arguments, but not JR. Although it is true that the distinction between JR and 'public law arguments' is not as sharply defined as it could be, the UT's assertion that the two types of argument amount to the same thing is not fully substantiated in *Noor.* Finally, as I go on to outline in the rest of this article, the judgments in both *Noor* and *Hok* run counter to a number of factors which would favour the appearance of more public law arguments in the FTT.

The legislative framework

The overriding objective of the FTT rules is ‘to enable the tribunal to deal with cases fairly and justly’. The tribunals system of which the FTT is a part was established to a large extent in response to criticism of the previous system, said in Sir Andrew Leggatt’s 2001 report to be overly complex and not sufficiently ‘coherent’ or ‘user-friendly’.

This is important, because the intention behind the overhaul of the tribunal system was that it should be self-sufficient and entirely competent to deal with issues of law in its specialist sphere (cf ***R (Cart) v Upper Tribunal* [2011] UKSC 28**). That purpose cannot be served where appeals are turned down for failure to comply with (expensive) legal distinctions, particularly if (as *Oxfam* suggests) arguments of a public law nature could be raised in courts outside the tribunal system, but not in the tribunals themselves.

Treatment of *Oxfam* outside the tax tribunal system

The First-tier Tribunal (Charity) (CT) has not taken the rigid interpretation of the jurisdiction of First-tier Tribunals subsequently advocated by the UT and applied by some FTTs. Alison McKenna (the CT’s principal judge) cited Oxfam as authority to consider public law arguments (provided they were not free-standing, ie of a JR nature) in *Holland v The Charity Commission for England and Wales* (CA/2010/0008). The CT has also used *Oxfam* as authority for further creativity, transferring the case of *Basharat Hussain v The Charity Commission for England and Wales* (CA/2010/0003) to the Administrative Court for JR, when it became clear that the CT lacked jurisdiction. These two cases represent a more pragmatic approach than the narrower, more formal approach in *Noor.*

At a more senior level, *Oxfam* was mentioned obiter by the Court of Appeal in Thorpe. The court did not criticise the decision, although the conclusion to be drawn from its comments is somewhat unclear. However, it is to be noted that the court did not feel it necessary to make the sort of criticism made in *Noor.*

EU principles

EU jurisprudence has independently developed several doctrines which could lead to public law arguments being fully admitted to the jurisdiction of the FTT. Bearing directly on the facts in *Oxfam* and *Noor* is the principle of 'legitimate expectation', developed in cases like ***Stichting 'Goed Wonen'***. In addition, we should bear in mind the EU law principles of 'equivalence' (remedies for rights derived from EU law should be equivalent to similar rights derived from UK law) and 'effectiveness' (states should not make it impossible or excessively difficult for citizens to exercise such EU law rights).

Effectiveness and equivalence may significantly enhance many other litigants' ability to plead public law in cases in the FTT, perhaps even beyond the limits advocated by Sales J. The development and effects of these EU law concepts are too complex for further discussion in this article, but they could have a significant effect on future discussions of FTT jurisdiction.

For now, however, any expansion of the FTT's jurisdiction in this area is to be put on hold owing to the decision of Warren J (one of the judges in *Hok* and *Noor*) and Judge Herrington in the recent case of ***Trustees of the BT Pension Scheme* [2013] UKUT 0105 (TCC)**. The judges in that case held that, since Hok had shown that the FTT had no public law jurisdiction, it was therefore also not competent to consider the EU law principle of equivalence.

Conclusion

Whether *Oxfam* is relied on or not, it seems likely that the FTT will not limit its jurisdiction to the simple question of whether or not a sum is due. The recent case of ***Cambrian Hydro Power Limited* [2012] UKFTT 764 (TC)**, which was decided on facts similar to those in *Noor*, is a good example of the FTT considering wider issues than simply the tax payable. Although *Oxfam* was not mentioned, Sir Stephen Oliver QC (who, as former president of the FTT, speaks with some authority) ordered that the case be sent back to HMRC for 'reconsideration', because 'the fairness and justice of the situation calls for a fresh decision'. The effect of this unorthodox order is very close to a JR quashing order and, although not unparalleled in the broader tribunal system, it is unusual in the FTT.

Cambrian Hydro Power demonstrates that tribunals are unlikely to be willing to give a ruling which results in an unjust outcome, even though they are required by *Noor* not to consider issues of fairness. Despite disagreements as to its interpretation, the

basic *ratio* of *Oxfam*, as interpreted by the majority of FTT tribunals before *Noor*, is as follows: that arguments of a public law nature relating to disputes between HMRC and taxpayers may be raised in the FTT, where they do not stray into the territory of full scale judicial review. This can only be a good thing, in that it allows the FTT, as the ideal forum, to see that justice is done between the parties. The question is of broader importance, since it is necessary for there to be consistency across the tribunals system. Excluding public law arguments from the FTT's remit, as is argued for in *Noor*, is troubling because it is contrary to important trends in EU law, and undermines the ability of the tribunal system to deliver justice for its users.