Constant change

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Tax is always changing, and ensuring books are up to date can be a never-ending task. *Penny Hamilton* considers the process of producing the second edition of *Hamilton on Tax Appeals*

Key Points

What is the issue?

There have been some important developments in Tribunal practice and procedure over the past six years.

What does it mean to me?

Anyone who is in dispute with HMRC needs to be aware of developments in the practice and procedure of the Frist-tier and Upper Tribunals.

What can I take away?

The Tribunal Rules are very general and need to be read in the light of the guidance in the decisions of the Tribunals and Courts. There are some areas where this is helpful, and others where it is imprecise or conflicting. Important developments to come are the introduction of Tribunal fees and the implications of Brexit.

As my husband observed: ‘If you are going to update a tax book, do it quickly’. Wise words: the developments over six years meant that the ‘update’ for a second edition was more of a complete re-write.

The first edition was very much an exposition of the new rules, with commentary on how they might be implemented, but with little case law or practical experience to rely on. Anyone who has read the *Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009* SI 2009/273 (FTTR) and the *Tribunal Procedure (Upper Tribunal (Tax Chamber) Rules 2008* SI 2008/2698 (UTR) will know that they are remarkably short on practical guidance. The desire for ‘one size fits all’ procedural rules across the unified Tribunal system has resulted in rules which are short on specific guidance and a poor comparison with those they replaced. We were assured that Tax Chamber would, in time, provide the necessary detailed guidance. The number of Practice Directions, so far, is relatively small. There are also some important areas of practice and procedure where uncertainty reigns because the judicial guidance has been imprecise or conflicting.

One area where there has been a welcome clarification is the extent to which the Upper Tribunal (UT) can revisit the facts as decided by the First-tier Tribunal (FTT). The general rule is that the findings of fact by the FTT are binding in all further appeals and cannot be revisited. In *HMRC v Pendragon Plc and others* [2015] UKSC 37 however, the Supreme Court held that there are some limited circumstances in which it may be appropriate for the Upper Tribunal to give guidance on a matter of

principle, even if this means interfering with the FTT's evaluation of the facts. An example is the concept of 'abuse of law', which is 'particularly well suited to detailed consideration by the Upper Tribunal, with a view to giving guidance for future cases'. In *Pendragon* UT found that the FTT had made 'errors of approach'. It was therefore appropriate for it to exercise its power to remake 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'. Nevertheless, as the Supreme Court observed, the UT's power to intervene has to begin from a finding of an error of law. The UT exercised this power in *HMRC v SAE Education Ltd* [2016] UKUT 193 (TCC) where the FTT had erred in its evaluation of the facts, so that it was appropriate for the UT to intervene.

An important area where there is no precise judicial guidance is the proper exercise of the power of the (FTT) under *FTTR*, r 23(4) to allocate an appeal as 'Complex'. This has two significant consequences: the winner can seek costs and the appeal can be transferred it to the UT for hearing. The criteria for allocation are that the case:

- will require lengthy or complex evidence or a lengthy hearing;
- involves a complex or important principle or issue; or
- involves a large financial sum.

In *Capital Air Services Ltd v HMRC* [2010] 373(TCC) the UT considered these criteria at some length and concluded that allocation was a matter of judgment for the FTT. The criteria in *FTTR*, r 23(4) were usually determinative, so that a case which was not complex within the ordinary meaning of the word could satisfy one or more of those criteria. In *Dreams plc v HMRC* [2012] UKFTT 614 (TC) the UT grappled with the criteria and held that, ultimately, allocation was a matter of discretion for the FTT. The starting point was that a case had to have some out-of-the-ordinary feature for it to be categorised as complex.

There has been conflicting judicial guidance about the extent to which the FTT has jurisdiction to review the conduct of HMRC in the same way as the Administrative Court, which would save an appellant the time, cost and uncertainty of applying to the Administrative Court for judicial review. The possibility was raised by the High Court in *Oxfam v HMRC* [2009] EWHC 3078 (Ch), a VAT case about the right to recover input tax. The Court acknowledged that VATA 1994, s 83 did not confer any general supervisory jurisdiction on the Tribunal, but that it was 'a non sequitur' to

say that the Tribunal had no power to apply public law principles relevant to an appeal against a decision of HMRC which fell within that provision, such as HMRC's decision regarding the amount of any input tax which may be credited. In *HMRC v Abdul Noor* [2013] UKUT 71 (TCC), another appeal against the disallowance of input tax, the UT reviewed the relevant authorities, including its earlier decision in *HMRC v Hok* [2012] UKUT 363 (TCC), and declined to follow *Oxfam*. This approach was echoed in Trustees of the *BT Pension Scheme v HMRC* [2015] EWCA Civ 713 where the Court of Appeal held that the FTT and UT had no jurisdiction to decide whether HMRC had properly operated an extra-statutory concession. That still may not be the end of the story, as the Court of Appeal was not dealing with the right to recover input tax, and so we are left with the conflicting approaches of the UT and the High Court, neither of which binds the other. The pragmatic solution is to appeal and also to apply for judicial review, which is cumbersome, expensive and subject to a strict three-month time limit.

A related issue is how the Tribunal should deal with cases where there has been an appeal and an application for judicial review. The Administrative Court has discretion under *Senior Courts Act 1981*, s 31A to transfer some applications for judicial review when it is in 'just and convenient', although there is no guarantee that it will be willing to relinquish its jurisdiction. When it does, and there is also an appeal to the FTT, there is a tension as to how those two sets of proceedings should be dealt with. Ideally, the application for judicial review should be heard with the substantive appeal (see *R (oao Reed Personnel Services Plc) v C & E Commrs* [2009] EWHC 2250 (Admin)) but, since the FTT does not have a general judicial review jurisdiction, the FTT must have made an order under FTTR, r 5, that the appeal be transferred to the UT. Since this can only be done if both parties consent it leads to what the UT described in *HMRC v Mitesh Dhanak* [2014] UKUT 68 (TCC) as 'something of a procedural thicket'. The problem is more easily solved if the appeal to the FTT has been heard and there is then a further appeal to the UT, such as in *Samarkand Film Partnership No 3 & Ors v HMRC* [2015] UKUT 211 (TCC). An application to the Administrative Court for judicial review had been transferred to the Upper Tribunal and stayed pending a statutory appeal to the First-tier Tribunal. After the FTT had decided the case there was a further appeal to the UT, which heard the appeal and the application for judicial review together.

There have also been some new developments meriting their own chapters, such as the introduction of the Scottish Tax Tribunals. HMRC's current enthusiasm for

alternative dispute resolution (ADR), in the form of a facilitated discussion or mediation by an HMRC or third party mediator, also merits a chapter on ADR.

And what of the next edition? It is not possible to predict everything that might arise but it will certainly need to deal with the unwelcome introduction of Tribunal fees, due this year. The proposed fees in the FTT for issuing an appeal range from £50 for an appeal in the 'Paper' category to £200 for a Complex appeal; and hearing fees of £200 for a Basic case to £1,000 for a Complex appeal. The exception is a fee of £20 for fixed penalty notice appeals of £100. In the UT, the fees will be £100 for an application for permission to appeal, £200 for a permission hearing where permission has been refused on the papers and £2,000 for a substantive appeal hearing.

The chapters on the impact of EU and ECHR law and references to the Court of Justice will also require some revision to reflect the impact of Brexit. Two things are certain, however: first, there will plenty to say. Secondly, it will not be this author who will be saying them.