Very appealing

Four years into the new system of tax appeals, TIMOTHY BRENNAN explains that the Supreme Court has opened the way for a wider appellate role for the tribunals in tax cases.

When the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) came into force for tax appeals on 1 April 2009 it did much to tidy up an untidy and complex jurisdiction which was of longstanding and had grown up piecemeal over many years.

Back in 2007, there were still three different bodies called "commissioners", each with different functions to do with tax. In direct tax cases, first instance appeals from decisions of (what were by now called) the Commissioners for Revenue and Customs were determined by the "Commissioners for the general purposes of the income tax" or, in more complex cases, by a body with an equally snappy statutory title: the "Commissioners for the special purposes of the Income Tax Acts". The general commissioners were, broadly, laymen with the benefit of advice from a qualified clerk and the special commissioners were professionals. National Insurance contributions, having much in common with income tax, were literally in classes of their own, with their own procedural niceties. Cases which the generals and specials did not touch went to the VAT Tribunals, with some personnel in common. And there were other, less mainstream, jurisdictional niches as well.

Of course, all this was perfectly straightforward to the experienced practitioner, and we all knew more or less where we stood.

KEY POINTS

- The impact of the Tribunals, Courts and Enforcement Act 2007.
- The appeal process and the grounds of appeal.
- The new two-tier model for tax cases.
- The increased use of experts in determining appeals.
- The function of the tribunal system to develop structured guidance.
- The historic difference between legal and factual issues.
- Does the recent *Ramsay* case show that a new approach has been adopted?

The appeal process

Appeals from decisions made in this legal jungle lay, broadly speaking, to the High Court. There was no general appeal on facts, but on points of law only. This is a very significant feature. At the top end, tax litigation is commercial litigation of the most sophisticated and expensive kind. Even major tax cases involving transfer pricing in the pharmaceutical industry, complex corporation tax frauds, or capital allowances on expensive specialist structures were dealt with under a relaxed procedural culture. This was the case even where they gave rise to masses of paper, raised points of law of fearsome complexity, required expert evidence and where huge sums of money were at stake. But once a litigant lost on the facts before the generals or the specials, he was on the back foot. Facts (and, usually, the inferences to be drawn from them) were sacrosanct, subject to appeal only on grounds immortalised by Lord Radcliffe in *Edwards v Bairstow* 36 TC 207, as being where "the true and only reasonable conclusion contradicts the determination".

TCEA 2007, with the aid of a few implementing and transitional statutory instruments, swept all of this away. The act was the product of a 2001 review carried out by Sir Andrew Leggatt into the operation of the system of administrative justice. It was a major undertaking, bringing under one very wide jurisdictional umbrella the judicial functions of tribunals

which operated alongside, but largely outside, the traditional court system. What became the six chambers of the new First-tier Tribunal took over the functions of as many as 20 tribunals that dispensed justice in areas such as immigration and asylum, social security, financial services, claims management, pensions, and even MPs' expenses. They also, of course, deal with the direct and indirect taxes, duties and contributions.

One of the aims, and broadly one of the results, of the reorganisation was to ensure that decisions in these areas were made by tribunals which were expert in their field. As (the then) Lord Justice Carnwath, the first senior president of tribunals, explained in a speech in 2008, announcing the features of the forthcoming new system:

> "Tribunals have come to play a central part in the UK civil justice system, particularly in relation to administrative law. Their principal distinguishing features, as compared to the courts, are flexibility, specialisation, and accessibility. The present system is the result of piecemeal and incoherent development of many decades. The TCEA 2007 has provided the statutory framework for a radical restructuring of the existing tribunal jurisdictions into a coherent two-tier model."

The two-tier model

The new two-tier model allocates tax cases in the first instance to the judges of the First-tier Tribunal, and appeals from their decisions to the Upper Tribunal. The judges are professionals, either salaried or fee paid, and with (at least some) experience of tax.

One anomaly which has been preserved, despite the timely disappearance of the general commissioners, is the involvement of lay members in difficult cases, albeit now always under the chairmanship of a professional judge. Lay members had no function before the special commissioners (though they did crop up in the VAT Tribunal). Under TCEA 2007, a difficult First-tier Tribunal case which would, under the old system, have been heard and determined by one or two Special Commissioners might well now be heard by a First-tier Tribunal judge sitting with a lay member (and not necessarily one who has any expertise at all in the area under discussion). It may be questioned just how useful is the participation of a non-specialist member sitting in a specialist tribunal dealing with, say, a complex issue of statutory interpretation, or a tax avoidance case.

It is more interesting, however, to look at what has happened with appeals, and at what might yet happen. Appeals now lie from the Tax Chamber of the First-tier Tribunal to the Tax and Chancery Chamber of the Upper Tribunal. Again, the Upper Tribunal is a specialist body. Its judges are the judges of the Chancery Division of the High Court, and certain specialist Upper Tribunal judges.

Importantly, the constitution of the Upper Tribunal maintains that feature, designed into the First-tier Tribunal, of specialism in the subject matter. Does this actually make any difference to the approach to individual cases? The Supreme Court has recently hinted that it might.

Appeal parameters

In *Jones (by Caldwell) v First-tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19, the Supreme Court heard an appeal in a case which had started in the First-tier Tribunal on appeal from a decision by the Criminal Injuries Compensation Authority. The issue in that case, which had nothing to do with tax, was whether a "crime of violence" had been committed by the deceased, who deliberately killed himself, but also caused a serious accident when he ran into the path of a lorry on the A282. The argument was that his act amounted to the infliction of grievous bodily harm on somebody injured in the accident and to a crime of violence.

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The Supreme Court had to grapple with the concepts of recklessness and foreseeability of harm, and concluded that it was not entitled to interfere with the assessment of the First-tier Tribunal, which had rejected the claim on behalf of the victim of the accident that the deceased had committed a "crime of violence" for the purposes of the statutory scheme.

Lord Carnwath, no longer Senior President of Tribunals but now further promoted to the Supreme Court, took the opportunity to say something more about the role of the Upper Tribunal under TCEA 2007. He made the following point.

> "Where, as here, the interpretation and application of a specialised statutory scheme has been entrusted by parliament to the new tribunal system, an important function of the Upper Tribunal is to develop structured guidance on the use of expressions which are central to the scheme, and so as to reduce the risk of inconsistent results by different panels at the first-tier level."

Legal or factual?

He observed that promotion of consistency of approach was part of the thinking behind the Leggatt recommendation in 2001 which had led to the new tribunal system. Furthermore, although appeals from the First-tier Tribunal were limited to "points of law", this term might in some jurisdictions be interpreted widely. An appeal hearing is not an opportunity to litigate again the factual issues that were decided at the first tier. Nonetheless, the Upper Tribunal might be permitted to interpret "points of law" flexibly to include points of principle or even factual judgments of general relevance to the specialised area in question. Quoting from an article of his own in 2009, Lord Carnwath suggested that, where there is an appeal on a point of law only to a specialist appellate tribunal,

"…the dividing line between law and fact may vary at each stage. … [An expert appellate tribunal] …, even though its jurisdiction is limited to 'errors of law', should be permitted to venture more freely into the 'grey area' separating fact from law, than an ordinary court. Arguably, 'issues of law' in this context should be interpreted as extending to any issues of general principle affecting the specialist jurisdiction. In other words, expediency requires that, where parliament has established such a specialist appellate tribunal in a particular field, its expertise should be used to best effect, to shape and direct the development of law and practice in that field."

Three members of the Supreme Court (Lord Walker, Lady Hale and Lord Sumption) expressly agreed with Lord Carnwath's observations.

Potential grey areas

The point has real potential significance for appeals in tax cases which would, under the conventional *Edwards v Bairstow* classification, have been brushed aside as depending solely on issues of fact. The Upper Tribunal should feel encouraged by the Supreme Court, in the right case, to exercise its statutory role as an expert tribunal to "shape and direct the development of law and practice".

Areas which immediately come to mind as potentially open for such consideration include employment status, questions of central management and control for the purposes of corporate residence, issues of individual residence and domicile, and questions of "reasonable excuse" in relation to time limits and penalties. Decisions in each of these (and no doubt other) areas would traditionally be said to depend on questions of fact rather than of law. Cases where an adviser might previously have said that an appeal was not warranted because "it's all a question of fact" could now be seen as falling into that grey area where the Upper Tribunal will venture more freely.

A new approach

The significance of what Lord Carnwath said has already been taken up. The case of *Ramsay v CRC* [2013] UKUT 226 (TCC) was a straightforward Upper Tribunal appeal concerning capital gains tax rollover relief on the transfer of a business as a going concern. HMRC argued that the decision of the First-tier Tribunal should be respected and upheld, as a multifactorial assessment of the facts. Rejecting that argument, Upper Tribunal Judge Roger Berner expressly referred to Lord Carnwath's remarks. He pointed out that the Upper Tribunal was specialist in nature; it was part of the role of an Upper Tribunal judge to use his expertise to shape and direct the development of law and practice. He allowed the taxpayer's appeal.

In 1982, the affairs of a company called *WT Ramsay Ltd* caused a re-thinking of the correct approach to taxation. It would be ironic if the start of a "new approach" to tax appeals was marked by another case called *Ramsay*. ■

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Correspondence from readers on topical subjects.

More on spies

I enjoyed the article "Spy or secondee?" (see *Taxation*, 23 May 2013, page 8) and agree with everything said by John Watson. I particularly admired the elegance of the phrase:

> "Since the merger of the Inland Revenue and Customs moved the official emphasis from intellect to muscle..."

This caught so much of what I have been thinking (and the reason that I tear my hair out on many occasions) in the last decade in a mere 17 words. This was a brilliant summary and I hope John will not mind if I repeat the phrase to others.

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Flat out

What a super chap "Gardener" must be (see the replies to the Readers' Forum query "Flat out", *Taxation*, 16 May 2013, page 25). It was very refreshing to hear a fellow professional say that if a mistake was made they should cough up and live with the consequences. Too many accountants seem to be of the opinion that clients should be able to walk away from tax liabilities and pay as little tax by whatever means possible whether it is moral (legal) or not.

Also, what on earth was Flat Cap (or a previous accountant) doing in not noticing his client had been calculating the VAT incorrectly for five years? Heaven help the profession.

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