ICAEW
REPRESENTATION 06/21

REFORMS TO ARRANGEMENTS FOR OBTAINING PERMISSION TO APPEAL FROM THE UPPER TRIBUNAL TO THE COURT OF APPEAL: CONSULTATION RESPONSE

Issued 11 January 2021

ICAEW welcomes the opportunity to comment on the proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal published by the Ministry of Justice on 30 November 2020 a copy of which is available from this link.

This response of 11 January 2021 has been prepared by the ICAEW's Tax Faculty and relates specifically to the impact of the proposals on cases relating to taxation. Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business.

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KEY POINTS

1. Our comments below relate specifically to the impact of the proposed changes on cases relating to taxation matters. As such, we make no comments on whether the proposals are appropriate for other cases heard at the Upper Tribunal/Court of Appeal.
2. Overall, we believe that the proposals taken together would make it more difficult for cases with genuine merit to be appealed from the Upper Tribunal's Tax and Chancery Chamber to the Court of Appeal. In particular, we believe that it would be especially difficult for taxpayers to demonstrate that an appeal should be considered on the grounds of "exceptional public interest". This appears to us to be an unwarranted restriction of access to justice. Further, the proposed test is inconsistent with the "general public importance" test used in the Supreme Court.
3. We have more sympathy with the proposals relating to applications for judicial review, provided there is a right of appeal before an Upper Tribunal judge different from the one that originally heard the case.
4. We do not believe that the consideration of permission to appeal or judicial review cases has a significant impact on the resources of the Court of Appeal in relation to tax cases compared to the benefit obtained from the parties involved. Such appeals are not numerous and are rarely made without real merit or a realistic chance of success.
5. If some hearings are heard instead by lower courts, we request that more opportunity be provided for the Court of Appeal to hold oral appeal hearings in respect of the remaining cases that it has to consider. Given the technical nature of many tax cases, it is probable that more appropriate decisions could be reached at oral hearings than in appeals made only in writing as any misunderstandings or misconceptions can more easily be resolved face-to-face.

COMMENTS ON PROPOSED REFORMS TO SECOND APPEALS FROM THE UPPER TRIBUNAL

6. The proposal is that, in the case of a second appeal, if the Upper Tribunal refuses permission to appeal to the Court of Appeal, the losing party may only apply directly to the Court of Appeal for permission to appeal "for reasons of exceptional public interest". We do not agree with this proposal in relation to tax cases.
7. Firstly, it is not clear what constitutes "exceptional public interest" (and it is difficult to indicate acceptance of something which has not been defined) but it is presumably intended to be tighter than the existing tests for second appeal to the Court of Appeal which are already relatively tight.
8. We are concerned that HMRC would be in a much better position to persuade the Court that this "exceptional public interest" test is met rather than a taxpayer. HMRC may have access to data demonstrating the potential impact on tax receipts from similar cases, for example, to which taxpayers would not have access.
9. In our view, this creates an imbalance of power and will make it much more difficult for taxpayers to appeal beyond the Upper Tribunal even though they may have good grounds for appeal. This is because, if the appeal is heard instead by the Upper Tribunal, we believe that it is much less likely to be allowed than if it was heard by the Court of Appeal, for the following reasons:
    a. Firstly, it is only human nature for the Upper Tribunal, which has just produced a carefully argued judgment coming to a firm conclusion, to be reluctant immediately to accept that it may have got it wrong.
    b. Secondly, we believe there is considerable risk that the Upper Tribunal would see this new test as only applying in extreme cases and that, in the vast majority of situations, it should not burden a higher court with such cases. Indeed, we are aware of a number of

examples where leave was not granted at the Upper Tribunal (or the High Court, previously) but were eventually given permission to go on to the Supreme Court by the Supreme Court. This provides evidence supporting our assertion that lower courts are much less likely to give permission to appeal to a higher court than is the higher court that will subsequently hear the case.

10. The consultation notes that very few appeals from the Upper Tribunal's Immigration and Appeal's Chamber actually succeed. That may be true but may not be the case for appeals from other Tribunals. There is no data provided in the consultation on other appeals from the Upper Tribunal, and there is a danger that a 'one size fits all' policy decision could be applied to the wider Tribunal system but which is based on data from only a part of it. Our experience and HMRC data shows that tax cases are very rarely appealed beyond the Upper Tribunal on a speculative basis. For example, in 2019-20 half of the tax appeals in the Court of Appeal and the Supreme Court were decided in the taxpayer's favour according to statistics published by HMRC. This compares to an 83% HMRC success rate at the First Tier Tribunal and a 76% success rate at the Upper Tribunal[1]. This suggests that taxpayer appeals have progressively more merit the further up the court chain a case is taken.

11. Furthermore, there are significant factors operating to reduce the likelihood of appeals to the Court of Appeal for tax cases where there is a low chance of success. For example, in certain cases, HMRC can issue accelerated payment or follower notices which require the taxpayer to pay the disputed amount of tax upfront pending the outcome of the case. Section 56 Taxes Management Act 1970 requires tax to be paid in accordance with the First-tier Tribunal's decision despite appeals being made to the Upper Tribunal and beyond. In Value Added Tax cases the tax is payable before the appeal proceeds, apart from cases of hardship. In such situations, an appeal to a higher court does not delay the payment of tax that the taxpayer is due to make.

12. In other cases where the tax does not need to be paid upfront, the taxpayer is at risk of increasing late payment interest the longer the court process takes if HMRC ultimately proves successful. Given no legal aid is available in respect of tax cases, continued appeal therefore comes at a potential significantly increased cost to the taxpayer.

13. As such, we believe that the time the Court of Appeal is being asked to spend on considering upward appeals of tax cases from the Upper Tribunal is reasonable given the benefits of increased scrutiny obtained from the involvement of a higher court.

14. The consultation document at paragraph 42 notes that 561 permission to appeal cases were determined by the Court of Appeal with regard to statutory second appeals in the Upper Tribunal Immigration and Asylum Chamber in 2018. This compares to just 31 tax cases in total heard by the Court of Appeal in 2018-19, and 18 in 2019-20. The number of Upper Tribunal tax cases in each year were 59 and 49 respectively[1].

15. This demonstrates the small impact that tax cases have on these courts compared to immigration cases. If time were freed up at the Court of Appeal, this would allow more oral hearings to take place on tax cases. It is simpler at an oral hearing to resolve misunderstandings and misconceptions that can arise where tax cases involving a technical issue are considered on the basis of the papers only. Currently, hearings are heard orally only on an exceptional basis where the judge considers it to be appropriate.

16. Finally, we note that restriction of permissions to appeal to the Court of Appeal for reasons only of exceptional public interest is a more stringent test than for permissions to appeal to the Supreme Court, which merely requires there to be points of "general public importance" to be determined. This seems inconsistent and we recommend that if the test were to be changed, it would be more appropriate for it to be aligned with the test for permissions to appeal to the Supreme Court.

17. We have considered a couple of potential alternatives for reducing the number of permission to appeal cases heard by the Court of Appeal:

[1] HMRC Annual Report and accounts 2019-20

a. Rather like the proposal for refusing judicial review hearings at the Court of Appeal where the Upper Tribunal has certified that the application is totally without merit, permissions to appeal to the Court of Appeal could be disallowed where the Upper Tribunal has certified that the case is hopeless. However, this would probably not apply in many cases because, as we have set out above, it is rare for tax cases to be appealed to the Court of Appeal unless they have significant merit or chances of success.

b. Such appeals for "hopeless" cases could be still be allowed but the application fee could be increased as a deterrent against speculative appeals.

COMMENTS ON PROPOSED CHANGES TO JUDICIAL REVIEW PERMISSION APPLICATIONS IN THE UPPER TRIBUNAL

18. The proposal is that where the Upper Tribunal has certified that an application for permission to bring a judicial review is totally without merit, there can be no recourse for the applicant to apply to the Court of Appeal for permission to appeal. Question four proposes a right of review instead before a second Upper Tribunal judge.

19. We have more sympathy with this proposal from the perspective of tax cases as a ruling by a court that a review is totally without merit is certainly highly persuasive. In an ideal world, we consider that the application should be considered by the Court most suitable to the matters of law in point. For example, where there are non-tax legal considerations, the Court of Appeal may be better placed to address these than the Upper Tribunal and so should therefore continue to be a permitted option as the Court of Appeal judge may conclude that a particular point of law missed by the Upper Tribunal makes the case worthy of merit.

20. In other cases, if the second Upper Tribunal judge is a High Court judge, or different from the judge who originally considered the case at that level then we agree that a right of review by a second Upper Tribunal judge may be a suitable alternative.

21. Question five considers whether the "second appeals" test should be applied by the Upper Tribunal when considering an application for permission to appeal to the Court of Session. We are unaware of any reasons for anomalies in this area. We consider the same test should be applied whether the appellate court is the Court of Appeal or Court of Session.