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## Proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal

### Response by the Chartered Institute of Taxation

#### 1 Executive Summary

- 1.1 The Chartered Institute of Taxation (CIOT) is the leading professional body in the UK for advisers dealing with all aspects of taxation. We are a charity and our primary purpose is to promote education in taxation with a key aim of achieving a more efficient and less complex tax system for all. We draw on the experience of our 19,000 members, and extensive volunteer network, in providing our response.
- 1.2 We are concerned the proposed stricter and narrower test of 'reasons of exceptional public interest' for applications to the Court of Appeal for permission to appeal from the Upper Tribunal (UT) will disproportionately affect taxpayers seeking to appeal HMRC decisions. Although the proposed test will apply equally to taxpayers and to HMRC where permission is sought to appeal, in practice HMRC will have access to data and government resources in making a case for exceptional public interest that is simply unavailable to taxpayers. The proposal has the potential to create an imbalance between the powers of tax collectors and the rights of taxpayers.
- 1.3 The evidence for resource pressure in the consultation document derives solely from the Immigration and Asylum Chamber. No data is provided for appeals from the UT Tax and Chancery Chamber. It is therefore unclear whether tax appeals follow the same pattern, in particular whether tax appeals have a greater percentage of success before the Court of Appeal or subsequently before the Supreme Court. It is not possible to evaluate the proposal without that data. We suggest the data is published for appeals from all four chambers of the UT.
- 1.4 Moreover, there are factors that distinguish tax appeals from the Tax and Chancery Chamber. Firstly, there is no legal aid funding for tax appeals. Secondly HMRC will usually require tax in dispute to be paid before the appeal is heard in all cases, subject to hardship so there is no obvious benefit in tax litigation from appealing a weak case simply to delay the final determination. These factors already operate to reduce the possibility of applications for second appeals for cases that stand little prospect of success.

- 1.5 It is difficult to predict what impact the proposed new test might have on tax appeals without knowing how it might operate in practice. It appears to be more stringent than the 'general public importance' test before the Supreme Court. That seems wrong in principle.
- 1.6 Where an application for permission for judicial review which has been certified as totally without merit by the UT we have no objection to the removal of the right to apply to the Court of Appeal for permission to appeal provided the new safeguard of the right of review before a second Upper Tribunal judge is introduced.

## **2 About us**

- 2.1 The CIOT is an educational charity, promoting education and study of the administration and practice of taxation. One of our key aims is to work for a better, more efficient, tax system for all affected by it – taxpayers, their advisers and the authorities. Our comments and recommendations on tax issues are made solely in order to achieve this aim; we are a non-party-political organisation.
- 2.2 The CIOT's work covers all aspects of taxation, including direct and indirect taxes and duties. Through our Low Incomes Tax Reform Group (LITRG), the CIOT has a particular focus on improving the tax system, including tax credits and benefits, for the unrepresented taxpayer.
- 2.3 The CIOT draws on our members' experience in private practice, commerce and industry, government and academia to improve tax administration and propose and explain how tax policy objectives can most effectively be achieved. We also link to, and draw on, similar leading professional tax bodies in other countries.
- 2.4 Our members have the practising title of 'Chartered Tax Adviser' and the designatory letters 'CTA', to represent the leading tax qualification.

## **3 Introduction**

- 3.1 The CIOT responds to the proposals for reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal consultation from the perspective of appeals from the Tax and Chancery Chamber of the Upper Tribunal only.
- 3.2 Our stated objectives for the tax system include:
  - A fair balance between the powers of tax collectors and the rights of taxpayers (both represented and unrepresented).

## **4 Second appeals from the Upper Tribunal**

**Question One: Do you agree that there should be a stricter and narrower test applied to applications to the Court of Appeal for permission to appeal in a second appeal from the Upper Tribunal to the Court of Appeal?**

**Question Two: Do you agree with the proposal to amend the current test so that it requires the application to demonstrate that it raises matters of exceptional public interest? Please give reasons.**

4.1 Where an unsuccessful party wishes to appeal against a decision of the Upper Tribunal (UT), an application is made to the UT for leave to appeal to the Court of Appeal in accordance with the Appeals from the Upper Tribunal to the Court of Appeal Order 2008<sup>1</sup>. The UT will consider whether

- (a) the proposed appeal would raise some important point of principle or practice; or
- (b) there is some other compelling reason for the Court of Appeal to hear the appeal.

In addition, the Upper Tribunal decision of *The Queen on the application of The Durham Company Ltd (trading as Max Recycle) v The Commissioners for HM Revenue and Customs and HM Treasury*<sup>2</sup> makes clear that permission should not as a matter of practice be granted unless the appeal has a real prospect of success.

Currently, if the Upper Tribunal refuses permission to appeal, leave may be sought from the Court of Appeal. Permission will only be granted if, under Rule 52.7 of the Civil Procedure Rules (CPR)<sup>3</sup> if the Court of Appeal considers that—

- (a) the appeal would—
  - (i) have a real prospect of success; and
  - (ii) raise an important point of principle or practice; or
- (b) there is some other compelling reason for the Court of Appeal to hear it.

The proposed change is to the test to be applied by the Court of Appeal in these circumstances from the test in Rule 52.7 to a single test of ‘reasons of exceptional public interest’. The rationale for the proposal is to allow the Court of Appeal to focus only on cases of exceptional public importance to reduce significant resource pressure on the senior judiciary. However, as noted above there are already strict criteria applied by the UT in determining whether leave to appeal to the Court of Appeal should be granted.

4.2 The consultation points to data from the Immigration and Asylum Chamber of the Upper Tribunal where there are a high proportion of second appeals and the consultation indicates ‘very few cases actually succeed at hearing’. The evidence for resource pressure in the consultation document derives solely from the Immigration and Asylum Chamber of the Upper Tribunal. No data is provided for appeals from the UT Tax and Chancery Chamber. It is therefore unclear whether tax appeals follow the same pattern, in particular whether tax appeals have a greater percentage of success before the Court of Appeal, or subsequently before the Supreme Court. We note the annual snapshot of court decisions in HMRC’s Annual Report for 2019/20 at Table 5<sup>4</sup> might suggest that the same pattern does not apply to tax appeals although it is not possible to tell from that table who was the appellant in the Court of Appeal.

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<sup>1</sup> [SI 2008/2834](#)

<sup>2</sup> [2018] UKUT 0188

<sup>3</sup> <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part52#52.7>

<sup>4</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/932874/HMRC\\_Annual\\_Report\\_and\\_Accounts\\_2019\\_to\\_2020\\_\\_Print\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932874/HMRC_Annual_Report_and_Accounts_2019_to_2020__Print_.pdf)

It is impossible to evaluate the proposal in the context of tax appeals without that data. We suggest the data is published for appeals from all four chambers of the UT to ensure the consultation is effective.

- 4.3 There are factors that distinguish appeals from the Tax and Chancery Chamber to those from the Immigration and Asylum Chamber. Firstly, there is no legal aid funding for tax appeals. Secondly HMRC will usually require tax in dispute to be paid before the appeal is heard in all cases, subject to hardship<sup>5</sup> so there is no obvious benefit in tax litigation from appealing a weak case simply to delay the final determination. These factors already operate to significantly reduce the possibility of applications for second appeals for cases that stand little prospect of success.
- 4.4 More generally we note the existing absence of a right to an oral permission hearing. That change to the Civil Procedure Rules in 2016 was designed to reduce the number of appeals requiring full hearings and therefore address resource pressures.
- 4.5 Sometimes the Court of Appeal will be the first time that a non-tax judge will be looking at the matter (if no High Court judge was appointed before the UT). This can mean that non-tax matters of law (which specialist tax judges are less familiar with) might only be properly addressed in the Court of Appeal for the very first time.
- 4.6 In terms of the proposed new test for permission for 'reasons of exceptional public interest', it is hard to predict what impact that might have on tax appeals without knowing how it might operate in practice. The consultation does not provide any indication of the criteria to be applied.
- 4.7 We note the proposed new test seems more stringent than the 'general public importance' test before the Supreme Court<sup>6</sup>. That seems wrong in principle.
- 4.8 We are very concerned the proposed test will create an imbalance between HMRC and taxpayers in securing permission to appeal. It is much easier for HMRC to assert that an appeal is of general importance and thus secure permission to appeal to the Supreme Court than it is for taxpayers. If this disparity is also to be introduced at the Court of Appeal level, this means that taxpayer appeals might end up being very much stifled since it is rare that taxpayers have access to that sort of data to support their case for appeal.

## 5 Judicial Review

**Question Three. For an application for permission for judicial review which has been certified as totally without merit by the Upper Tribunal do you agree that the right to apply to the Court of Appeal for permission to appeal be removed?**

**Question Four. For an application for permission for judicial review which has been certified as totally without merit by the Upper Tribunal, do you agree that there should be a right of review before a second Upper Tribunal judge?**

- 5.1 We agree the right of review before a second UT judge appears to provide a reasonable safeguard where the case has been certified as totally without merit by the UT.

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<sup>5</sup> HMRC Appeals Reviews and Tribunals Manual: [ARTG8930](#).

<sup>6</sup> Supreme Court Practice Direction 3.3.3 [www.supremecourt.uk/procedures/practice-direction-03.html](http://www.supremecourt.uk/procedures/practice-direction-03.html)

**6 Question Five. Do you agree that the ‘second appeals’ test should be applied by the Upper Tribunal when considering an application for permission to appeal to the Court of Session?**

6.1 We are not aware of any reason for this anomaly and therefore agree the same test should be applied as where the appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland.

**7 Impact Assessment**

**Questions Six - Nine**

7.1 We reiterate the point above at 4.2. The Impact Assessment is largely confined to cases in the Immigration and Asylum Chamber and related data such as legal aid funding which are of little relevance to tax appeals in the Tax and Chancery Chamber. Similarly the focus of the Equalities Impacts is on immigration and asylum matters.

**8 Acknowledgement of submission**

8.1 We would be grateful if you could acknowledge safe receipt of this submission, and ensure that the Chartered Institute of Taxation is included in the List of Respondents when any outcome of the consultation is published.

The Chartered Institute of Taxation

11 January 2021