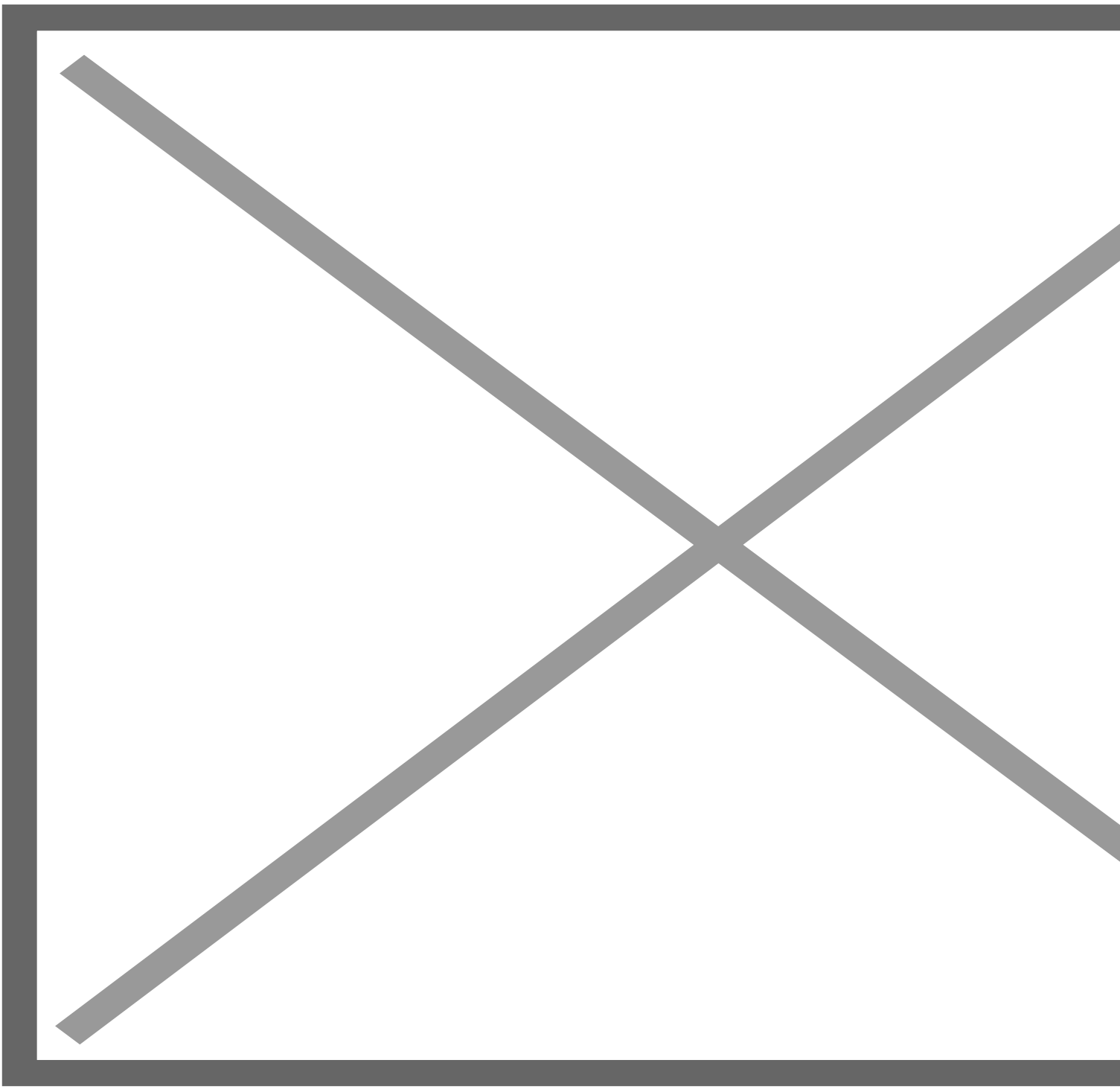
A matter of exceptional public interest

Management of taxes



02 March 2021

Hui Ling McCarthy QC considers the government proposals to restrict appeal rights and their potential impact on tax appeals

Key Points

What is the issue?

On 30 November 2020, the Ministry of Justice published a consultation entitled ‘Reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal’.

What does it mean for me?

The government’s proposal is that if, in the case of a second appeal, 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’.

What can I take away?

It is hard to predict what the impact might be on tax appeals without a clear understanding of precisely what ‘exceptional public interest’ entails – and the consultation provides no indication of the criteria that might be applied.

On 30 November 2020, the Ministry of Justice published a consultation entitled ‘Reforms to arrangements for obtaining permission to appeal from the Upper Tribunal to the Court of Appeal’. The Consultation addresses two specific matters:

- appeals in judicial review cases which have been deemed ‘totally without merit’; and
- second appeals from the Upper Tribunal to the Court of Appeal.

The rationale for the proposals is apparently because of the amount of judicial time taken up with such appeals. The consultation identified that in 2019, only three out of 67 ‘totally without merit’ applications to the Court of Appeal were granted permission, and none were successful overall. In the case of a second appeal, 561 permission to appeal applications were determined in the Immigration and Asylum Chamber of the Upper Tribunal, yet permission was granted in only 92 cases, of which only 27 succeeded.

On the face of it, it seemed that the consultation was intended to further the Home Secretary’s desire expressed at the Conservative Party Conference at the start of October 2020 to ‘stop [people] making endless legal claims to remain’ in the UK.

Judicial reviews in tax cases are relatively rare and the data said to support the perceived problem with second appeals was limited to immigration and asylum cases. Tax professionals would therefore be forgiven for thinking that the consultation had little to do with them. After all, the word ‘tax’ appears nowhere in the paper.

Read further, however, and it becomes clear that the consultation was in fact intended to apply to all chambers of the Upper Tribunal, including the Tax and Chancery Chamber.

Judicial review proposals

All claims for judicial review in tax cases begin in the High Court. Before a claim for judicial review can be brought, the claimant must secure permission. Once permission has been obtained, tax judicial reviews:

- may be stayed behind statutory appeals;
- may be transferred to the Upper Tribunal (Tax and Chancery Chamber) – for example, if a level of technical tax expertise is required to get to the heart of the issue; or
- may simply proceed to a hearing before the High Court – for example, where the challenge centres on HMRC's conduct.

Permission is first considered 'on the papers' and, if refused, there is an automatic right to request a reconsideration at an oral hearing, save where the application is certified by the judge as totally without merit. In that scenario, there is no oral reconsideration and the claimant must appeal the refusal to the Court of Appeal.

The first proposal outlined in the consultation is to excise the Court of Appeal's involvement in totally without merit cases. Instead, the proposal is that the matter be referred to a different Upper Tribunal judge to reconsider the question of permission. This change is unlikely to have a material impact on tax disputes. In the rare case that a tax judicial review is deemed totally without merit, provided that there is opportunity for reconsideration by a different judge, whether that judge sits in the Court of Appeal or the Upper Tribunal is unlikely to make much difference to the outcome.

Court of Appeal proposals

The proposals regarding second appeals from the Upper Tribunal to the Court of Appeal are not, however, so innocuous. At present, the losing party in an Upper Tribunal appeal can apply to the Upper Tribunal for permission to appeal; and may, if unsuccessful, renew their application to the Court of Appeal. The applicant must satisfy either the Upper Tribunal or the Court of Appeal that:

- the appeal would have a real prospect of success and raises an important point of principle or practice; or
- there is some other compelling reason for the Court of Appeal to hear it.

The government's proposal is that if, in the case of a second appeal, the Upper Tribunal refuses permission to appeal to the Court of Appeal, the losing party may only apply to the Court of Appeal for permission to appeal 'for reasons of exceptional public interest'. If the Upper Tribunal is uncertain whether to grant or refuse permission to appeal, it may refer the application for permission to appeal for determination by the Court of Appeal (which will be determined in the usual way on the papers, unless the judge directs an oral hearing).

As mentioned, the impetus for this proposal is said by the government to be the high numbers of immigration and asylum appeals where permission is sought from the Court of Appeal but, as the numbers appear to indicate, rarely granted. The same, however, cannot be said of tax cases (and it is striking that tax appeals are not expressly considered in the impact assessment accompanying the consultation).

Tax appeals

According to HMRC's Annual Report for 2019/20 (see bit.ly/2MKpDr4), it is clear that there are far fewer Upper Tribunal (Tax and Chancery Chamber) decisions than there are from the Upper Tribunal (Immigration and Asylum Chamber): 59 in 2018/19 and only 49 in 2019/20. HMRC's data does not show the number of cases in which permission to appeal to the Court of Appeal was requested; or the identity of the appellant (and so whether it was the taxpayer or HMRC). It is nevertheless clear that a significant proportion of tax appeals are granted permission. In 2019/20, taxpayers and HMRC enjoyed equal success before the Court of Appeal and the Supreme Court – nine wins each!.

The Tax and Chancery Chamber register of cases records the progress of Upper Tribunal tax appeals, including information on Upper Tribunal permission decisions (see bit.ly/2N7e5hu). By cross-referring to the Court of Appeal's judgments on BAILII examples emerge of cases succeeding in the Court of Appeal, notwithstanding that the Upper Tribunal refused permission. For example, the Upper Tribunal dismissed the appeals in Payne v HMRC [2019] UKUT 90 (TCC), affirmed the decision of the First-tier Tribunal and refused permission to appeal; yet the Court of Appeal allowed HMRC's cross-appeal ([2020] EWCA Civ 889). The appeal in NHS Lothian v HMRC [2018] UKUT 218 (TCC) was dismissed by the Upper Tribunal and permission refused; yet the taxpayer succeeded before the Court of Session ([2020] CSIH 14).

It is also not uncommon for cases to 'flip-flop' as they make their way through the appeal courts (HMRC v Fortyseven Park Street [2019] EWCA Civ 849 is an example of this) or indeed for the taxpayer to prevail for the very first time before the Supreme Court (as in Routier v HMRC [2019] UKSC 43 and John Mander Pension Trustees Ltd v HMRC [2015] UKSC 56). It is, however, doubtful whether any of these cases could have overcome an 'exceptional public interest' test.

It is hard to predict what the impact might be on tax appeals without a clear understanding of precisely what 'exceptional public interest' entails – and the consultation provides no indication of the criteria that might be applied. On any view, the proposed test looks stricter than the 'general public importance' test for appealing from the Court of Appeal to the Supreme Court (Supreme Court Practice Direction 3.3.3) and it is difficult to understand the justification for this.

Practical applications

The consultation suggests that some litigants 'misuse the system' and 'see an advantage in the delay caused by bringing hopeless challenges'. This does not, however, reflect my general experience of tax appeals, for a number of reasons:

1. There is no legal aid funding for tax appeals, meaning that taxpayers are at risk of adverse costs awards from the Upper Tribunal onwards.
2. HMRC can require the tax in dispute to be paid immediately following an unsuccessful First-tier Tribunal appeal, so there is no financial advantage to be gained by appealing a weak case simply to delay the final determination.
3. The advent of accelerated payment notices means that HMRC can require payment of tax upfront if it believes that a taxpayer has taken part in an avoidance scheme.

These factors already significantly reduce the prospect of applications for second appeals in tax cases that stand little chance of success. Indeed, the change to the Civil Procedural Rules in 2016 removing the automatic right to an oral permission hearing before the Court of Appeal was itself designed to address Court of Appeal resourcing issues.

Finally, the proposals risk creating a real inequality of arms between taxpayers and HMRC when it comes to securing permission to appeal. It is much easier for HMRC to demonstrate that a particular issue of law – and therefore a given appeal – is of 'exceptional public importance' since it will have access to the data that shows how many taxpayers it affects and how much tax is potentially at stake. On the other hand, taxpayers (or their representatives) would be unlikely to have access to the same information in all but the rarest of cases.

It is notable that the Impact Assessment is largely confined to cases in the Immigration and Asylum Chamber and there has been no apparent consideration of the impact on tax appeals whatsoever. One is therefore left wondering to what extent the government is committed to applying these proposals across the board. Indeed, a cynic might speculate that the consultation is a knee-jerk, political reaction to the current media attention on

immigration and asylum claims. Whatever the reason, government proposals designed to reduce access to the courts are always of concern.

The CIOT has responded to the consultation. The full response can be found at bit.ly/2OdjOCJ.