End of year review

Contentious tax: procedure and practice in 2022

Speed read

At the end of a somewhat tumultuous year, we look back at some of the key themes that emerged in 2022 in the relationship between taxpayer and HMRC, the cases that have helped clarify important procedural points and the welcome guidance issued by the FTT to improve certainty in processes.

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2022 was a year like no other. The death of the UK's longest serving monarch, Elizabeth II, gave us time to reflect on what life in public service should look like. In stark contrast, the frequency and speed of exits of the senior tenant at numbers 10 and 11 Downing Street (seven at the time of writing) resembled *I'm a celebrity*, which itself controversially relied on a former senior politician to successfully boost its viewing figures.

A trusted relationship

The current occupant of No. 10 claimed in his first speech as PM that 'trust is earned, and I will earn yours'. This could serve as the strapline for the OECD report, *Tax morale II: building trust between tax administrations and large businesses*, published in September, which was based on a survey of 1,240 tax officials from 138 countries.

The report highlighted that routine compliance by large business was generally perceived by tax officials to be good, but that distrust over tax planning and their willingness to ignore the spirit of tax laws persists – although the report noted that, in many countries, the intention of some laws was difficult to decipher, which itself creates uncertainty and increases the number of tax disputes.

The report builds on the OECD's cooperative compliance programme. In May, HMRC updated its published compliance manuals to put the OECD's initiative at the heart of HMRC's compliance framework, providing a general set of principles for large businesses and HMRC to follow to build a more effective relationship through, in part, 'transparency and justified trust'. The framework supplements HMRC's existing toolkit for assessing a business' approach to tax risk management, with continued compliance with the framework serving as an indicator of a lower-risk business.

For most large businesses, there is of course a continuing dialogue with HMRC. In pursuit of tax certainty (what businesses typically want), issues are raised and discussed with HMRC, engaging with customer compliance managers (CCMs) where appointed. When working effectively, tax issues can be resolved, or remaining points in dispute clarified, in an efficient manner.

However, voluntary cooperation only goes so far. In April, the notification of uncertain tax treatment regime was introduced, with the stated policy objective being to reduce the legal interpretation element of the tax gap, which HMRC calculate at £3.2bn for large businesses.

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The regime is still in its infancy, but it is questionable how much information will be notified that would otherwise not have been shared with HMRC by diligent and compliant taxpayers, or how many notifications have or will be made: perhaps this is one for a future freedom of information request. HMRC's pausing of the introduction of the 'third trigger' for reporting – where there is a substantial possibility that a tribunal or court would find the taxpayer's position to be incorrect in material respects – was nevertheless welcome given that it was largely perceived as a 'catch all' clause in its proposed form. That said, HMRC is understood to be continuing to work on a third trigger, albeit in a different form. Watch this space.

The last point segues neatly into trust being a two-way street: and HMRC's own behaviour and attitude towards cooperation is just as critical to a successful and transparent tax relationship. In *Sintra Global Inc and another* [2022] UKFTT 365 (TC), the First-tier Tribunal (FTT) heavily criticised an experienced HMRC officer for issuing and steadfastly maintaining VAT and excise duty assessments without 'fairly considering' all the material in their possession, no matter how relevant or credible it was. In deciding that the assessments had not been made to the officer's best judgement, the FTT noted that, had HMRC taken a less myopic approach from the outset, it may well have reached an entirely different conclusion.

To encourage voluntary engagement and continued taxpayer cooperation, HMRC must be seen to enter discussions with an open mind, rather than create the perception of having formed a view from the outset of which

they need to be dissuaded. Many officers may fairly claim to do so, but businesses will no doubt recognise some of the behaviours highlighted in the FTT judgment in their own dealings with HMRC.

Assessments: flawed procedures

In *E Curtis* [2022] UKFTT 172 (TC), HMRC suspected unauthorised payments had been made from registered pension schemes, giving rise to a charge to income tax under FA 2004 s 208. Despite being within the window to give notice of its intention to enquire into the taxpayer's return, HMRC elected not to do so, considering it 'more efficient' to progress straight to the issuing of a discovery assessment under TMA 1970 s 29(1).

However, efficiency cannot trump statutory necessity: where a taxpayer has filed a self-assessment tax return, one of two conditions must be satisfied for HMRC to raise a valid discovery assessment. As Mrs Curtis had neither acted deliberately nor carelessly in bringing about an insufficiency of tax the first condition (s 29(4)) was not met. The second condition (s 29(5)) – and most important here – required that sufficient information to alert HMRC of the suspected deficiency was not available to HMRC before the enquiry window ended (or if an enquiry has been opened, the enquiry is closed), which on the facts was self-evidently not the case here.

Staysure.co.uk Ltd [2022] UKFTT 134 (TC) is a reminder that although something may constitute HMRC's long established 'normal practice', it does not automatically follow that it is correct in law. The appellant was a UK insurance intermediary receiving supplies which HMRC determined should be subject to VAT. In October 2016, HMRC retrospectively VAT registered Staysure from 1 January 2009. On 26 January 2017, HMRC issued Staysure with a 'global' VAT assessment for the period 1 January 2009 to 31 March 2015 (the 'long period'). HMRC did so on the grounds that the assessment was in time, having been issued within two years of the end of the prescribed accounting period – which it considered to be the long period, per VATA 1994 s 73(6)(a).

The FTT decided the appeal on the grounds that the supplies at issue were VAT exempt. The judge nevertheless addressed the question of whether HMRC's assessment would have been made within the statutory time limits. The HMRC officer gave evidence that it was normal practice to issue a single long period assessment, rather than an assessment for 25 quarterly periods. It was accepted that HMRC had not adopted this approach to circumvent statutory assessment time limits.

The FTT held that 'prescribed accounting period' could not be a single long accounting period because it would mean that HMRC could avoid the application of the strict statutory time limits for assessments at its discretion, which cannot have been Parliament's intention. Instead, it must refer to a three month period. The judge also departed from earlier FTT authority in finding that it does not follow that if part of the global assessment is out of time then the whole assessment must fail. The judge therefore allowed the assessment in so far as it covered the final three months of the long period only.

Appeals: procedural compliance

A stricter approach to sanctions for litigants who fail to adhere to procedural rules has been a theme of the past decade, both in the commercial courts and tax tribunal. In *York Burton Lane Club and Institute Ltd & others* [2022] UKFTT 406 (TC) the appeals concerned claims for overpaid VAT on gaming machines, stayed pending the long-running 'Rank litigation'.

There are various issues covered in the FTT's judgment, but a group of taxpayers, said to be representative of hundreds of others, had their 2006 claims repaid by HMRC in 2010/11, subject to HMRC issuing protective assessments pending the outcome of the litigation, which the taxpayers did not appeal in error (apparently on the mistaken assumption that HMRC would honour the outcome of the litigation if they lost).

HMRC was successful in 2014 and the taxpayers repaid the VAT; only for HMRC to finally accept defeat in 2020. The taxpayers then applied to the FTT for permission to appeal against the protective assessments, out of time. In refusing permission the FTT applied a three step approach, considering whether: the length of delay was serious and significant (it was); there was adequate explanation for the delay (there was not); or other factors – including the fact the taxpayers' claims would have a very strong case of succeeding; and that any prejudice to HMRC in dealing with appeals would not be great – were sufficient to justify granting permission (they were not). A seemingly compelling claim, originally submitted in time, was therefore inadvertently lost through a failure to adhere to procedural rules.

But not all procedural missteps will result in lost opportunity. In *SNM Pipelines Ltd* [2022] UKFTT 231 (TC) the taxpayer filed a notice of appeal within the 30-day time limit, but neither paid the VAT in dispute nor made an application for hardship. The FTT can only 'entertain' an appeal if the tax has been deposited or hardship applies, and so the tribunal returned the appeal to the taxpayer, who resubmitted the appeal with a hardship application, but by then outside of the 30 day window. HMRC ultimately accepted hardship applied. The question arose as to whether the taxpayer had appealed in time.

Ultimately the FTT decided that the appeal was in time because 'entertaining an appeal' is a concept essentially referable to the progression of an appeal, and only relevant once the independent criteria for commencing an appeal have been satisfied. As such, it was unnecessary for the original appeal to have been returned and it remained valid. Despite this, the FTT's decision is not binding precedent and best practice remains for taxpayers to either deposit the tax in dispute or make a hardship application within the 30 days appeal deadline wherever possible.

Second appeals: new arguments

In *HBOS PLC & another* [2022] UKUT 139 (TCC), the taxpayer objected to HMRC introducing two new points in its response to the taxpayer's notice of appeal to the Upper Tribunal (UT), on the grounds that HMRC ought to have sought permission to appeal from the FTT to do so.

The 'agreed issue' before the FTT was the date on which the taxpayer was entitled to interest under VATA 1994 s 78 on bad debt relief claims. Deciding the appeal in HMRC's favour on the agreed issue, the FTT did not determine HMRC's alternative argument ('the further Issue'). The taxpayer appealed to the UT and HMRC filed its response, alleging that the FTT erred in law in its interpretation of s 78(1)(d), and including an argument, made in the alternative, based on the further Issue.

The UT rejected the taxpayer's objections to the inclusion by HMRC of the alternative argument. HMRC were 'wholly successful' at the FTT and so to require them to obtain PTA would go against the principle that only an unsuccessful party

can appeal a decision. In relation to the further Issue, HMRC could not, having won on the agreed issue, seek permission on an issue which the FTT did not decide, or purport to decide. Note, the issues in this appeal pre-dated the changes to rule 24 of the UT rules, effective from 6 April 2022, which we address below.

In *W Paul* [2022] UKUT 116 (TC), the UT was asked to determine whether, as respondent in an appeal, HMRC needed permission to argue a point not argued before the FTT; and, if so, whether permission should be granted. The taxpayer's principal argument before the UT was that HMRC had not opened an enquiry because the notice of enquiry was not properly 'served' under TMA 1970 s 115. In its response, HMRC included a new argument that the taxpayer was estopped by convention from denying that a valid enquiry had been opened, pursuant to the Supreme Court's decision in *Tinkler* [2021] UKSC 39.

The taxpayer objected to the introduction of a new argument. HMRC maintained permission was not required because it had been successful on all grounds before the FTT, and the relevant principles from *Singh v Dass* [2019] EWCA Civ 360 are only relevant to an unsuccessful party seeking to rely on a new argument on appeal. The referred principles include that an appellate court should be cautious in deciding whether to allow a new argument to be advanced, and that it should not, generally, permit it if the argument either (i) would necessitate new evidence or (ii) had it been advanced in the court below, would have resulted in the trial being conducted differently with regards to the evidence.

The UT held the *Singh* principles apply equally to unsuccessful and successful parties at first instance, such that a respondent does need the UT's permission to introduce a new argument. In denying HMRC permission, the UT noted that whilst HMRC's new argument would be unlikely to involve new evidence, if argued before the FTT it would likely have resulted in the trial being conducted differently, with the taxpayer undoubtedly having sought to cross-examine the HMRC officer. Further, HMRC could have made the argument at the FTT but did not. As such, it would neither be fair nor just to the taxpayer to allow the application.

Taxpayer confidentiality

Taxpayer confidentiality is a fundamental right, but is not without limitation. In *Cider of Sweden Ltd* [2022] UKFTT 76 (TC), the FTT considered the right in the context of a third party application for disclosure of appeal documents.

The big four firm, EY, sought disclosure of the appellant's notice of appeal, HMRC's statement of case and any further pleadings, relying on the principle of 'open justice', the purpose of which is to enable the public to understand and scrutinise the justice system of which the courts are the administrators. Both HMRC and the appellant opposed the application, arguing that there was no right to obtain documents, that the taxpayer's right to confidentiality must be respected, and that it was not evident that access would either enable public scrutiny of the way in which the FTT decides cases nor provide an understanding of how the justice system works and why decisions are taken.

The FTT followed the Supreme Court's guidance in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 in refusing the application. Whilst the principle of open justice applies to the FTT, there is no right for a third party to have access to documents. Whereas for High Court claims there is a publicly accessible register of cases that anyone can interrogate upon payment of a fee, and appeal documentation can be sought under CPR r. 5.4C(1) (subject to certain safeguards), the position is not replicated in the FTT. This was significant, and it was noted that taxpayers rightly consider their tax affairs to be private until they are the subject of a public hearing and that HMRC have a statutory duty of confidentiality.

The FTT noted that whilst wishing to understand the legal basis of the arguments being advanced is a legitimate reason for seeking access to documents, the parties to the proceedings had legitimate interests in wishing to keep such matters confidential. In this appeal, at the stage of proceedings at which the application was made, the latter outweighed the former. However, the judge was clear that if the application was made at a later stage, when there had been greater judicial intervention in the proceedings: for example, after any interim applications and associated decisions, the decision reached might be different.

Tribunal practice directions, statements and guidance

The FTT has issued three helpful documents providing clarity and guidance on a series of procedural matters: (i) the allocation of cases to categories; (ii) witness summonses and orders to produce documents; and (iii) oral evidence from witnesses abroad, responding to the UT decision in *Agbabiaka* [2021] UKUT 286 (IAC).

The Tribunal Procedure (Upper Tribunal) Rules, SI 2008/2698, were amended with effect from 6 April 2022 to include r. 21(1A) and r. 24(1C), allowing a responding party (taxpayer or HMRC) opportunity, where necessary, to make an application for permission to appeal directly to the UT in response to an appellant's notice of appeal – whether on existing grounds unsuccessfully deployed at first instance (even if ultimately the successful party), or on new grounds not previously argued – rather than seeking permission from the FTT.

The Tribunal Procedure Committee issued a consultation on possible changes to the UT rules in connection with 'CE-filing' – an online case management system that has been trialled and subsequently mandated for parties legally represented in certain other UK courts. Whilst CE-filing is currently permitted in the UT, uptake has to date been very low. Nevertheless, it is anticipated that CE-filing will become a requirement at the UT for legal advisers in due course.

And finally

HMRC used this year to start initiatives it promised in the conclusions to its review of the tax administration of large business, published in November 2021. One such initiative is better guidance – in the hope that this will lessen areas for differences in view. Despite this, in a recent survey we conducted, 80% of our clients expected to see tax disputes increase. Interestingly, though, only 18% have chosen to appoint a dedicated head of tax controversy internally. The last 12 months have shown courts willing to take a hard line on procedural rules, making it all the more important to ensure large companies have the requisite disputes expertise on tap. ■

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- Staleness refreshed: delay and abuse of process in the FTT (S Rhind, 25.11.22)
- Further developments in discovery: case law after *Tooth* (H Adams, 22.11.22)
- When does open justice become engaged in the FTT? (R Doran & J Balson, 23.3.22)