

CHAPTER 1

TAX TREATIES: THE PERSPECTIVE OF COMMON LAW COUNTRIES

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1.1. Common law tax appeals generally

1.1.1. Introduction

Reading the national reports in this volume – all from civil law countries – makes me, as a common law lawyer, feel as if I live in a different world. To give just one example relating to tax appeals to the highest courts: in France 120 judges of the *Conseil d'État*, which deals with administrative law, decide about 1,000 tax appeals per annum; in the UK 12 judges in the House of Lords, which deals with all branches of law for both England and Scotland (a separate legal system), hear five or six tax appeals per annum (out of a total of about 75 appeals).

This difference is not merely that in the UK, the higher courts can be, and are, highly selective about whether to hear an appeal; the first instance direct tax tribunal for serious cases for the whole of the UK, the Special Commissioners, heard only 77 appeals in 2005. I do not have an answer to the reason for these differences but I believe they are important to our understanding of how tax appeals are approached in different countries. If we restrict ourselves to a comparison of the common law and civil law approaches to interpretation of tax treaties in isolation – such as the extent to which the OECD Commentaries are used by courts – I doubt if we shall not find many fundamental differences; but, I suggest, it is necessary to look at these questions in the wider legal context of the significant differences between common law and civil law on how appeals are heard and decided, which may indirectly affect the approach and, even in some cases, lead to different results.

To give some further examples of the UK system that I believe are different from civil law systems:

- tax law is part of ordinary law, not administrative law;
- the burden of proof of facts is almost always on the taxpayer, which is different from normal civil litigation; facts must be proved to the balance of probabilities;

1. Special Commissioner and VAT and Duties Tribunal Chairman.

- the proceedings are primarily oral with witness evidence; the court relies entirely on the legal and factual arguments of the parties put forward at the hearing, but counsel have a duty to the court to refer to case law that is against their case; essentially there is a “day in court” (which may well exceed one day) when all the facts and arguments are considered – the court does nothing in the way of investigating the merits of the case before that, although at the hearing the judge can take an active role in questioning counsel on their arguments of law;
- judges will restrict their decisions to the points argued and set out fully in the decision the process by which the decision is reached;
- in the tax tribunal and lower courts, a single judge is normal, and in higher courts, where there is a panel of judges, dissenting judgments can be given; it necessarily follows from the small number of appeals on any one legal topic that the judges in the courts hearing appeals from the tax tribunal are all generalists;
- higher courts are selective about whether they will hear an appeal; appeals to the courts are on a point of law only, but there is still extensive oral argument on the law;
- there is also no equivalent to a *juge rapporteur* or advocate-general providing additional views to the court;
- decisions of higher courts bind lower courts and so, in deciding a case, a higher court is not merely deciding the case but is also laying down guidance for the future for lower courts, with the consequence that it is most unlikely for a higher court ever to meet the same point more than once;
- the number of cases is far smaller (but also each one much longer) than is the case in civil law countries; most cases are therefore settled without litigation, in part because of the time and money involved in an appeal, but also because the tax authority operates in a way that encourages settlement of tax disputes.

As I believe that a civil law reader may find many, or even all, of these strange, I shall therefore start with a brief description of how tax appeals in general are conducted in the UK.

1.1.2. The system of tribunals and courts for tax appeals in the UK

In common with much of the system of justice in the UK, the first stage in a tax appeal is to a tribunal.² Tribunals are part of the court system but are less formal than courts. For example, there is no restriction on who can appear for a taxpayer in the tax tribunals and the strict rules of evidence

2. “The Leggatt Committee Report”, Tribunals for Users (March 2001), noted the existence of 137 different tribunals in the UK.

that apply in court do not apply in the tribunal. There are separate tribunals for direct and indirect taxes; historically, these were dealt with by two different tax authorities, which merged in 2005. The direct tax tribunal³ consists of two tribunals, the General and the Special Commissioners, both of which have been functioning for over 200 years.⁴ The General Commissioners are a lay tribunal who sit with a clerk who is usually legally qualified. The Special Commissioners are a legally qualified tribunal comprising four full-time Commissioners in London (of whom I am one) and two in Manchester, plus a pool of 27 part-time Commissioners. Normally, we sit on our own but in particularly heavy cases two may sit.⁵ In many cases, the taxpayer can choose whether to appeal to the General or Special Commissioners, but there are certain matters, including claims for double taxation relief,⁶ that are reserved to the Special Commissioners. The Special Commissioners in practice hear most of the serious tax cases at first instance. The number of cases is quite limited: for 2005, the *Simon's Tax Cases (Special Commissioners' Decisions)* reports (which reports all their decisions comprehensively) include 77 cases throughout the whole of the UK and the decisions comprise 881 printed pages.⁷ Because most disputes are settled by negotiation those that are determined by the tribunal can be quite old, the delay being caused by the negotiations, not in having the appeal heard by the tribunal.⁸

3. As this chapter is concerned with direct tax, the VAT and Duties Tribunal, which deals with all indirect taxes, is only dealt with in passing.

4. For the origins of the Special Commissioners, see the writer's "The Special Commissioners from Trafalgar to Waterloo", [2005] BTR 40 and "The Special Commissioners after 1842: from administrative to judicial tribunal", [2005] BTR 80.

5. The Chairman has a casting vote if they disagree. For an example, see *Jones v Garnett* [2005] STC (SCD) 9. In indirect tax appeals, except where the issue is a pure point of law, a legally qualified Chairman normally sits with a non-legally qualified member, such as an accountant, surveyor or other person with qualifications relevant to the subject matter of the appeal (but two Chairmen cannot sit). It is expected that some of these differences between the two tribunals will disappear as part of the reform, see text at note 9.

6. TMA 1970 s.46C(3)(e).

7. In the VAT and Duties Tribunal, in 2005 for the whole of the UK, there were 273 VAT appeals (including 13 civil fraud cases) and 216 VAT penalty appeals; 17 customs duty and 90 excise duty appeals. (Since there is no equivalent of the General Commissioners in indirect tax appeals these figures may give a better picture of the total number of appeals at first instance.) Not all these decisions are reported but they are all on the Tribunal's website (www.financeandtaxtribunals.gov.uk). It is not therefore possible to give the number of pages of decisions for comparison with the Special Commissioners.

8. In the Special Commissioners' 2005 reports, the last period to which the appeal related was 1989 – 3; 1991 – 2; 1995 – 3; 1996 – 2; 1997 – 5; 1998 – 5 1999 – 4; 2000 – 11; 2001 – 13; 2002 – 11; 2003 – 6; 2005 – 2 (those of 2005 are both appeals against refusals to renew sub-contractors' certificates).

Recently a committee recommended a reform of all tribunals in the UK that would become a two-tier system,⁹ which the Government adopted in a White Paper,¹⁰ and further consultation has taken place over the details for the tax tribunals in an advisory Stakeholders' Committee.¹¹ It is expected that a tribunal similar to the Special Commissioners would be a second-tier tribunal, hearing appeals from the first tier and probably hearing some major cases at first instance. A Bill containing the legislation dealing with the reform was introduced into the House of Lords on 17 November 2006, which means that it is now likely to go ahead.

From the Special Commissioners there is an appeal to the ordinary courts but only on a point of law. What is a point of law that is capable of being appealed against is fairly widely interpreted. The facts as found by the tribunal cannot be disputed, except on the ground that there was no evidence to support them, for which the tribunal's notes of the evidence may be required (although in important cases a shorthand writer's transcript of the evidence is taken usually with each day's transcript being available to the parties that evening). The position is less strict when inferences are made from the primary facts found. An appeal court can upset such an inference on the basis that it is a point of mixed fact and law.

The hierarchy of courts above the Special Commissioners is that in England, the appeal is to the High Court (one judge sitting alone), the Court of Appeal (three judges) and the House of Lords (five judges);¹² in Scotland, effectively, the High Court is missed out and the appeal lies to the Inner House of the Court of Session (three judges), which is the equivalent of the English Court of Appeal. In the first two levels – the tribunal and the High Court – there is therefore a single judge; above that, where there is more than one judge, each judge is free to give a separate judgment (although often this will merely agree with another judge) and dissenting judgments can be given. No doubt some negotiation takes place to reach a common judgment but if a judge fundamentally disagrees, he will dissent.¹³ Such dissents are helpful to courts in deciding whether to give permission to appeal (and to the parties deciding whether

9. See note 2.

10. "Transforming Public Services: Complaints, Redress and Tribunals", Cm.6243 (July 2004).

11. The minutes are available on the General Commissioners' website: www.generalcommissioners.gov.uk/reform.htm.

12. The House of Lords will be separated from the House of Lords as a legislative chamber and will become a Supreme Court in 2009. In Scotland, in effect, the appeal from the Tribunal is to the Court of Appeal, the inner House of the Court of Session.

13. For example, in *Agassi v Robinson* [2006] STC 1056, 1064 Lord Walker's speech records: "I have found it a difficult case, and I have hesitated whether to carry my doubts to the point of dissent."

to appeal).¹⁴ Under the proposed reform of tribunals, an appeal would lie from the upper-tier tribunal to the Court of Appeal in England, thereby cutting out the High Court (and the procedure would, as now, be the same in Scotland). It takes approximately a year between each of the appeal stages.

14. A recent interesting example is *Condé Nast v Customs and Excise Comrs* [2006] STC 1721 in which there was a strong dissent in the Court of Appeal in an earlier similar case (*Fleming v Customs and Excise Comrs* [2006] STC 864) that was at the time under appeal to the House of Lords. The Court of Appeal in *Condé Nast* felt obliged to follow the majority decision in the earlier case, but clearly found the dissenting judgment more persuasive.