Analysis

Tax appeals: what is the 'point of law'?

SPEED READ: Lord Carnwath's 'brief comment' in *Pendragon* further undermines the orthodox view of what amounts to a 'point of law' in tax appeals. Lord Carnwath's approach suggests that the specialist Upper Tribunal has a wider appellate jurisdiction in cases involving 'issues of general principle' than had previously been thought. The underlying policy rationale of Lord Carnwath's approach is to endeavour to keep specialist appeals within the specialist tribunal system, and to limit the extent to which the Court of Appeal will intervene in, and set aside, decisions of the Upper Tribunal.

John Brinsmead-Stockham is a tax barrister at 11 New Square, undertaking both advisory and litigation work in all areas of tax. In 2015, he was selected by *Tax Journal* as one of the leading *40 under 40* individuals working in UK tax. Email: john.moore@11newsquare.com; tel: 020 7242 4017.

In the recent Supreme Court judgment in *HMRC v Pendragon plc* [2015] UKSC 37, Lord Sumption provided further guidance about the concept of 'abuse of law' in VAT. However, Lord Carnwath's 'brief comment' at the end of the judgment may prove to be of more lasting and practical significance to tax appeals generally.

In *Pendragon*, Lord Carnwath revisited the subject of the scope and nature of the appellate jurisdiction of both the Upper Tribunal (UT) and the Court of Appeal (CA): a topic his Lordship had previously considered in an article ('Tribunal justice – a new start' [2009] Public Law 48), and in his speech in *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19 (*Jones*). Lord Carnwath's views challenge the orthodox understanding of the extent of the jurisdiction of the UT to set aside and remake decisions of the First-tier Tribunal (FTT).

A hallowed orthodoxy

Sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 (TCEA 2007) provide that taxpayers may appeal from the FTT to the UT, and from the UT to the CA on any 'point of law' arising from a decision of the tribunal below. TCEA 2007 ss 12 and 14 go on to provide that the UT and CA may only interfere with a decision of the tribunal below if that decision involved 'the making of an error on a point of law'. Thus, the concept of a 'point of law' delineates the extent of the appellate jurisdiction of both the UT and the CA.

In its decisions, the FTT makes findings on points of fact (e.g. the date on which company X's website went online), and on points of law (e.g. the test for what amounts to 'carrying on a trade'). The FTT will also often be required to make what are sometimes referred to as findings on 'mixed questions of fact and law' (e.g. whether company X was 'carrying on a trade' when its website went online). Such findings usually require the FTT to make an evaluative judgment in applying the relevant legal test to the facts that it has found.

The orthodox view, long established as a matter of high authority by cases such as *Edwards v Bairstow* [1956] AC 14 (although not universally adhered to by the courts), maintains that in tax appeals concerning mixed questions of fact and law the appellate courts have a limited jurisdiction. Under that limited jurisdiction the UT or CA may only allow an appeal if they are able to:

- identify an error in the legal test applied by the tribunal below; or
- hold that the FTT arrived at a conclusion (in finding the facts, or in applying the legal test to those facts) that no reasonable tribunal could have reached.

The UT and CA may not simply substitute their own evaluative judgment for that of the FTT in answering a mixed question of fact and law; such evaluative judgments are treated as findings of fact and not as points of law.

A matter of 'policy'

In *Pendragon*, Lord Carnwath endorsed a more flexible approach to determining what amounts to a 'point of law', with '"law" for this purpose being widely interpreted to include issues of general principle affecting the jurisdiction in question'.

More specifically, Lord Carnwath (quoting Lord Hoffmann in *Lawson v Serco* [2006] ICR 250) stated that whether or not a mixed question of fact and law should be treated as a question of law (and therefore subject to appeal) depended upon 'whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review'. In his article, Lord Carnwath identified some relevant policy considerations in this context, namely:

> 'the utility of an appeal, having regard to the development of the law in the particular field, and the relative competencies in that field of the tribunal of fact on the one hand, and the appellate court on the other.'

In *Pendragon*, Lord Carnwath emphasised that the UT was a 'specialist tribunal' tasked with providing guidance to the FTT, and 'ensuring that [the FTT adopts] a consistent approach to the determination of questions of principle'. His Lordship went on to hold that the concept of 'abuse of law', at issue in *Pendragon*, was a 'general principle of central importance to the operation of ... VAT'; and, although it was a concept 'involving an issue of mixed law and fact, or ... the evaluation of facts in accordance with legal principle' it was, nonetheless, 'well suited to detailed consideration by the UT'. The CA had, therefore, been wrong to focus on whether the UT had gone beyond its proper appellate role. In such questions of 'general principle' the UT was entitled to come to its own evaluative conclusions in respect of mixed questions of fact and law.

A tense, conditional, future

Lord Carnwath's analysis of what amounts to a 'point of law' abandons the conceptually clear position of

the orthodox view in favour of an approach imbued with legal realism. He recognises that, in practice, the boundary between errors of law and fact can be difficult to identify, and often depend simply upon the willingness of an appellate court to substitute its own view for that of the FTT.

Lord Carnwath's 'brief comments' in both *Jones* and *Pendragon* are technically obiter dicta, and are therefore not binding on lower courts and tribunals. His analysis is also open to the criticism that it arrives at a fairly radical conclusion on the basis of limited authority (i.e. dicta of Lord Hoffmann, and a government White Paper). Nonetheless, Lord Carnwath's views received unanimous support in both *Jones* and *Pendragon* (where the original judgment was reissued in an amended form to record that all of the justices agreed with Lord Carnwath). It will be a brave judge that seeks to depart from them in future appeals.

The main practical implication of Lord Carnwath's approach is that it expands the appellate jurisdiction of the UT, in cases concerning 'issues of general principle' (a concept that will inevitably be subject to future debate). In such cases, if Lord Carnwath's approach is followed, the UT will be entitled to substitute its own decision for that of the FTT in an appeal turning on a mixed question of fact and law. This will be so, regardless of whether on an orthodox view the FTT decision may have been treated as resting upon a finding of fact, and therefore not subject to appeal. It is clear, following *Pendragon*, that Lord Carnwath considers that his approach should apply in the tax field, as in other specialist jurisdictions; and that, contrary to the views of Sales J in *Eclipse Film Partners (No. 35) LLP v HMRC* [2014] STC 1114 at para 43, it is unnecessary to show a:

> 'particularly clear policy-based reason ... to justify the Upper Tribunal departing on any particular issue from well-established principles of classification of questions of fact and questions of law in the tax field, which are well understood by taxpayers and the Revenue alike.'

As a result, the UT is bound to see an increase in applications for permission to appeal in respect of matters that would previously have been viewed as questions of fact. It will be interesting to see how the UT responds to the inherent tension between Lord Carnwath's suggested approach, and the limited resources available to that tribunal. Indeed, the UT has already sought (somewhat unconvincingly) to limit the impact of Lord Carnwath's views in *Degorce v HMRC* [2015] UKUT 447 (TCC) at para 92.

A second implication of Lord Carnwath's approach is that, despite the identical wording of the statutory provisions setting out the appellate jurisdictions of the UT and the CA, the extent of those two jurisdictions is different – as his Lordship recognised in his article:

> 'Logically, if expediency and the competency of the tribunal are relevant, the dividing line between law and fact may vary at each stage [of the appeal]'.

On that basis, the UT, as a 'specialist tribunal' should 'be permitted to venture more freely into the "grey area" separating fact from law, than an ordinary court'. Conversely, the CA, as a non-specialist court, has no such freedom, and is limited to determining whether the UT made an 'error on a point of law' on an orthodox (i.e. *Edwards v Bairstow*) basis. In so doing, Lord Carnwath stated in *Pendragon*, that the CA should, in most cases, proceed:

> 'by looking primarily at the merits of the UT's reasoning in its own terms, rather than by reference to their evaluation of the FTT's decision ... Indeed, given the difficulties of drawing a clear division between fact and law ... it may not be productive for the higher courts to spend time inquiring whether a difference between the two tribunals was one of law or fact, or a mixture of the two.'

This aspect of Lord Carnwath's approach seeks to end arid debates before the CA as to whether a decision of the FTT rests upon a finding on a point of fact or of law; and consequently whether the UT was entitled to intervene and set aside the decision of the FTT. However, it appears simply to reframe such debates in terms of whether an appeal involves an 'issue of general principle', such that the UT was entitled (or required) to exercise its broader appellate jurisdiction. Paradoxically, this may require the non-specialist CA to determine whether a particular tax appeal involves an 'issue of general principle affecting the [tax] jurisdiction', and may leave the CA in a difficult position if it forms a different view to the UT on that point.

Conclusion and action points

The broad thrust of Lord Carnwath's approach is to seek to increase the jurisdiction and authority of the UT, with a view to keeping appeals in tax and other specialist fields within the specialist tribunals; and to limit the extent to which such appeals come before the CA and the Supreme Court (the jurisdiction of which was not analysed by his Lordship). Such a result would have the desirable consequences of ensuring that disputes are resolved more quickly, and saving litigants the cost of multiple appeals. It is wholly unclear, however, whether such a dream will ever be realised. All that can be said with certainty is that the meaning and ramifications of Lord Carnwath's new approach will be subject to further judicial scrutiny in the years to come. In the meantime, advisers should:

- continue to emphasise the crucial importance of the hearing before the FTT, and strive to secure favourable findings in that tribunal as to the facts of the case – findings on pure points of fact are very unlikely to be disturbed on appeal;
- if appealing to the UT, consider arguing that the case involves an 'issue of general principle' such that the UT has a wider appellate jurisdiction to reconsider mixed questions of fact and law; and
- if resisting an appeal before the CA, consider emphasising the limited jurisdiction of the CA on appeal from the specialist UT.

Lord Carnwath's approach … expands the appellate jurisdiction of the UT, in cases concerning 'issues of general principle'

For related reading, visit www.taxjournal.com

Cases: *Pendragon and others v HMRC* (16.6.15)

What's new in VAT abuse? (Michael Conlon QC & Rebecca Murray, 24.6.15)

Public law jurisdiction of the tax tribunal (Angela Savin, 19.4.10)