

## Public law in the tax tribunals and the case for reform

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## Public law in the tax tribunals and the case for reform

Stephen Daly\*

### Abstract

*The central thesis of this article is that, first, the jurisdiction of the First-tier Tax Tribunal to deal with typical public law complaints is limited; secondly, that the jurisdiction of the Tribunal should be broadened, as this would be more efficient and the Tribunal judges have the experience and ability to deal with such matters.*

### Introduction

Consider the following example. A taxpayer has an assessment issued against her by HMRC. Her argument is that the tax is not due under the relevant taxing provision, or in the alternative that she is entitled to rely upon Extra-Statutory Concession (ESC) A19 which provides that HMRC will “give up” tax due where the body has failed to make timely use of information supplied by the taxpayer.<sup>1</sup> In such a case, the taxpayer will have to institute two separate proceedings. In one, she will appeal against the assessment to the First-tier Tribunal.<sup>2</sup> In the second, she will institute judicial review proceedings in the Administrative Court claiming a legitimate expectation that she was entitled to rely upon ESC A19 (or that HMRC’s decision not to apply the concession was irrational).<sup>3</sup> This situation is entirely unsatisfactory. The result in either of the proceedings may render the other redundant, with the effect being a waste of the time and money of all concerned. In such a case, why should the expertly constituted First-tier Tax Tribunal not have the capacity to resolve both disputes?

This article seeks to demonstrate that the underlying restriction is unjustified. Further, there are considerable practical benefits to extending the ambit of the First-tier Tribunal’s jurisdiction. The article will propose that taxpayers should be allowed to bring public law issues before the First-tier Tribunal where there is additionally a substantive dispute. The Tribunal is the best placed forum for resolving such cases.

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\* Lecturer at the University of Birmingham. The author would like to thank Dr John Avery Jones, Dr Paul Daly, Ruth Kennedy and the two anonymous reviewers for helpful comments on an earlier draft of the piece. Different iterations also benefitted from comments of those attending the annual SLSA Conference and the 5th Annual TARC workshop, and in particular from the comments of Professors Peter Cane, Richard Kirkham, Robert Thomas, Jason Latham of HM Courts and Tribunals and Judges Nick Wikeley and Nick O’Brien at an early career workshop on administrative justice at the University of Sheffield. Any errors are the sole responsibility of the author.

<sup>1</sup> HMRC, *Extra-Statutory Concessions: ex-Inland Revenue* (6 April 2017), available at: <https://www.gov.uk/government/publications/extra-statutory-concessions-ex-inland-revenue> [Accessed 31 December 2017].

<sup>2</sup> Note that the taxpayer is entitled to ask for an internal review whereby the decision is reviewed by somebody who was not involved in the original assessment before proceeding to appeal to the tribunal. On which, see: Taxes Management Act 1970, ss. 49A-49I.

<sup>3</sup> It should however be noted that as judicial review is a remedy of last resort, a taxpayer will often first be required to seek an internal review and perhaps even approach the Adjudicator’s Office. On this, see: *R. (on the application of NCM 2000 Ltd) v HMRC* [2015] EWHC 1342 (Admin), at [51]-[59] and also *R. (on the application of Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716 at [51]-[71]; [2017] WLR(D) 723 (Sales LJ).

This proposal develops upon a similar proposal first aired almost a quarter of a century ago by Dr John Avery Jones.<sup>4</sup>

The article is set out in three parts. The first briefly will set out the current position in terms of bringing public law claims in the tribunals. The second thereafter will set out the case for extending the jurisdiction of the First-tier Tax Tribunal. The third part will examine the options for reform. Finally, it should be noted that this article will only assess the viability of extending the First-tier Tax Tribunal's jurisdiction, though a similar argument could be made for reforming the jurisdiction of other tribunals.

## The Current Position

As a general rule, public law issues must be argued by way of judicial review in the courts, rather than the tax tribunals. The reason for this is that the tribunals are creatures of statute, whereas judicial review is grounded in the “ancient and inherent supervisory jurisdiction of the court”.<sup>5</sup> If the tribunals are to have any jurisdiction to hear public law issues accordingly, this can only be where it has been granted by Parliament. There is provision for the tribunals to consider public law matters in certain specified circumstances. For the most part, this arises only in the case of the Upper Tribunal, which was made a superior court of record by the governing Tribunals, Courts and Enforcement Act 2007 (TCEA 2007), thereby having jurisdiction equivalent to that of the High Court. For instance, litigants may apply to the Administrative Court to have their Judicial Review case heard by the Upper Tribunal.<sup>6</sup> The Administrative Court must be satisfied that transferring the case would be “just and convenient”.<sup>7</sup> There are instances also where the First-tier Tribunal may hear public law issues, provided there is jurisdiction statutorily conferred, as further examined below.<sup>8</sup>

For a time, it seemed possible that a broad reading of the legislative provisions could prevail, allowing for a greater range of public law issues to be considered by the First-tier Tribunal. In *Oxfam v HMRC (Oxfam)*,<sup>9</sup> Mr Justice Sales (as he then was) considered that the jurisdiction of the First-tier Tribunal to hear public law claims was broader than previously understood. Sales J discussed at length the issue of bringing legitimate expectation claims before the First-tier Tribunal.<sup>10</sup> He held that the Tribunal did have jurisdiction to hear the public law claim. This was justified by reference to the statutory scheme. The relevant provision allowing for appeal in the case, section 83(c) of the Value Added Tax Act 1994 provided that “an appeal shall lie to a tribunal with respect... to the amount of any input tax which may be credited to a person”. This gave the Tribunal a broad jurisdiction to consider any legal question, including a public law question, capable of being determinative of the issue

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<sup>4</sup> J. F. Avery Jones, “Tax appeals: the case for reform” (1994) BTR 3, 13. See also: *Committee on Enforcement Powers of the Revenue Departments* (Cmnd 8822, 1983), at [25.4.13] onwards.

<sup>5</sup> C. Turpin and A. Tomkins, *British Government and the Constitution*, 7<sup>th</sup> edn (Cambridge: Cambridge University Press, 2011), 661.

<sup>6</sup> See generally TCEA 2007, ss. 15-21.

<sup>7</sup> Senior Courts Act 1981, s 31A(3); TCEA 2007, s. 19(1).

<sup>8</sup> See below, “Competence of the First-tier Tribunal”, in text at n 37 onwards.

<sup>9</sup> *Oxfam v HMRC* [2009] EWHC 3078 (Ch) [73], [2010] STC 686. The decision on jurisdiction has been followed in its immediate aftermath. See for instance *Hanover Company Services Ltd v Revenue and Customs Commissioners* [2010] UKFTT [27]-[42] (TCC), [2010] SFTD 1047 1054-1060.

<sup>10</sup> *Oxfam*, above fn. 9, [2009] EWHC 3078 (Ch) at [61]-[79].

of the amount of input tax which should be credited to a taxpayer.<sup>11</sup> Such an interpretation was defensible on the basis that the Tribunal is particularly well positioned to make judgments about the fair treatment of taxpayers by HMRC and it avoids the cost, delay and potential injustice and confusion associated with proliferation of proceedings.<sup>12</sup> Parliament would plausibly have had in mind avoiding these issues when drafting the provision.<sup>13</sup>

The reasoning of Sales J aligns broadly with that of the Supreme Court in the subsequent case of *R. (on the application of Cart) v Upper Tribunal (Cart)*.<sup>14</sup> The Court there took a broad reading of TCEA 2007 in order to develop a means of judicially reviewing decisions of the Upper Tribunal. Although the statute states that the Upper Tribunal is a superior court of record,<sup>15</sup> the Court held that this did not preclude judicial review of its decisions. In terms of the mechanics of such judicial review, the Court used the language of TCEA 2007 to develop a novel, pragmatic (although doctrinally empty)<sup>16</sup> approach that the courts ought to take.<sup>17</sup> The Court justified the invention *inter alia* by reference to the need to spare judicial resources.<sup>18</sup> To this end, the judgment supports Sales J's assessment in *Oxfam* in that having two proceedings dealing with effectively the same issue is a poor use of judicial resources and hence contrary to the intention of Parliament.<sup>19</sup>

The Supreme Court judgment in *Cart* however was not mentioned in *Noor v HMRC*,<sup>20</sup> which has in practice been taken to have restricted considerably the scope of Sales J's judgment. The Upper Tribunal there also considered the issue as to whether the First-tier Tribunal could hear issues of public law and powerfully responded to *Oxfam*. The judgment is particularly significant as it was handed down by the (then) President of the Upper Tribunal Tax and Chancery Chamber, Mr Justice Warren, and President of the First-tier Tribunal Tax Chamber, Judge Bishopp. The Upper Tribunal rejected Sales J's analysis. If Parliament had intended to allow the Tribunal to consider public law issues in such a manner, it would have expressly done so and subjected this to specific conditions, as it did in the case of the Upper Tribunal.<sup>21</sup> This reasoning has found support in differently constituted panels of the Upper Tribunal subsequently.<sup>22</sup> Although not expressly rejecting *Oxfam*, the Court of

<sup>11</sup> *Oxfam*, above fn. 9, [2009] EWHC 3078 (Ch), at [63].

<sup>12</sup> *Oxfam*, above fn. 9, [2009] EWHC 3078 (Ch), at [70].

<sup>13</sup> *Oxfam*, above fn. 9, [2009] EWHC 3078 (Ch), at [70].

<sup>14</sup> *R. (on the application of Cart) v Upper Tribunal* [2011] UKSC 28, [2011] MHLR 196.

<sup>15</sup> TCEA 2007, s. 3(5).

<sup>16</sup> M. Elliott and R. Thomas, "Tribunal justice and proportionate dispute resolution" (2012) 71(2) CLJ 297, 309; M. Elliott and R. Thomas, "Cart and Eba—the new tribunals system and the courts", UK Constitutional Law Blog (5 October 2011), available at:

<https://ukconstitutionallaw.org/2011/10/05/mark-elliott-and-robert-thomas-cart-and-eba%20%94the-new-tribunals-system-and-the-courts/> [Accessed 31 December 2017].

<sup>17</sup> On which see *Cart*, above fn. 14, [2011] UKSC 28 at [128]-[134] (Lord Dyson).

<sup>18</sup> M. Elliott and R. Thomas, "Tribunal Justice", above fn. 16, 312. See *Cart*, above fn. 14, [2011] UKSC 28 at [47] (Lady Hale). [89] (Lord Phillips) [100] (Lord Brown), [104] (Lord Clarke), [124]-[126] (Lord Dyson).

<sup>19</sup> It is notable likewise that the TCEA 2007 was intended to produce a coherent structure for the delivery of administrative justice. See: Andrew Leggatt, *Tribunals for Users: One System, One Service* (March 2001), "Terms of Reference".

<sup>20</sup> *Noor v HMRC* [2013] UKUT 071 (TCC), [2013] STC 998.

<sup>21</sup> *Noor v HMRC*, above fn. 20, [2013] UKUT 071 (TCC) at [29], [76]-[78].

<sup>22</sup> *Reed Employment plc and others v Revenue and Customs Commissioners* [2014] UKUT 160 (TCC) [343], [2014] STC 1982, 2068. The Upper Tribunal in *British Disabled Flying Association v Revenue and Customs Commissioners* [2013] UKUT 162 [52], [2013] STC 1677, 1689 also adopted the reasoning in *Noor v HMRC* but without giving reasons for doing so.

Appeal in *Trustees of BT Pension Scheme v HMRC*<sup>23</sup> similarly noted that “when one of the tax tribunals was intended to be able to determine public law claims Parliament made that expressly clear”.<sup>24</sup> Indeed, it is a strong argument that as Parliament has not provided a key to the front door, it would be inappropriate to imply that one can sneak in through the back. More recently, the Court of Appeal in *Samarkand Film Partnership No. 3 v Revenue and Customs*<sup>25</sup> also noted that the First-tier Tribunal did not have jurisdiction to consider the lawfulness of a possible breach of legitimate expectation by HMRC.<sup>26</sup> However, it was not argued otherwise by the parties in the case and so did not expressly reject *Oxfam*.

In brief, the current position is that the First-tier Tax Tribunal may only consider public law complaints where a statutory provision allows it to do so. How broadly the provisions can be read is the subject of conflicting judgments<sup>27</sup> at the same level of authority,<sup>28</sup> though a restrictive reading has found more favour in recent years.

## Reasons to amend the law

It will be argued in this section that the current constraint on allowing public law claims to be heard in the tribunals is overly restrictive. This becomes evident when one considers the policy behind this restriction, the competence of the tribunals, the practical advantages to loosening the restriction and the arguments against such a move. These matters will be considered in turn.

### *Policy behind the restriction*

Given that jurisdiction to hear public law claims is governed by statute, it is worth considering the reason the primary governing statute TCEA 2007 only allows for the tribunals to consider public law issues in limited circumstances. The Leggatt Report,<sup>29</sup> which brought about the formalization of the tribunals regime in 2007, did little to elaborate upon why First-tier Tribunals such as the tax tribunal should not be entitled to deal with issues of judicial review. The Review notes merely that it was suggested in the case of the VAT and Duties Tribunal that it might usefully exercise a judicial review function at first instance.<sup>30</sup> This was rejected however “[i]f only for reasons of the greater complexity of the procedure”<sup>31</sup>

Reason for restricting the scope of the tribunals’ jurisdiction can be found in the debates on the underlying Bill in the Houses of Parliament. It was *perceived* that the tribunals lacked sufficient expertise. For instance, at the third reading of the Bill in

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<sup>23</sup> *Trustees of the BT Pension Scheme v Revenue and Customs Commissioners* [2015] EWCA Civ 713, [2016] STC 66

<sup>24</sup> *Trustees of the BT Pension Scheme*, above fn. 23, [2015] EWCA Civ 713 at [143].

<sup>25</sup> *Samarkand Film Partnership No. 3 & Ors v Revenue and Customs* [2017] EWCA Civ 77, [2017] STC 926.

<sup>26</sup> *Samarkand v Revenue and Customs*, above fn. 25, [2017] EWCA Civ 77 at [2].

<sup>27</sup> It has been claimed that the cases can be reconciled. For instance, in *Rotberg v HMRC* [2014] UKFTT 657 (TC); *Garrod v HMRC* [2015] UKFTT 0353 (TC). Cf: *Sigma Security Systems v HMRC* [2013] UKFTT 329 (TC).

<sup>28</sup> On which, see: *Secretary of State for Justice v RB* [2010] UKUT 454 (AAC), [2011] MHLR 37, at [40].

<sup>29</sup> *Leggatt Report*, above fn. 19.

<sup>30</sup> *Leggatt Report*, above fn. 19, at [6.8].

<sup>31</sup> *Leggatt Report*, above fn. 19, at [6.8].

the House of Lords, several members expressed their opinion that judicial review should only be exercised by those with expertise in such matters. Lord Campbell noted that the exercise of discretion in judicial review cases called for “judicial expertise”.<sup>32</sup> At the second sitting of the Public Bill Committee, Vera Baird (the Parliamentary Under-Secretary of State for Justice at the time) acknowledged that the purpose of allowing transfers from the High Court to Upper Tribunal in selected cases was to “harness the expertise that is likely to be available in that forum on the special kinds of business that the tribunal system takes care of”.<sup>33</sup> Indeed, in the Explanatory Notes to the Act, it is noted that the provision would “allow the parties to have the benefit of the specialist expertise of the Upper Tribunal in cases similar to those with which the Upper Tribunal routinely deals in the exercise of its statutory appellate jurisdiction”.<sup>34</sup>

Importantly it is not a requirement that judicial review matters can only be considered by the Upper Tribunal where the panel is formed solely of High Court judges,<sup>35</sup> although there must be one “judge” of the Upper Tribunal sitting in the panel.<sup>36</sup> “Judges” of the Upper Tribunal are appointed on the recommendation of the Lord Chancellor and must have significant experience with the law (such as 7 years of practice as a barrister or solicitor).<sup>37</sup> As such, what is relevant is expertise in dealing with issues of public law, not the particular form of the relevant decision-maker. In this respect, an amendment to the Tribunals, Courts and Enforcement Bill which would have meant that cases could be transferred only to the Upper Tribunal where the panel consisted only of High Court judges was rejected on the basis that persons other than High Court justices can be sufficiently competent to deal with public law issues.<sup>38</sup>

If the purpose of restricting who can hear judicial review claims is that such matters should only be dealt with by the persons properly competent to do so, then it follows that the competence of the First-tier Tax Tribunal should be analysed. If it can be shown that the body has sufficient expertise to consider public law matters, then the rationale for restricting the body’s jurisdiction falls away.

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<sup>32</sup> HL Deb 20 Feb 2007, vol 689, col 1007.

<sup>33</sup> Tribunals, Courts and Enforcement Bill 15 March 2007, col 37.

<sup>34</sup> Explanatory Notes to Tribunals, Courts and Enforcement Act 2007, at [122].

<sup>35</sup> See Senior Courts Act 1981, s 31A(3). This can be contrasted with TCEA 2007, s. 18(8) where a High Court judge must be presiding where there is a judicial review of an unappealable First-tier decision (such other persons as may be agreed from time to time between the Lord Chief Justice, the Lord President, or the Lord Chief Justice of Northern Ireland, as the case may be, and the Senior President of Tribunals). On which, see: Classes of cases specified under section 18(6) of the Tribunals, Courts and Enforcement Act 2007 (Practice Direction), s. 2(b).

<sup>36</sup> Composition of Tribunals in relation to matters that fall to be decided by the Tax chamber of the First-tier Tribunal and the Finance and Tax Chamber of the Upper Tribunal on or after 1 April 2009 (Practice Statement), s. 11.

<sup>37</sup> TCEA 2007, Sch. 3, s. 1.

<sup>38</sup> HL Deb 20 Feb 2007, vol 689, cols 1007-1009.

### *Competence of the First-tier Tax Tribunal*

Dr Avery Jones has argued that the First-tier Tax Tribunal ought to be entitled to hear public law issues.<sup>39</sup> not as a matter of “principle”,<sup>40</sup> but rather because the Tribunal already hears public law issues.<sup>41</sup> This is a strong argument for extending the jurisdiction of the First-tier Tribunal, namely, that the body has the practical expertise to consider matters of public law. Indeed, it is this logic that permitted extending the jurisdiction of the Upper Tribunal to consider cases of judicial review. To this end, if it can be shown that the First-tier Tribunal has the requisite expertise, then it should be equally permitted to consider judicial review cases.

Although the classification is not without difficulty,<sup>42</sup> it is orthodox to start by noting that there are three primary grounds for judicial review when discussing the grounds for review: illegality, unreasonableness and procedural impropriety.<sup>43</sup> Proportionality and legitimate expectation are both claims that can be made in judicial review proceedings, but whether these are subsumed by the aforementioned three primary grounds or constitute their own independent grounds for review is a matter of continuing debate.<sup>44</sup> In tax cases at least, legitimate expectation claims are generally dealt with as an independent ground for review.<sup>45</sup> If it can be demonstrated that the First-tier Tribunal is already endowed with the jurisdiction to consider issues in respect of all the different grounds for review, then it follows that the body has the requisite expertise to consider public law issues generally. The article will approach this task by demonstrating that the First-tier Tribunal is already endowed with responsibility for considering public law issues under the different heads of review. Although these heads cover a wide spectrum of potential claims, the important point is that under each the critical judicial task is the balancing of public law considerations. While the article will only look at a select few examples, it can be extrapolated from these that the Tribunal is more generally competent. Finally, it should be noted that in his above cited article for the *British Tax Review*, Dr Avery Jones highlighted briefly some provisions where the lower Tribunal may deal with

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<sup>39</sup> J. F. Avery Jones, “The reform of the tax tribunals: a story of uncompleted business” (2006) BTR 282, 291-293; Avery Jones, “Tax appeals”, above fn. 4, 13.

<sup>40</sup> Avery Jones, “The reform of the tax tribunals”, above fn. 39, 291; Avery Jones, “Tax appeals”, above fn. 4, 13.

<sup>41</sup> Avery Jones, “The reform of the tax tribunals”, above fn. 39, 291; Avery Jones, “Tax appeals”, above fn. 4, 13.

<sup>42</sup> M. Elliott and R. Thomas, *Public Law*, 3<sup>rd</sup> edn (Oxford: Oxford University Press, 2017), 497. Sarah Nason has also proposed a different taxonomy, see: S. Nason, *Reconstructing Judicial Review* (Oxford: Hart Publishing 2016).

<sup>43</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (Lord Diplock).

<sup>44</sup> For instance in *R. v IRC, ex p Unilever plc* [1996] STC 681 it was mooted that legitimate expectations claims could be subsumed within the banner of “Wednesbury unreasonableness”. See the discussion in *Pham v Secretary of State for the Home Department* [2015] UKSC 19, [2015] 1 WLR 1591 on the differences between proportionality and reasonableness.

<sup>45</sup> See, for instance, *R. (on the application of Davies and another) v Commissioners for HM Revenue and Customs*; *R. (on the application of Gaines-Cooper v Commissioners for HM Revenue and Customs* [2011] UKSC 47; *R. (on the application of Cameron) v RCC* [2012] EWHC 1174 (Admin), [2012] STC 1691; *R. (on the application of Hely-Hutchinson) v HMRC* [2015] EWHC 3261. It should be noted that breach of a legitimate expectation does not itself provide a successful claim, it must be additionally proved that the breach of the expectation is conspicuously unfair (*Unilever*, above fn. 44, [1996] STC 681, 697 (Simon Brown LJ)) such that it amounts to an abuse of power. In this sense, it would be more correct for the courts to use the heading “abuse of power” rather than “legitimate expectation”.

public law issues.<sup>46</sup> This section should in this sense be seen as further developing Dr Avery Jones' argument.

### Illegality

Illegality is a broad category which encompasses those decisions made by public authorities that the bodies did not have authority to do. It applies to situations where the decision-maker has used a power for an improper purpose, has taken account of irrelevant considerations (or failed to take account of relevant considerations), has unlawfully delegated decision-making power, or has fettered her discretion.<sup>47</sup> Importantly, there are statutory provisions which entitle the First-tier Tribunal to consider the “illegality” of HMRC actions in respect of these situations. Paragraph 3A of Schedule 1AB of the Taxes Management Act 1970 for instance sets out the requirements for a claim to “special relief” (a claim for repayment of tax more than four years after the end of the relevant tax year). HMRC is not required to repay the tax unless three conditions are satisfied,<sup>48</sup> Condition A of which is relevant for present purposes. This is that “in the opinion of the Commissioners it would be unconscionable for the Commissioners to seek to recover the amount”. This requires the Tribunal to take account of judicial review principles,<sup>49</sup> including whether the Commissioners’ discretionary power has been used for an improper purpose.<sup>50</sup> Meanwhile, section 16(4) of the Finance Act 1994 requires the Tribunal to ascertain whether irrelevant considerations have been taken into account when assessing the reasonableness of an HMRC Officer refusing to restore seized goods.<sup>51</sup>

### Unreasonableness

Where litigants attempt to challenge the “reasonableness” of decisions in judicial review proceedings, their challenge goes more towards the merits of a particular decision. In relation to this ground, the First-tier Tribunal is given jurisdiction by various statutory provisions to assess the “reasonableness” of HMRC actions. Section 16(4) of the Finance Act 1994 permits the Tribunal to consider whether the refusal by an Officer of the UK Border Force (following a review) to restore items seized at the border was a decision which “could not reasonably have arrived at”.<sup>52</sup> Elsewhere, section 83(1) of the Value Added Tax Act 1994 in certain circumstances allows the Tribunal to assess the reasonableness with which HMRC has exercised its statutory discretion. By way of background, a taxable person is not entitled to input tax credit

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<sup>46</sup> Avery Jones, “The reform of the tax tribunals”, above fn. 39, 291, footnote 54; Avery Jones, “Tax appeals”, above fn. 4, 13, footnote 42.

<sup>47</sup> Turpin and Tomkins, above fn. 5, 669-677.

<sup>48</sup> Taxes Management Act 1970, Schedule 1AB, para 3A (3).

<sup>49</sup> See *Pegasus Birds v Customs & Excise Commissioners* [1999] STC 95, 101.

<sup>50</sup> *Donald Fitzroy Currie v HMRC* [2014] UKFTT 882 (TC), at [29]. See also *Qualapharm Limited v HMRC* [2016] UKFTT 100 (TC), at [42] where it is speculated that the Tribunal could consider whether a penalty has been issued for an “improper purpose”.

<sup>51</sup> *Lindsay v Customs & Excise Commissioners* [2002] EWCA Civ 267, at [40] (Lord Phillips). See also: *Customs & Excise Commissioners v JH Corbitt (Numismatists) Ltd* [1981] AC 22, 40 (Lord Lane).

<sup>52</sup> On which, see *Juliet Forster-Copperi v Director of Border Revenue* [2016] UKFTT 157 (TC); *Bakht v Director of Border Revenue* [2014] UKFTT 551 (TC); *Brian Talbot v Director of Border Revenue* [2012] UKFTT 381 (TC).

unless that person holds a tax invoice. However, the Commissioners have a statutory discretion to allow credit for input tax notwithstanding that the registered person does not hold such a tax invoice.<sup>53</sup> The First-tier Tribunal has supervisory jurisdiction to review the reasonableness of the exercise of this discretion.<sup>54</sup>

### Procedural Impropriety

The Human Rights Act (HRA) 1998 made a considerable change to the public law landscape by allowing litigants to take cases in UK courts considering infringements of the European Convention on Human Rights (ECHR). By virtue of section 3 of the HRA 1998, primary and subordinate legislation must be read and given effect in a way which is compatible with Convention rights. As Mosedale J has noted:

“The effect of this is that primary and secondary legislation must be read in so far as possible as consistent with the Convention. This goes well beyond giving legislation a purposive interpretation: the legislation must be read as consistent with the Convention if at all possible to do so”<sup>55</sup>

Importantly, this requires the First-tier Tribunal to construe legislation in light of Article 6 of the ECHR which applies to administrative proceedings that determine the “civil rights and obligations [of an individual] or of any criminal charge against him”. In such a case, the person concerned is “entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal”. Article 6 also guarantees minimum rights for those persons charged with a criminal offence, such as to be informed in detail and promptly of the nature and scope of the accusation. These obligations overlap (and at times extend)<sup>56</sup> those required at common law in respect of procedural propriety. To this end, Article 6 imposes procedural fairness requirements upon certain acts of HMRC which are in turn subject to the jurisdiction of the First-tier Tribunal. Cases in which procedural impropriety issues through the median of Article 6 have been raised include *Aqua Products Limited v HMRC*<sup>57</sup> (whether a thirty day time limit in which to appeal infringes appellant’s Convention rights), *Lindsay Hackett v HMRC*<sup>58</sup> (whether HMRC’s decision to proceed by way of personal liability notice infringed Article 6), *Mr D v HMRC*<sup>59</sup> (whether a Tribunal hearing should be *in camera*), and *Westminster College of Computing v HMRC*<sup>60</sup> (whether a failure to give a taxpayer sufficient time to prepare his case amounted to an infringement of Article 6).

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<sup>53</sup> See *Kohanzad v Commissioners of Customs and Excise* [1994] STC 697, 969 (Schiemann J) on how to interpret Regulation 29(2) of the Value Added Tax Regulations 1995.

<sup>54</sup> *Kohanzad v Commissioners of Customs and Excise* [1994] STC 697; *Best Buys v HMRC* [2011] UKUT 497 (TCC), at [49]-[50], [2012] STC 885, at [49]-[50].

<sup>55</sup> *LH Bishop v HMRC* [2013] UKFTT 522 (TC), at [190].

<sup>56</sup> H. William Wade and Christopher F. Forsyth, *Administrative Law*, 11<sup>th</sup> edn (Oxford: Oxford University Press 2014), 405.

<sup>57</sup> *Aqua Products Limited v HMRC* [2013] UKFTT 340 (TC).

<sup>58</sup> *Lindsay Hackett v HMRC* [2016] UKFTT 781 (TC).

<sup>59</sup> *Mr D v HMRC* [2017] UKFTT 850 (TC).

<sup>60</sup> *Westminster College of Computing v HMRC* [2014] UKFTT 669 (TC).

### Proportionality

Proportionality may be either a distinct ground for judicial review, or may be largely subsumed within “reasonableness”. What is uncontroversial is that proportionality analysis will be engaged where EU law or ECHR rights are concerned. In *de Freitas v Permanent Secretary of the Ministry of Agriculture, Land and Housing*,<sup>61</sup> the test for proportionality was formulated as follows:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."<sup>62</sup>

For present purposes, it is sufficient to briefly note that the Tribunal must engage in proportionality analysis when considering the purported infringement of rights under the ECHR.<sup>63</sup> The Tribunal must also engage in proportionality analysis in respect of EU law.<sup>64</sup>

### Legitimate Expectation

Lord Carnwath in the recent Privy Council case of *The United Policyholders v Attorney General for Trinidad and Tobago*<sup>65</sup> surveyed the cases concerning the doctrine of legitimate expectations and the accompanying academic commentary before summarising the doctrine as follows:

“Where a promise or representation, which is “clear, unambiguous and devoid of relevant qualification”, has been given to an identifiable defined person or group by a public authority for its own purposes, either in return for action by the person or group, or on the basis of which the person or group has acted to its detriment, the court will require it to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. In judging proportionality the court will take into account any conflict with wider policy issues, particularly those of a “macro-economic” or “macro-political” kind.”<sup>66</sup>

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<sup>61</sup> *de Freitas v Permanent Secretary of the Ministry of Agriculture, Land and Housing* [1999] 1 AC 69.

<sup>62</sup> *de Freitas*, above fn. 61, [1999] 1 AC 69, 80.

<sup>63</sup> See for instance *Trinity Mirror v HMRC* [2014] UKFTT 355 (TC); *Rockliff v Her Majesty's Revenue & Customs* [2009] UKFTT 162 (TC).

<sup>64</sup> For instance, see: *Highland Wood Energy v HMRC* [2016] UKFTT 420 (TC); *Imperial v HMRC* [2015] UKFTT 0033 (TC).

<sup>65</sup> *The United Policyholders Group and others v The Attorney General of Trinidad and Tobago* [2016] UKPC 17, [2016] WLR 3383.

<sup>66</sup> *United Policyholders*, above n 61, [2016] UKPC 17 at [121] (Lord Carnwath).

Although the First-tier Tribunal has no “general supervisory jurisdiction”<sup>67</sup> and hence cannot generally hear legitimate expectation cases, there are nevertheless circumstances where it can consider issues which usually come within the ambit of that doctrine. In *Spring Salmon v HMRC*<sup>68</sup> for instance, the First-tier Tribunal considered whether HMRC was prevented from pursuing tax due owing to a prior agreement between the taxpayer and HMRC. The First-tier Tribunal ultimately held against the taxpayer on the point, finding that there was no agreement which arose upon which the taxpayer could rely.<sup>69</sup> However, the Tribunal adopted the same approach which would be taken when considering claims under the doctrine of legitimate expectation. The Tribunal approached the issue by looking at three separate facets: the terms of any agreement, whether the conditions of such an agreement had been satisfied, and whether the agreement was implemented.<sup>70</sup> In the language of legitimate expectations, this would equate to asking whether there was a representation made which was clear, unambiguous and devoid of qualification upon which the taxpayer could and did rely. In rejecting the claim, the Tribunal used language which is to be found in legitimate expectation cases, noting that the assurance by HMRC was “guarded” and “qualified” thereby preventing an agreement from arising.<sup>71</sup>

Further, the analysis which was deployed in respect of the ECHR in relation to “Procedural Impropriety” above<sup>72</sup> can be used here to demonstrate that the First-tier Tribunal may consider legitimate expectations in certain circumstances. Article 1 of the First Protocol to the ECHR protects the “peaceful enjoyment of possessions”, within which a claim for a substantive legitimate expectation can be made. A legitimate expectation claim must be incidental to a property right in order for it to garner the protection of the First Protocol.<sup>73</sup> Thus, if a property right is present,<sup>74</sup> for instance such as a right to recover input tax,<sup>75</sup> a claim to a legitimate expectation can be considered by the First-tier Tribunal.<sup>76</sup>

#### *Practical advantages to loosening the restriction*

Having identified that the policy behind restricting the ability of the First-tier Tribunal to consider public law matters is on the basis of expertise, and having established that the body is competent to adjudicate on such issues, it still needs to be established what exactly would be the benefit to broadening the jurisdiction of the First-tier Tribunal. Primarily, it is that it would no longer be necessary to maintain two separate proceedings dealing with different sides or aspects of the same case. This has

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<sup>67</sup> See: *Revenue and Customs Comrs v Hok Ltd* [2012] UKUT 363 (TCC) [36], [41], [2013] STC 225, 234, 235; *Oxfam*, above fn. 9, [2009] EWHC 3078 (Ch), 712; *Noor v HMRC*, above fn. 20, [2013] UKUT 071 (TCC), at [30].

<sup>68</sup> *Spring Salmon v HMRC* [2014] UKFTT 887 (TC).

<sup>69</sup> *Spring Salmon*, above fn. 68, [2014] UKFTT 887 (TC) at [258]-[270].

<sup>70</sup> *Spring Salmon*, above fn. 68, [2014] UKFTT 887 (TC) at [259].

<sup>71</sup> *Spring Salmon*, above fn. 68, [2014] UKFTT 887 (TC) at [263].

<sup>72</sup> See “Procedural Impropriety” in text at fn. 54 onwards.

<sup>73</sup> *Prince Hans-Adam II of Liechtenstein v. Germany* (42527/98) [2001] ECHR 463, at [83].

<sup>74</sup> See *R. (Carvill) v IRC (No2)* [2003] STC 1539, at [49].

<sup>75</sup> On which, see: *Bulves AD v Bulgaria* (3991/03) [2009] ECHR 143; *Aleena Electronics Ltd v Revenue & Customs* [2011] UKFTT 608 (TC), at [38]-[44].

<sup>76</sup> What amounts to a possession for tax purposes was recently considered by Lord Justice McCombe in *R. (on the application of Rowe and Vital Nut) v HMRC* [2017] EWCA Civ 2105, at [158]-[185].

important practical advantages and can also be supported by an argument based on deference.

Fundamentally then, the great advantage of this proposal is that it would dispel with the need for two proceedings considering different aspects of the same case. There is a “clear public benefit” in allowing the Tribunal to consider public law points as it is well-positioned to make judgments about the fair treatment of taxpayers and this reduces cost, delay, potential injustice and confusion.<sup>77</sup> Having the one tribunal hear arguments on two separate points, one going to substance and the other going to public law concerns, allows the Tribunal to consider whether findings of fact are necessary for determining both points, or whether a finding on one point will vitiate the need to make a finding on the other. As noted by Lord Justice Hughes (as he then was) in *Davies v Revenue and Customs*:<sup>78</sup> “it is undoubtedly good general practice to ensure, so far as possible, that a challenge in law by way of judicial review is mounted on the basis of known facts”.<sup>79</sup> The Tribunal can also apply its expertise in deciding which issues ought to be resolved first, as the resolution of one may render resolution of the other redundant!<sup>80</sup> This would avoid precisely the situation which arose in the joined cases of *Davies* and *Gaines-Cooper*.<sup>81</sup> In the Supreme Court, two sets of judicial review proceedings were heard together. The procedural history of the two however was quite distinct. The first appellants had stayed the substantive hearing until after the judicial review whilst the second appellant had pursued the substantive appeal and thereafter instituted judicial review proceedings. Given that a successful judicial review would render the investment of time and resources by the Revenue in challenging the substantive case redundant, Lord Wilson labelled it “unfortunate” that the course taken in the case of the first appellants was not taken in the case of the second.<sup>82</sup> At the same time, hearing the substantive appeal first would also pre-empt and for all intents and purposes determine the outcome of the judicial review proceedings, as Lord Justice Hughes noted in *Davies v Revenue and Customs*.<sup>83</sup>

The prudence of extending the jurisdiction of the First-tier Tribunal to consider issues of public law where they are relevant to resolving a dispute is particularly present today. HMRC has acquired a series of novel powers which seek to nudge taxpayers away from tax avoidance activities and also away from delaying the collection of tax by engaging in litigation. Crucially, where these are challenged by taxpayers, there may also be an underlying dispute about how the underlying substantive law applies to the relevant facts.<sup>84</sup> This in turn would render it prudent to have one forum consider both sets of issues. For instance, consider the introduction of

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<sup>77</sup> *Oxfam*, above fn. 9, [2009] EWHC 3078 (Ch), at [70].

<sup>78</sup> *Davies v Revenue and Customs* [2008] EWCA Civ 933.

<sup>79</sup> *Davies v Revenue and Customs*, above fn. 78, [2008] EWCA Civ 933, at [7].

<sup>80</sup> On which, see: *Reed Employment v HMRC* [2010] UKFTT 596 (TC), at [18]-[27], in particular at [24].

<sup>81</sup> *Gaines-Cooper*, above fn. 45, [2011] UKSC 47.

<sup>82</sup> *Gaines-Cooper*, above fn. 45, [2011] UKSC 47, at [6].

<sup>83</sup> *Davies v Revenue and Customs*, above fn. 78, [2008] EWCA Civ 933, at [17]-[18].

<sup>84</sup> In addition to Accelerated Payment Notices (and Partner Payment Notices), one could also consider Follower Notices, the General Anti-Abuse Rule and its penalty regime, and the Serial Avoiders Scheme. The Disclosure of Tax Avoidance Scheme and Promoters of Tax Avoidance Scheme rules are also a means of nudging in this manner particularly when used as a proxy for determining whether notices (Accelerated, Partner or Follower) requiring the upfront payment of tax should be issued. A recent discussion paper from the IFS helpfully highlights the development of these “new” regulatory powers. See: Tracey Bowler, “The implications of recent additions to HMRC powers and the shifting balance in the relationship with taxpayers” (Institute for Fiscal Studies, November 2017).

Accelerated Payment Notices (APNs). The APN regime broadly requires that taxpayers pay disputed tax upfront, before being able to challenge HMRC's assessment through the normal channels. APNs may be issued where the following conditions are present:<sup>85</sup>

1. Either an enquiry or appeal are in progress;
2. A tax advantage accrues from the particular arrangements; and
3. A follower notice has been issued;<sup>86</sup> the arrangements are DOTAS notifiable;<sup>87</sup> or a GAAR counteraction notice has been issued<sup>88</sup>

Once an APN has been issued to the taxpayer, the money becomes payable within 90 days.<sup>89</sup> There is no right of appeal against the APN, but merely the right to make representations to HMRC, as a means only of objecting to either the satisfaction of the conditions or to the amount submitted to be due.<sup>90</sup> After taking into account the representations, HMRC may refuse to withdraw the APN.<sup>91</sup> If an APN has been issued to a taxpayer who entered into the once seemingly popular film schemes, the amount due could well be into the hundreds of thousands of pounds.<sup>92</sup> Taxpayers are left with little option but to fight the APN, but without any right of appeal against the APN available, the only route which can be taken is through the Administrative Court. Partner Payment Notices (PPNs) are almost identical to APNs but apply to parties who have invested through partnerships.<sup>93</sup>

As of March 2017, 87 judicial review applications had been launched in relation to APNs and PPNs, with 4,116 applicants or potential applicants seeking interim relief from APNs/PPNs which HMRC's records show amounted to a total sum in excess of £756m.<sup>94</sup> Importantly for the purposes of this article, these judicial review applications relate to cases where there is additionally a substantive dispute between the parties,<sup>95</sup> with the likelihood that many would proceed to the FTT by way of appeal. Crucially there must be genuine substance to HMRC's claim for tax. In *R. (on the application of Rowe and Vital Nut v HMRC)*,<sup>96</sup> the Court of Appeal confirmed that an APN or PPN could not be issued *anytime* that a scheme had been notified under DOTAS. Rather, such a notice could only be issued where HMRC had been *positively* satisfied that the scheme notified under DOTAS would also be ineffective.<sup>97</sup> This was because the amount of tax that must be paid upfront, known as the "disputed tax", is to be determined by a designated officer in HMRC using the

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<sup>85</sup> Finance Act 2014, s. 219.

<sup>86</sup> See Finance Act 2014, s. 204.

<sup>87</sup> See Finance Act 2003, s. 311.

<sup>88</sup> See Finance Act 2013, Schedule 43, para 12.

<sup>89</sup> Finance Act 2014, ss. 223(4) and 223(5). Where representations have been made, this can have the effect of delaying the date for repayment by up to 30days.

<sup>90</sup> Finance Act 2014, s. 222.

<sup>91</sup> Finance Act 2014, s. 222(4).

<sup>92</sup> See for instance: Adam Palin, "Tax schemes: HMRC urged to stop bankrupting investors" *Financial Times* (London, 20 November 2015).

<sup>93</sup> See Finance Act 2014, s. 228 and Schedule 32. See also HMRC, *Compliance checks series – CC/FS24*, 1, available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/580530/CC-FS24-11-16.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/580530/CC-FS24-11-16.pdf) [Accessed 31 December 2017].

<sup>94</sup> *R (VVB Engineering Services Ltd & Ors) v HMRC* [2017] EWHC 506 (Admin), at [10].

<sup>95</sup> See Finance Act 2014, s. 219 and paragraph 2 of Schedule 32.

<sup>96</sup> *Rowe and Vital Nut*, above fn. 76, [2017] EWCA Civ 2105.

<sup>97</sup> *Rowe and Vital Nut*, above fn. 76, [2017] EWCA Civ 2105, at [62] and [220].

“best of the officer’s information and belief”.<sup>98</sup> The Court of Appeal read this as requiring positive satisfaction as to the ineffectiveness of the underlying scheme.<sup>99</sup>

Thus, it is necessary for the court to make a determination as to whether there is merit in HMRC’s claim that the tax is due. With APNs accordingly, there is a clear case for allowing the First-tier Tribunal to consider the merits of a public law point. It will be hearing the substantive dispute at any rate, but also importantly, findings of fact can lead to the resolution of both disputes. Given the interdependence of the issues, it would be prudent in such a case to extend the jurisdiction of the Tribunal to allow it to consider the public law issues.<sup>100</sup> The Tribunal could exercise its expertise to decide which issues ought to be resolved first.<sup>101</sup>

The justification for extending the jurisdiction of the First-tier Tribunal where there is a substantive dispute may also be buttressed by an argument based on “deference”. One of the most basic purposes of administrative law is the allocation of responsibility for decision-making. The role of the court in judicial review is generally not to decide what the correct decision should be. It is to decide upon whether the processes that led to that decision were proper.<sup>102</sup> This does not prevent the courts entirely from intruding upon the merits of a decision, some decisions are unreasonable for instance and may be overturned.<sup>103</sup> But the degree to which the courts may intervene in respect of the merits of a decision is controlled by the principle of deference: that the courts should defer to the decision arrived at by the official or entity vested with the decision-making power. As Endicott points out,<sup>104</sup> this process of not second-guessing decisions is justified on the basis of the *legal allocation of power* (that officials, and not the courts, have been vested with the power by a sovereign Parliament), *expertise* (the official will be institutionally competent to take the decision), *political responsibility* (the processes for political accountability for decisions will be established in the case of the official) and *processes* (courts are constrained by rules of judicial process, such as rules on evidence, as to what factors are relevant for a decision, whereas the primary decision-maker will have greater resources and capabilities for information, and will be more attuned accordingly to the relevant information).

This idea of deference to decision-makers however is turned on its head in the case of the First-tier Tribunal which is a body staffed with tax experts acutely attuned to the vagaries of HMRC actions. Dealing with Endicott’s four concerns: (i) The

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<sup>98</sup> Finance Act 2014, s. 221(3) and paragraph 4 of Schedule 32.

<sup>99</sup> This overturned the onus of proof established by the High Court in *R. (on the application of Vital Nut) v HMRC* [2016] EWHC 1797 (Admin), at [35], [2016] 4 WLR 144.

<sup>100</sup> The same case can be made in respect for instance of the operation of the Diverted Profits Tax (DPT), which aims to counteract contrived arrangements used by large groups that result in the erosion of the UK tax base (Explanatory notes to Finance Act 2015, s. 77). As with the APN regime, taxpayers are required to pay disputed tax upfront where a Charging Notice has been issued pursuant to the DPT provisions (see generally: Finance Act 2015, Part 3) and similarly, it is a prerequisite to the issuance of a notice that the relevant HMRC believes tax to be due as a matter of substantive law (on this, see: for instance *R. (on the application of Glencore) v Revenue and Customs* [2017] EWCA Civ 1716, at [73]-[78], [2017] WLR(D) 723). To this end, there is a substantive tax law dispute in addition to a potential judicial review claim, where the determination in the former would be an important factor in the resolution of the latter.

<sup>101</sup> On which, see: *Hankinson v HMRC* [2009] UKFTT 384 (TC) [114]-[115].

<sup>102</sup> *Council of Civil Service Unions*, above fn. 43, [1985] ICR 14, 28-29 (Lord Fraser), 33-34 (Lord Scarman) 39 (Lord Diplock), 41-42 (Lord Roskill), 50-51 (Lord Brightman).

<sup>103</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223. See also Senior Courts Act 1981, s. 31(5A) which allows a judge to remake a quashed decision

<sup>104</sup> Timothy Endicott, *Administrative Law*, 3<sup>rd</sup> edn (Oxford: Oxford University Press, 2014), 234-236.

Tribunal has been legally allocated power to adjudicate upon disputes concerning HMRC and taxpayers. (ii) It has unique institutional competence and expertise. (iii) HMRC is a non-ministerial governmental body which is lacking in oversight mechanisms, which has been articulated elsewhere.<sup>105</sup> Broadening the jurisdiction of the Tribunal would then in fact enhance the accountability of HMRC and its staff. (iv) The First-tier Tribunal adjudicates disputes *de novo* and as such does step into the shoes of the primary decision-maker, equipped with all the relevant information to arrive at a decision. That the Tribunal satisfies these conditions is in fact another reason why the body ought to be extended the opportunity to consider public law issues.

### *Counterarguments*

Having established a positive case for extending the jurisdiction of the First-tier Tribunal, it is worth considering the counterarguments. A potential reason for restricting the ability to hear public law claims is the problem of “complexity”, which was highlighted in the Leggatt Report. The formalisation of the tribunals’ regime was intended to introduce a clear, streamlined approach to appeals through the tribunals.<sup>106</sup> Allowing public law claims to be raised in the First-tier Tax Tribunal only, but not in for instance the Immigration or Employment Tribunals, undermines this consistency and adds complexity. In response, the status quo already creates unnecessary complexity for the ordinary taxpayer who may have to participate in two separate sets of proceedings in different courts. Furthermore, this objection overlooks the point that some public law claims can already be brought in the First-tier Tribunal.<sup>107</sup>

A second counterargument is that there is already a mechanism for having one tribunal, namely the Upper Tribunal, consider all matters, both substantive and public law points, relevant to the resolution of a dispute between HMRC and the taxpayer. The judicial review case can be transferred from the Administrative Court to the Upper Tribunal, whilst the substantive appeal can be transferred from the First-tier Tribunal to the Upper Tribunal.<sup>108</sup> This argument however neglects the fact that the First-tier Tribunal is expert at making determinations on facts, whilst appeal to the Upper Tribunal traditionally lies only on points of law. The proposal here is to broaden the jurisdiction of the First-tier Tribunal *where there is a substantive dispute*, which in turn requires determinations of fact. Although the Upper Tribunal can make factual determinations, and indeed High Court judges often hear witness actions, it is the First-tier Tribunal which is more expertly constituted to make such determinations. In this sense, the counterargument that the Upper Tribunal could hypothetically hear both the judicial review case and the substantive case misses a critical component of this proposal. Disputes should be resolved in the forum best placed to do so, and in this case, that is the First-tier Tribunal.

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<sup>105</sup> S. Daly, “Oversight of HMRC Soft Law: Lessons from the Ombudsman” (2016) 38(3) Journal of Social Welfare and Family Law 343.

<sup>106</sup> See for instance *Leggatt Report*, above fn. 19, at [6.2].

<sup>107</sup> It is notable also that the scope of the First-tier Tribunal’s jurisdiction still confuses members of the Administrative Court. See: S. Daly, “Fairness in tax law and revenue guidance: *R. (Hely-Hutchinson) v HMRC*” (2016) 1 BTR 18, 20.

<sup>108</sup> Rule 28 of the First-tier Tax Tribunal Procedure Rules 2009 allows for a transfer of a “complex case” with the permission of the parties.

A third more powerful counterargument relates to practicality. Tribunals are intended to be, *inter alia*, quicker, cheaper and more informal than the courts.<sup>109</sup> Allowing judicial review claims wholesale would place an extreme burden upon the tribunal system. The ability to petition for judicial review is restricted quite heavily generally by virtue of a filtering system which imposes a significant threshold before a claim may proceed. As set out by Judge Mosedale in *LH Bishop v HMRC*,<sup>110</sup> Parliament cannot have intended for challenges to, effectively, the fairness of a provision to be brought in an unrestricted manner.<sup>111</sup> By limiting such claims to judicial review, and therein having a permission filter to weed out unmeritorious claims, it could be said that there is merit in preventing the Tribunal from hearing public law issues without limit.<sup>112</sup> Again, this argument also misses the point of this proposal. It is not intended that the jurisdiction of the First-tier Tribunal should be extended generally to consider public law issues. It is only that the First-tier Tribunal should be entitled to consider public law issues where it relates to an additional substantive dispute. If the claim on the public law issue is unmeritorious, the Tribunal can easily dismiss it when considering the other issues. The proposal then would not place any significant additional burden upon the Tribunal. In this sense, all that remains of this objection is that there would be an augmentation of taxpayers' access to justice in respect of protecting against impropriety on HMRC's part. That however is a good thing.

A fourth related contention would be that extending the scope of the First-tier Tribunal's jurisdiction in such a manner creates a sort of tax "opt-out" whereby the ordinary procedural rules of judicial review, such as that judicial review proceedings must be instituted within 90 days of the relevant decision,<sup>113</sup> do not apply. But again, this proposal only seeks to extend jurisdiction where there is a substantive dispute. In this scenario, if there is a good claim in judicial review, it infects HMRC's argument. For instance, where there is a dispute about whether tax is due, the taxpayer's argument may be that tax is not due both in law and because she had a legitimate expectation based upon an express assurance from HMRC. HMRC's claim that tax is due accordingly, even if in terms of the substantive tax law this is correct, could fail because of a public law claim.<sup>114</sup> That tax could be due or not is a matter of public law and substantive tax law. The two are inextricably linked. That HMRC should be able to claim tax that is not due simply because of the expiration of a restrictive time limit is unfair. It should further be recalled that some public law issues can already be heard at the First-tier Tribunal. In this sense, there is already a sort of tax "opt-out". Moreover, it should be noted that taxpayers must generally appeal HMRC decisions within 30 days.<sup>115</sup> If a taxpayer is seeking to appeal a decision of HMRC, the public

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<sup>109</sup> M. Elliott and R. Thomas, *Public Law*, 3<sup>rd</sup> edn (Oxford: Oxford University Press, 2017), 687; *Report of the Committee on Administrative Tribunals and Enquiries* (Cmnd 218, 1959), at [38].

<sup>110</sup> *LH Bishop v HMRC*, above fn. 55, [2013] UKFTT 522 (TC).

<sup>111</sup> *LH Bishop v HMRC*, above fn. 55, [2013] UKFTT 522 (TC), at [143]-[146].

<sup>112</sup> *LH Bishop v HMRC*, above fn. 55, [2013] UKFTT 522 (TC), at [143]-[146].

<sup>113</sup> Civil Procedure Rule 54.5.

<sup>114</sup> Though significant hurdles would remain. See: *Davies v Revenue and Customs*, above fn. 78, [2008] EWCA Civ 933, at [18].

<sup>115</sup> See for instance Taxes Management Act 1970, s. 31A(b). More generally, on timings in direct tax disputes, see: HMRC, *Reviews and appeals for direct taxes: Appealing against a decision: Customer does not reply to the decision within the time limits* (10 August 2016), available at:

<https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg2220>

[Accessed 31 December 2017]. On indirect tax disputes, see: HMRC, *Reviews and appeals for indirect taxes: Appealing against a decision or assessment: Time limit for making an appeal* (10 August 2016),

law ground that she may additionally seek to pursue will generally relate to that decision. In this sense, the taxpayer will likely come within the 90 day rule anyway.

Finally, it is tempting to argue that there is something intrinsically superior about the ability of the higher courts to consider public law issues.<sup>116</sup> In response, it is worth noting that the Lord Chief Justice, when the Tribunals, Courts and Enforcement Bill was being scrutinised by Parliament, rejected the idea that only High Court judges have the requisite knowledge to consider issues of public law.<sup>117</sup> Indeed Baroness Ashton in the House of Lords supported the Lord Chief Justice's view, particularly given the expertise which is espoused by members of the tax tribunals.<sup>118</sup> Furthermore, the courts too are liable to misconceive public law issues. In the case of *R. (on the application of Ingenious Media) v HMRC*, HMRC defended disclosures of confidential taxpayers' information on the basis that such actions fell within its managerial discretion.<sup>119</sup> This was accepted by the High Court<sup>120</sup> and unanimously by the Court of Appeal,<sup>121</sup> but rejected thereafter unanimously by the Supreme Court.<sup>122</sup> Lord Toulson, giving the only judgment of the Court, remarked that the "whole idea of HMRC officials supplying confidential information about individuals to the media on a non-attributable basis is, or should be, a matter of serious concern"<sup>123</sup> and regarded the justifications for HMRC's actions, which were accepted by the High Court and Court of Appeal, "as far too tenuous to justify"<sup>124</sup> disclosing confidential information.

### The mechanics of the proposed reform

Having established the case for extending the jurisdiction of the First-tier Tax Tribunal to consider public law points where there is an additional substantial dispute, the remaining matter relates to how this reform would operate. There are three potential avenues which could be explored. The first, narrow, option is that the rules could be amended such that the High Court could transfer a judicial review case to the First-tier Tribunal where the Court considers that it would be "just and convenient" to do so.<sup>125</sup> In considering whether it would be so, the Court could then look to the aforementioned advantages where there is a substantive dispute ongoing and the fact that the First-tier Tribunal is well-equipped to deal with public law issues. The rules

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available at: <https://www.gov.uk/hmrc-internal-manuals/appeals-reviews-and-tribunals-guidance/artg3120> [Accessed 31 December 2017].

<sup>116</sup> Note however that even the Magistrate's Court may consider public law issues. See *Pawlowski v Dunnington* [1999] WL 250041, [1999] STC 550. On which, see: John Tiley and Glen Loutzenhiser, *Revenue Law*, 8th edn (Bloomsbury 2016), 79.

<sup>117</sup> Letter from 7 February 2007 to Baroness Ashton in relation to amendment tabled by Lords Lloyd and Kingsland to the Tribunals, Courts and Enforcement Bill. See: HL Deb 20 Feb 2007, vol 689, col 1009.

<sup>118</sup> HL Deb 20 Feb 2007, vol 689, col 1009.

<sup>119</sup> See: S. Daly, "Public disclosures and HMRC's duty of confidentiality: *R. (Ingenious Media) v HMRC*" (2017) 1 BTR 101.

<sup>120</sup> *R. (on the application of Ingenious Media and another) v HMRC* [2013] EWHC 3258 (Admin), [2014] STC 673.

<sup>121</sup> *R. (on the application of Ingenious Media and another) v HMRC* [2015] EWCA Civ 173, [2015] STC 1357.

<sup>122</sup> *R. (on the application of Ingenious Media and another) v HMRC* [2016] UKSC 54, [2016] 1 WLR 4164.

<sup>123</sup> *Ingenious Media*, above fn. 122, [2016] UKSC 54 at [35].

<sup>124</sup> *Ingenious Media*, above fn. 122, [2016] UKSC 54 at [34].

<sup>125</sup> See Senior Courts Act 1981, s 31A(3).

would also have to be amended so that the First-tier Tribunal could offer the same remedies that the Upper Tribunal can now grant in relation to judicial review applications.<sup>126</sup> The problem with this amendment is that taxpayers would still have to commence separate judicial review proceedings in the High Court, thereby imposing additional costs on the taxpayer.<sup>127</sup>

The second, more radical option is to amend the grounds upon which an appeal to the First-tier Tribunal can be made. The proposal in this article is not a wholesale extension of jurisdiction, but merely seeks to allow taxpayers to make public law arguments in the First-tier Tribunal where there is additionally a substantive dispute. The parameters of this proposal are accordingly defined by two important restrictions. The first is that there must have been an “appealable decision” of HMRC<sup>128</sup> against which the claimant is formally appealing and the second is that the public law claim is *additional* to a substantive ground of appeal. In this instance, thus, the case would potentially collapse on the resolution of either dispute as in the ESC A19 example in the introduction. If there is *only* a public law claim, the taxpayer must take their case through the usual routes, either via Internal Review, the quasi-judicial path of the Adjudicator’s Office and then Parliamentary Ombudsman, or through judicial review through the courts. Practically, this proposal would require legislative amendment of a number of provisions which provide for appeals to the Tribunal.<sup>129</sup> Whilst this would be straightforward in the case of some taxes, such as VAT<sup>130</sup> and Inheritance Tax<sup>131</sup> where appeal is provided for in a single provision, appeal rights are more spread out across the provisions in respect of other taxes.<sup>132</sup> Finally, in relation to the practicalities of this proposal, it needs to be specified that the First-tier Tribunal will act in a supervisory capacity when deciding upon public law points, and thus cannot substitute its own decision for that of HMRC.<sup>133</sup> This is in keeping with the role of the courts generally in respect of judicial review. An amendment will need to be made to TCEA 2007 so as to clarify that the First-tier Tribunal may only offer those remedies that can be provided by the courts generally in judicial review proceedings. Helpfully, section 15(1) of TCEA 2007 sets out these remedies.

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<sup>126</sup> TCEA 2007, s. 15(1).

<sup>127</sup> On this point, see: Memorandum submitted by the Institute of Chartered Accountants in England and Wales (ICAEW) (TRI 11) to the Public Bill Committee (March 2007), at [22] available at: <http://www.publications.parliament.uk/pa/cm200607/cmpublic/tribunals/memos/ucm1102.htm> [Accessed 31 December 2017]; Memorandum submitted by the Low Incomes Tax Reform Group (LITRG) (TRI 10) to the Public Bill Committee (March 2007) available at: <http://www.publications.parliament.uk/pa/cm200607/cmpublic/tribunals/memos/ucm1002.htm> accessed 31 December 2017. See also: Tracey Bowler, “Countering tax avoidance in the UK: which way forward?” (Institute for Fiscal Studies, February 2009), at [7.9].

<sup>128</sup> A condition proposed also by Avery Jones, see Avery Jones, “The reform of the tax tribunals”, above fn. 39, 262.

<sup>129</sup> For an overview of the types of appeals that may be brought before the First-tier Tribunal, see: HM Courts & Tribunals Service, *First-tier Tribunal Tax Chamber Making an appeal Explanatory leaflet* (March 2015), 10, available at: <http://formfinder.hmcctsformfinder.justice.gov.uk/t242-eng.pdf> [Accessed 31 December 2017].

<sup>130</sup> Value Added Tax Act 1994, s. 83.

<sup>131</sup> Inheritance Tax Act 1984, s. 222.

<sup>132</sup> The right to appeal income tax decisions for instance is spread out over multiple Acts!

<sup>133</sup> In practice in tax cases, the effect is almost indistinguishable. Where HMRC loses a judicial review, the decision is remitted back to be considered again in light of the error highlighted in the review. It is the practical effect of the error that will generally be the reason for the dispute. With the error eliminated, the dispute is resolved thus in the taxpayer’s favour.

Of course, given the judgment in *Cart*, as argued above, it might well be the case that there is no need for legislative amendment in order to pursue this particular option. Legislative amendment however is more preferable as this could better tease out procedural issues such as the remedies that are available and the capacity in which the court ought to act. Moreover, practically, it could be many years before a court of sufficient authority, namely the Court of Appeal or Supreme Court, would consider the matter and set out definitively the circumstances in which the public law issues can be heard in the First-tier Tribunal.

The third and favoured proposal is a combination of both of the above. The High Court should be given the discretion to transfer cases to the First-tier Tribunal where it believes this to be just and equitable, and that public law claims can be adjoined to substantive claims. The reason that both proposals should be adopted is that a lacuna is created between the two in the case of regulatory actions by HMRC which are interrelated but nevertheless distinct from substantive disputes. For instance, APNs are issued where there is a substantive dispute. The claim that the APN ought not to have been issued is separate to the claim that the tax is not due in the first place. So whilst the claims both relate to the same dispute, there is no *additional* claim in public law that the tax is not due. For this reason, it would be necessary for the judicial review proceedings to be transferred from the High Court. This is different to the ESC A19 example given in the introduction where the case would collapse on the resolution of either dispute in favour of the taxpayer.

Finally, it must be questioned why there should even need to be, as envisaged by this proposal, a substantive dispute before the taxpayer is entitled to take public law points in the Tribunal? It has been argued in this article that the Tribunal is competent to adjudicate on matters ordinarily reserved to the courts on judicial review. The specific mischief that this proposal addresses however is the duplication and waste of having to take two separate cases to deal with one dispute. Where a taxpayer's only contention is that there is a public law infringement, then the ordinary routes (internal review, the Adjudicator's Office, the Parliamentary Ombudsman and/or the Administrative Court) are appropriate. The piece has not argued that there is some inadequacy in relation to these. As noted elsewhere, the Adjudicator's Office and Parliamentary Ombudsman are important tools in remedying HMRC indiscretions.<sup>134</sup> Although the high cost of judicial review proceedings will often be a significant deterrent to taxpayers,<sup>135</sup> this is more to do with legal fees rather than court fees, the solutions to both of which lie in legal aid or remission of court fees<sup>136</sup> and not in extending the Tribunal's jurisdiction.

## Conclusion

It is unfortunate that the extension of the jurisdiction of the First-tier Tax Tribunal has not yet come to pass, particularly given that it is over a decade since Dr Avery Jones expressed the hope that the *British Tax Review* would “not still be publishing articles on tribunal reform in 25 years’ time”.<sup>137</sup> This article has sought to make the case that

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<sup>134</sup> Daly, “Oversight of HMRC Soft-Law”, above fn. 105.

<sup>135</sup> *William Bourne v HMRC* [2010] UKFTT 294 (TC) [24]. Whilst both sides to a dispute in the First-tier Tribunal generally bear their own costs (cf Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, Rule 10), the general rule for Judicial Review is that the losing party pays the costs, (CPR 44.3(2)).

<sup>136</sup> Civil Proceedings (Fees) Order 2008, Sch 2.

<sup>137</sup> Avery Jones, “The reform of the tax tribunals”, above fn. 39, 293.

the time for reform is nigh. It is proposed that the jurisdiction of the First-tier Tax Tribunal should be extended to allow the body to consider public law matters. The justification is fourfold: first that the underlying policy does not exclude the possibility that the Tribunal should be given jurisdiction; secondly that the Tribunal is indeed competent in the vagaries of judicial review; thirdly that there is a clear, positive case for the proposal; and finally that there are no counterarguments which undermine the case for the extension of jurisdiction.

The reform itself should combine two forms. The first is that the Administrative Court would have discretion to transfer judicial review cases to the First-tier Tax Tribunal, just as it has in respect of the Upper Tribunal, where there is substantive dispute. The second is that the First-tier Tribunal should be entitled to hear public law claims where there is an additional ground of appeal with the result that the case would collapse on the resolution of either dispute. Of course, a final option is that nothing could be changed and we could wait a further 13 years for Dr Avery Jones' hopeful prediction to become defeated.