Judicial system of the United Kingdom

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I Introduction

Any description of the system of tax appeals in the United Kingdom is complicated by the facts that at the time of writing there are:

- different systems of administrative appeal for the direct taxes (income tax, corporation tax and capital gains tax), for value added tax, for stamp duties and for inheritance tax
- separate court systems in England and Wales, in Scotland and in Northern Ireland, to which appeals may be taken after the administrative appeal stage
- different possibilities for appeal within those systems depending on the nature of the case under appeal.

In addition, in April 2009:

- the whole of the present system of administrative appeals in the United Kingdom will be replaced by a new structure
- in England and Wales for some cases the number of appeal stages following the administrative appeal stage will be reduced

and, in October 2009:

- a new Supreme Court will be established as the final court of appeal for the whole of the United Kingdom in place of the House of Lords.

In order not to make this note too complex, Part II describes the development and current state of the present system for administrative appeals in direct tax cases, using income tax as an example. Part III describes the system of further appeals to the ordinary courts separately in relation to England and Wales, Scotland and Northern Ireland. Separate sections in this part also deal with the system of judicial review, which can sometimes be used in tax cases, and the rule of *stare decisis.* Part IV describes the changes that will take effect in April 2009 both in relation to administrative appeals and the jurisdiction of the ordinary courts and also deals with the replacement of the House of Lords by a new Supreme Court in October 2009. Part VI deals with the reporting and citation of cases. In each part particular note will be taken of the processes applicable to appeals in tax treaty cases.

II Administrative Phase

The first level of appeal by a taxpayer against an income tax assessment or determination by an Inspector of Taxes or the Commissioners of Inland Revenue (since 2006 the Commissioners for HM Revenue and Customs) is either to the General Commissioners or to the Special Commissioners. In most cases the body to which the appeal is made is a matter of choice for the taxpayer; but there are certain matters that are reserved to the General Commissioners and other matters that can only be heard by the Special Commissioners. In order to explain the difference between the two bodies and how their jurisdictions developed, it is necessary to delve into history a little.

Some history

Income tax was first introduced in Great Britain (i.e. England and Wales and Scotland) by Act of Parliament in 1799 as a temporary war-time measure, was repealed in 1802 following the Peace of Amiens and reintroduced in 1803 when war was declared again against France. The Act was amended in 1805 and 1806 and the 1806 Act provided that it would continue "until the 6th of April following the definitive signature of a treaty of peace and no longer". In March 1816 the government put forward a motion in Parliament for its continuation for a limited period on the basis of economic need; but the motion was defeated and income tax was allowed to expire on 6 April 1816. In 1842 it was reintroduced for one year and has been renewed annually ever since. It was extended to Ireland in 1853.

The administration of income tax was largely modelled on that of the pre-existing Land Tax, under which each county in Great Britain was divided into districts or "divisions". Gentlemen (i.e people who did not need to work for a living) who satisfied a high property qualification and were generally of ability and "strongly impelled by feelings of public spirit" were appointed as Commissioners for each division and were responsible for the administration of the Land Tax in their district. The 1803 Act provided for Commissioners for the general purposes of the income tax ("General Commissioners") who were to be chosen from among the Land Tax Commissioners for each division. The General Commissioners then appointed Additional Commissioners, who were required to have half the property qualification of the General Commissioners, to make assessments which were subject to appeal by either party to the General Commissioners and, in the absence of an appeal, were subject to confirmation by the General Commissioners.

The Special Commissioners (properly the Commissioners for the special purposes of the Income Tax Act) were the creation of the 1805 Act and at first had only administrative functions in connection with the determination of certain claims for relief. They acquired an appellate jurisdiction on the reintroduction of income tax and its extension to the profits of trades and professions in 1842. The 1842 Act provided that the Special Commissioners should hear appeals from the General Commissioners in such cases and, where the taxpayer wished to keep his affairs secret from those who might be his competitors, he could opt for

the assessment to be made by the Special Commissioners in the first place. Where that option was exercised, any appeal against the assessment was also to be made to the Special Commissioners.

The administrative and appeal functions of both General and Special Commissioners were not properly differentiated in the nineteenth and first half of the twentieth centuries, though gradually over this period the emphasis changed from that of administrative bodies with appeal functions to becoming fully judicial tribunals. The power to assess was transferred from the Additional Commissioners to Inspectors, or in some cases the Commissioners of Inland Revenue, in 1965 and the last assessing function, that of giving permission for the making of assessments when the limitation period had expired, was abolished in 1989. However, the function of giving permission for the making of requests for certain types of information from the taxpayer, where the failure to comply gives rise to penalties, still remains.

The decisions of the General Commissioners, where there was no appeal to the Special Commissioners, and of the Special Commissioners on appeals either from their own assessments or those confirmed by the General Commissioners, were final until a right of appeal to the ordinary courts on questions of law was introduced in 1874. At the same time as a right of appeal to the courts was introduced, the seldom exercised power to appeal to the Special Commissioner against an assessment confirmed by the General Commissioners was abolished.

The General and Special Commissioners in the Twentieth Century

The appeal functions of the Special Commissioners, which were originally limited to assessments of profits of trades and professions, were extended from the 1920s onwards to include cases where there were no appropriate General Commissioners or where it was considered that the complexity of the subject matter required a more professional approach. For example, the Special Commissioners were designated as the exclusive appeal body hearing appeals by non-residents and appeals against refusal of certain claims for relief, such as a claim for relief under a double taxation treaty or the statutory provisions for unilateral double taxation relief or its predecessors, colonial and dominion income tax relief. A large part of the Special Commissioners' time, until the unification of surtax and income tax, was taken up by the hearing of appeals in relation to surtax assessments, where they also had exclusive jurisdiction. In most cases, however, the taxpayer continued to have a choice of a tribunal near his residence or place of business, in which the members were lay and unpaid, or of a tribunal sitting in London, Edinburgh, Belfast or another big city, in which some of the members were legally qualified and all were paid.

General Commissioners continued to give their services voluntarily though they could recover their travelling and subsistence expenses at rates approved by the Treasury. The property qualification and the requirement to be a "gentleman" had, however, long since disappeared. They were required to retire from office at the age of 75. Special Commissioners on the other hand were paid from the

beginning of their existence and were full time officials appointed by the Treasury who had to retire at the age of 70. In fact the Commissioners of Stamps and Taxes (who later became the Commissioners of Inland Revenue) were *ex officio* Special Commissioners until 1965. In practice, the custom developed of making appointments both from serving officials of the Inland Revenue and from practising members of the Bar in roughly equal numbers. This practice was discontinued when the power to appoint Special Commissioners was transferred to the Lord Chancellor (in Scotland to the Secretary of State) in 1984, after which only legally qualified persons were appointed as Special Commissioners. At the same time provision was made for the appointment of Deputy Special Commissioners, who would sit part-time as Special Commissioners and continue their occupations as barristers or solicitors for the remainder of their time.

The minimum number of both General and Special Commissioners sitting at a hearing was two, though from 1967 a single Special Commissioner could sit provided the taxpayer consented. The power to sit as a single Special Commissioner without the need for consent was not conferred until 1984. Because General Commissioners were not expected to have any professional tax experience, they were required to appoint and pay a clerk (usually part-time), who would often be a solicitor practising in the district or sometimes a retired Inspector of Taxes. Clerks were required to retire at the age of 70, though the General Commissioners who appointed them could extend the retirement age to 75, if they thought it in the public interest to do so. Some bodies of General Commissioners, for example those for the City of London, might have considerable business and professional experience of tax; but such bodies were the exception to the rule.

Appeals against assessments or other determinations of the tax authority had to be brought within 30 days of the notification to the taxpayer of the assessment or determination but otherwise there were no detailed rules of procedure for hearings before either the General or Special Commissioners until 1994. In practice General Commissioners' hearings were quite informal, unless the parties were legally represented. Hearings before the Special Commissioners, or General Commissioners such as those for the City of London, where representation was more common, tended towards the formality of a judicial hearing. Hearings, whether informal or formal, followed the British tradition of being primarily oral. The Commissioners would not necessarily have seen any papers before the hearing and would only look at documents to which they were referred at the hearing by the parities. Until 1994 the Commissioners were bound by the strict rules of evidence and so hearsay evidence was only admissible in accordance with those rules. The only significant procedural requirement before both bodies, which derived from the statutory provision that an assessment stands good in the absence of evidence to the contrary, was that the initial burden of proof was on the taxpayer to displace the assessment or determination. Consequently, when proceedings took on a more formal aspect, the taxpayer's submissions were heard first and the Inspector's submissions followed with the taxpayer having a final right of reply.

Before 1994, hearings before both General and Special Commissioners were held in private and their decisions were not published. Neither body was required to give written reasons for its decisions and General Commissioners rarely did so, though it became customary for the Special Commissioners to do so in complex cases. Under regulations made in that year, hearings before the Special Commissioners became public hearings (though General Commissioners' hearings remained private) and their decisions were to be given in writing and reported, though the taxpayer had the right to require a hearing in private until that right was removed in 2003. Since then, the presumption has been that all Special Commissioners' hearings are in public unless the tribunal decides to sit in private on grounds set out in the regulations, such as that publicity would prejudice the interests of justice. Where hearings are held in private, the decision may still be published, but in an anonymised form.

When giving their decisions the General and Special Commissioners have the power to substitute their decisions for those of the Inspector of Taxes, or of the Commissioners of Inland Revenue, as the case may be and make any determination that was within the powers of the Inspector or those Commissioners.

The Special Commissioners usually hold their hearings in London, though hearings are also held in Manchester, in Edinburgh for the convenience of Scottish taxpayers and in Belfast to hear Northern Ireland appeals. Hearings can also be held by arrangement in other population centres, though the custom of two Commissioners holding regular circuits outside London in such places as Edinburgh, Glasgow, Belfast, Manchester, Liverpool, Leeds, Sheffield, Exeter and Bristol did not survive the reduction in routine appeal business following the abolition of surtax as a separate tax.

There were no General Commissioners in Ireland because Land Tax never applied to Ireland and so there were no Land Tax Commissioners from which to appoint General Commissioners. The Special Commissioners therefore fulfilled all the functions of General Commissioners, as well as their own functions, in relation to Irish taxpayers from the extension of income tax to Ireland in 1853. This remained the position in relation to Northern Ireland after the partition of Ireland in 1922, where the Special Commissioners sat in seven other towns in addition to Belfast when on their Northern Ireland circuit, until 1991, when the Lord Chancellor was given powers to appoint General Commissioners for districts there.

III The Courts

Although the system of General Commissioners is the same in each part of the United Kingdom, and the Special Commissioners are a tribunal with a jurisdiction throughout the United Kingdom, appeals to the Courts from both bodies have to be made to the separate jurisdictions in England and Wales, Scotland and Northern Ireland, depending on the part of the United Kingdom in which the administrative level of appeal was heard.

As mentioned above, appeals to the Courts from General and Special Commissioners on questions of law were introduced in 1874. The decisions of the Commissioners on questions of fact continued to be final and this still remains the case. A point of law can arise in one of three ways. It may be alleged that the Commissioners have misinterpreted the statutory provision applicable to the case or that the statutory provision invoked was not applicable to the facts of the case. It is also a point of law whether, on the primary facts found by the Commissioners, it was open to them to reach a conclusion expressed in their decision.

The procedure originally adopted was "appeal by way of case stated", as there were no reasoned written decisions against which to appeal. The "case stated" was a document prepared by the Commissioners (or their clerk in the case of General Commissioners) at the request of the appellant, in which were set out the facts found by the Commissioners, the submissions of the parties, the issues for determination and the Commissioners' decision. This document formed the basis for the court hearing on appeal and the parties could not introduce new facts not contained in the case stated. New legal arguments could be put forward, provided sufficient notice in writing was given to the other party before the hearing of the appeal. However, the proceedings in court were primarily oral, though the parties are now required by rules of court to submit skeleton arguments, which should set out the basis for the case that they are presenting to the court. The case stated procedure was abolished for appeals from the Special Commissioners in 1994 and appeals since then have been simply against their written decisions, which now contain the facts found by them, the contentions of the parties and the reasons for the decision. The case stated procedure continued to apply to appeals from General Commissioners.

England and Wales – The High Court

In England and Wales the appeal route is first to a single judge in the High Court, styled Mr Justice (or Mrs Justice), which in writing is abbreviated to "J" placed after the surname. All superior court judges in the United Kingdom are referred to as "his Lordship" or "her Ladyship" (which, except in the case of members of the House of Lords, does not indicate that the person addressed has a peerage). The present system of superior courts derives from a comprehensive reform of the courts in 1875, as a result of which the High Court sits in three divisions, the Queen's Bench Division, the Chancery Division and the Family Division (formerly Probate, Divorce and Admiralty Division). Originally there were five divisions and tax appeals were heard in the Exchequer Division, which was merged with the Queen's Bench Division shortly after the reforms took effect.

Tax cases are, however, now assigned to the Chancery Division, which has around 20 judges who sit principally in London, though eight provincial centres also have a chancery jurisdiction. Appeals in tax cases can be heard outside London but there is only one example of this having happened. The reason is probably that London is where most members of the tax bar have their practices

and consequently it is the most convenient venue for them when hearings are being arranged. The presiding judge of the Chancery Division was called the Vice-Chancellor until 2007 but is now known as the Chancellor of the High Court.

The decision of a single judge of the Chancery Division may be appealed to the Court of Appeal only with leave (permission) of the judge or of the Court of Appeal itself. There is now a presumption against allowing a second appeal hearing in a case and so judges are reluctant to give permission unless it can be shown that the case involves an important point of law or that the amounts involved in the case justify the further level of appeal.

Judges in the High Court (and the Court of Appeal and the House of Lords) have the same powers as the appeal Commissioners to substitute their determinations for those of the tax authorities but, if there is any difference of view as to the effect of their decision on, say, the amount of an assessment, are still inclined to order that the case be referred back to the appeal Commissioners for them to adjust the assessment in the light of the court's decision. Where the decision against which an appeal is brought is a decision in principle only, this result is of course inevitable.

England and Wales – Court of Appeal

The Court of Appeal sits in two divisions (Civil and Criminal) and tax cases are naturally assigned to the Civil Division. The presiding judge of the Court of Appeal is called the Master of the Rolls and the other judges are styled Lord (or Lady) Justice (abbreviated to "LJ" placed after the name). The court sits as a single judge to hear an application for permission to appeal and as a panel of two, or more usually, three Lord Justices for a substantive hearing. A number of differently constituted panels may be sitting at any one time. Normally cases which are appealed from the Chancery Division are heard by a court, of which at least the presiding judge and one other of the judges sitting to hear the appeal have previously served as judges in the Chancery Division.

If all parties to an appeal from the Special Commissioners consent, the Special Commissioners certify that their decision involved a point of law relating wholly or mainly to the construction of a statutory provision which was fully argued before them and fully considered by them and the leave (permission) of the Court of Appeal is given, the case may be appealed direct to the Court of Appeal. However, this power is rarely exercised.

If all three judges agree both on their decision on the appeal and on the reasons for their decision, a single judgment of the court may be delivered by the presiding judge. However, it is common in many tax cases for the judges in the Court of Appeal to state their decisions in their own way or to add points of their own. Dissenting judgments are permitted and these can be of importance when the question arises of a further appeal to the House of Lords. A decision of the Court of Appeal can be appealed to the House of Lords only with the permission of the Court of Appeal that heard the case or of the House of Lords itself.

Permission is usually easier to obtain, where the court is divided in its decision. Sometimes, and particularly where it is the tax administration that seeks permission to appeal, the Court of Appeal will only give permission if the party wishing to appeal undertakes not to seek to disturb any order for costs made against it by the court.

Scotland – The Court of Session

In Scotland, the equivalent to the High Court and Court of Appeal in England and Wales is the Outer House and the Inner House of the Court of Session. Judges of the Court of Session are designated Senators of the College of Justice and are styled "Lord" or "Lady". However, the difference in terms of tax appeals is that all appeals from General and Special Commissioners go direct to the Inner House. The Inner House sits in two divisions, called the First and Second Divisions, presided over by the Lord President and the Lord Justice Clerk respectively. Each division consists of five judges but the quorum is three. It is now common for an Extra Division of three judges to sit to deal with the pressure of business.

An appeal to the House of Lords does not require the permission of the Court of Session or of the House of Lords. In other words, there is only one instance in Scotland before an appeal lies in a tax case to the House of Lords, where there are two in England and Wales, and in practice it appears that it is easier for a Scottish appeal to reach the House of Lords than one from England and Wales.

Northern Ireland – Court of Appeal

The position in Northern Ireland resembles that in Scotland in that there is only one level of appeal before the House of Lords. Although the equivalents in Northern Ireland of the High Court and Court of Appeal in England and Wales are the High Court and Court of Appeal of Northern Ireland, all appeals from the General and Special Commissioners lie direct to the Court of Appeal. However, a further appeal to the House of Lords not only requires the permission of the Court of Appeal or the House of Lords itself but the Court of Appeal must certify that the case involves a point of general public importance.

The House of Lords

The House of Lords is the final court of appeal for cases from all parts of the United Kingdom. In form, an appeal to the House of Lords takes the form of a petition to the upper house of the legislature and, even when exercising its judicial functions, the House of Lords remains part of the legislature. If the Court of Appeal has not given permission for an appeal to the House of Lords, a party wishing to appeal will have to petition the House for leave to appeal. The House of Lords normally decides whether to give permission on the basis of the papers before it, which will include the petition of appeal itself and any response to that petition, and may also impose terms as to costs if it does give permission. In a doubtful case a hearing may be held before three Lords of Appeal (the Appeal

Committee) at which the parties will be invited to adduce additional oral arguments, before a decision on the matter is reached.

At one time judicial hearings were held in the chamber of the House during the day before normal parliamentary business began in the evening. Since 1948, however, the consideration of appeals has been delegated to one or more Appellate Committees, which hear the oral arguments of Counsel in one of the committee rooms of the House, though the judgments are still delivered in the chamber. Judicial business continues even when Parliament is not in session. The membership of an Appeal Committee usually consists of five Lords of Appeal in Ordinary or ("Law Lords"), who number twelve in all and work full time on the judicial business of the House and receive a salary paid out of the Consolidated Fund. The full time appointments end at the age of 70 but those who were appointed as Law Lords remain members of the House.

Law Lords are usually appointed from the ranks of senior appeal court judges in each part of the United Kingdom and it is customary for there to be two from Scotland and one from Northern Ireland at any one time. Other Members of the House of Lords who have held high judicial office are also eligible to sit on an Appellate Committee, which means that the House can call on retired Law Lords, and former senior judges who are members of the House, to sit on an Appellate Committee in case of need.

The procedure before the Appellate Committee is the same as that before any other appeal court in the United Kingdom, but it is the place where the art of oral advocacy and iteration between Counsel and the bench is at its most refined. Counsel are robed but the Law Lords are dressed in lounge suits and sit behind desks at the same level as Counsel. Most hearings last at least two or more days and there is an unhurried character to the Law Lords' consideration of the arguments that is not always present in the lower courts. It is common for each Law Lord sitting on a case to deliver his own judgment, which is referred to as an opinion or a speech (on the basis that it was delivered at a session of the House), and dissenting opinions are quite common. However, when the Appellate Committee reaches a unanimous decision and wishes to mark its importance, a single opinion may be issued as the opinion of the whole committee.

As cases move through a system where dissenting opinions are possible at each of the last two stages, it is quite possible to have a situation where, on a head count of all the judges sitting on the case, the decision would go one way, while the actual decision went the other way. At the extreme, six judges may have found for the losing party (one in the High Court, three in the Court of Appeal and two in the House of Lords), while only three (the majority in the House of Lords) will have found for the ultimately successful party.

Stare decisis

One of the distinguishing features of the legal systems in the United Kingdom is the operation of the doctrine of *stare decisis.* In practice this means that the decisions of higher courts are binding on lower courts, although it is important to be clear about the way in which decisions are binding. Not every aspect of a court's decision is binding on lower courts. For example, decisions on questions of fact are never binding, because the facts of two different cases are never identical. What is binding is what is called the *ratio decidendi* of the case: in other words the legal principle that can be discerned from a close examination of the reasoning used by the court to reach its decision in the context of the facts of the case. This may not always be easy to discern, particularly where, as is often the case in the House of Lords, the judges deliver individual judgments in which the reasoning may differ from one judge to another.

In formal terms, decisions of the House of Lords are binding on all lower courts throughout the United Kingdom but, since July 1966, the House of Lords has not regarded itself as bound by its previous decisions. In England and Wales, decisions of the Court of Appeal are binding on all lower courts and on itself, as an attempt by the Court of Appeal in the same year to follow the House of Lords, and declare itself to be no longer bound by its previous decisions, was smartly disapproved by the House of Lords.

The decision of a single judge of the High Court is also binding on all lower courts but, while entitled to great respect, is not technically binding on another single judge of the High Court. Decisions of courts in other parts of the United Kingdom are also not technically binding but it would highly unusual for a court not to follow the decision of a court of higher rank and a court would be extremely reluctant to dissent from a decision of a court of equivalent or higher status, particularly if that court was in Scotland.

In Scotland, the decisions of the Inner House of the Court of Session are binding on all lower courts as in Northern Ireland are those of the Court of Appeal.

Judicial Review

A procedure that may be available to an aggrieved taxpayer in certain circumstances is that of judicial review. Judicial review is the method that the courts have developed in order to control the legality and rationality of administrative actions. It is regarded as a "remedy of last resort" and is consequently not available when an alternative remedy, such as an appeal, is prescribed by statute. As there is normally an appeal route in a tax dispute between a taxpayer and the administration, it is unusual for judicial review to be the way in which such a dispute comes before the courts.

An example of a case where there were such proceedings in a tax context was the refusal of the administration to pay repayment supplement on a repayment of

tax to a non-resident taxpayer, in circumstances where a resident taxpayer would have received the supplement. As there was no provision for an appeal to the General or Special Commissioners against the refusal to pay repayment supplement, the taxpayer's only remedy was to apply for judicial review.

An application for judicial review starts with an application to the Administrative Court (a division of the High Court) for permission to bring judicial review proceedings. The application is made by completing a form and attaching any relevant documents and filing it in court, where it will first be dealt with by a single High Court judge on the basis of the papers before him. If the judge considers that there is substance in the application and gives permission for the proceedings to be brought, a hearing will be arranged, usually before two judges. On occasion a Court of Appeal judge may sit in the Administrative Court, if the issue is deemed to have sufficient importance.

If the judge examining the application for permission to bring proceedings is in doubt as to whether there is a substantial point in the application, he may set it down for a hearing before a single judge (or two judges) where both the applicant and the administration would have right to be heard. In appropriate cases (for example where it becomes clear from the skeleton arguments submitted before the hearing that there is a substantial point in issue) the substantive hearing will follow on immediately after the grant of permission to bring the proceedings.

The remedies available to the Administrative Court do not include the power to re-make the decision against which the complaint has been made. If the court finds that the administration has incorrectly interpreted or applied the law, or has acted in a way that no reasonable administration properly instructed in the law would act ("irrationality"), its only power is to quash the decision and require the administration to re-make it in a way that corresponds with the proper interpretation of the law or applies the law correctly or is reasonable in all the circumstances. An appeal lies from the Administrative Court to the Court of Appeal, with the permission of either court, and from the Court of Appeal to the House of Lords, again with the permission either of the court or of the House itself.

The remedy of judicial review is available in Scotland and Northern Ireland and the procedure is broadly similar in each jurisdiction.

IV Changes taking effect in 2009

The First-tier and Upper Tribunals

Major changes are taking place through 2008 and 2009 to the whole of the system of administrative justice in the United Kingdom, which involve the replacement of many different tribunals that had largely been set up for specific purposes without regard for the need for consistency of approach or of procedure. As part of those changes, the General and Special Commissioners

are being abolished and from 1 April 2009 their jurisdictions will be transferred to a new First-tier Tribunal and a new Upper Tribunal. Within the new structure, chambers will group similar appeal rights together and there will be a single Tax Chamber in the First-tier Tribunal and a Finance and Tax Chamber in the Upper Tribunal. The Tax Chamber of the First-tier Tribunal will have jurisdiction over all tax appeals and tax related proceedings so that it will cover, in particular, income tax, corporation tax, capital gains tax, inheritance tax, stamp duty and value added tax.

The First-tier Tribunal will consist of both full and part-time legally qualified (judicial) members and non-legal members, thus retaining the lay element of the General Commissioners, though all members will be paid. Existing General Commissioners and their clerks lose their appointments at the end of March 2009 but can apply for judicial or non-legal posts in the new First-tier Tribunal. Existing Special Commissioners and Deputy Special Commissioners will automatically transfer to full or part-time judicial posts in the First-tier. The jurisdiction will be split into seven regions so that appeals that previously went to the General Commissioners can be heard within a reasonable distance of the taxpayer's residence or place of business. However, there does not appear to be any provision enabling the taxpayer to choose to have his appeal heard by a legally qualified tribunal.

The Upper Tribunal will consist of all the judicial members of the First-tier, some High Court judges and some non-legal members. Its chief function will be to hear appeals from the First-tier but it will have an original jurisdiction to hear appeals in the categories referred to below and all tax related judicial review cases.

Cases may be heard in the Upper Tribunal without first going to the First-tier Tribunal if they fall within one of the following categories, all parties consent and the permission of the president is obtained –

> matters raising substantial and complex issues that depend mainly on questions of law and where fact-finding will be of subsidiary importance to the outcome of the dispute
>
> matters raising issues not necessarily falling within the above, which are shown to have wide significance e.g. lead and "class" appeals and group litigation arrangements. These would include matters that involve similar issues to cases already heard by the First-tier and on which the First-tier has produced conflicting decisions
>
> inheritance tax disputes that are likely to be substantially confined to matters of law
>
> judicial review matters that are not within the existing jurisdiction of the VAT and Duties Tribunal

Scottish cases where the facts are agreed and can be referred direct to the Inner House of the Court of Session

Of these, the first two are, of course, of the most relevance to tax appeals in treaty cases.

Appeals from the Upper Tier will lie direct to the Court of Appeal (in Scotland, to the Inner House of the Court of Session and, in Northern Ireland, to the Court of Appeal) and from there to the House of Lords (or, after October 2009, to the Supreme Court).

Clearly much of the detail of the new jurisdictions is still to be worked out and it will only be clear over time how the overlapping jurisdictions of the First-tier and Upper Tier Tribunals will operate. At the time of writing no rules of procedure have been promulgated, though drafts have been published for comment. One element in the system that is new for the direct taxes (though not for VAT) is that, after an appeal against a decision of HM Revenue and Customs has been lodged, but before it is notified to the Tribunal, the appellant may require, or HMRC may offer, an internal review of the decision which must be completed within 45 days.

The Supreme Court

The other major change that is taking place in the legal system in the United Kingdom in 2009 is the abolition of the judicial role of the House of Lords and the transfer of its jurisdiction to a new Supreme Court. Despite the fact that it had long seemed to academic lawyers and others to be anomalous that the upper house of the legislature should have a judicial function, the change was not uncontroversial and was initially opposed by a number of the Law Lords.

The Supreme Court will initially have 12 judges, who will be styled Justices of the Supreme Court, and existing Law Lords who have not by then reached retirement age will automatically become Justices. They will retain their seats in the House of Lords as their appointments to the House were for life. However, new appointees to the Supreme Court will not necessarily be granted a life peerage. One of the judges will be appointed as President and one as Deputy President. The Supreme Court will have exactly the same jurisdiction as the House of Lords and will also take over the jurisdiction of the Judicial Committee of the Privy Council to decide disputes arising out of the legislation devolving legislative powers to the Scottish Parliament and the Welsh and Northern Ireland Assemblies.

Geographically the Law Lords will not be moving very far. The new Supreme Court building will be the former Middlesex Guildhall on the opposite side of Parliament Square from the Houses of Parliament.

Part V Decisions

The General Position prior to 2001

Until January 2001 there was no standard form in which court judgments (decisions) were given in England and Wales, no official numbering system for judgments and no official text of judgments. Judgments were, and often still are, delivered orally and used often to be *ex tempore* following the end of the arguments of counsel. From mediaeval times it had been the practice of certain frequenters of the courts, usually themselves members of the bar, to note down oral judgments of significance and publish volumes of their notes (or reports) of judgments in cases that were of precedent value. The quality and accuracy of such reports were very variable and depended very much on the abilities of the author. Some of these "authors' reports" were of very high quality, while others had less enviable reputations. In order to try and ensure a basic minimum standard in reports that could be cited in subsequent cases, the judges of the superior courts developed the practice of refusing to look at any report of which the author was not a member of the bar.

During the nineteenth century several commercial series of reports were published but most of these did not carry on for very long. The longest lasting was a series published by the publishers of *The Times* newspaper, which continued well into the first half of the twentieth century. In 1865 a group of lawyers decided to regularise the situation and set up the Incorporated Council for Law Reporting ("ICLR") in order to publish reliable Reports of cases in all the superior courts under the title of *The Law Reports*. *The Law reports* are often described as "official" reports, though they are not sponsored in any way by the state. They are "official" in the sense that the practice of the courts is to require a case that is both reported by the ICLR and in another series to be cited to them in the form published in *The Law Reports*.

After the 1875 reform of the superior courts, the ICLR began the system, which lasts to the present day, of publishing separate annual volumes for each division of the High Court and to include in the relevant volume reports of appeals from that division decided in the Court of Appeal. House of Lords' decisions are published in a separate annual volume. The format of the report is the same in each case: following the title naming the parties to the case and a short list of indexing or "catch" words, the reporter contributes a "headnote", which contains a short summary of the facts that he considers relevant to the decision and sets out his understanding of the basis for the court's decision and any other point of law on which the court has pronounced. There follow a note of the counsel appearing in the case and a fuller statement of the facts of the case as extracted from the court's decision. The judgment of the court or, where there is more than one, all the judgments (including any dissenting) are then set out and finally the names of the solicitors on each side and the name of the reporter of the case are mentioned.

Reports of judgments published in *The Law Reports* are cited by reference to the names of the parties followed by the year of the annual volume, the division of the High Court in which it was heard and the page number at which the judgment

in question starts. For example, *Smith v Jones* [2005] Ch 450 indicates that the case of that name can be found in the 2005 volume of judgments in cases heard in the Chancery Division of the High Court beginning at page 450. Sometimes a "2" will be found before "Ch". This indicates that there are two volumes of Chancery Division cases for the year in question and the case will be found in the second volume. House of Lords cases published in the separate volume for such cases are cited, for example, as *Smith v Jones* [2005] AC 355. "AC" in this citation stands for "Appeal Cases". The year in each case is in square brackets because it is an essential part of the citation. In some series of reports volumes are numbered in sequence and in citing these reports the year of the case (if included at all) is printed in round brackets, as it is not an essential part of the citation.

The Law Reports have dominated the scene for the last 140 or so years, although one private series of reports, which started publication in 1936, has established itself particularly among the solicitors' branch of the legal profession. These are the *All England Law Reports* published by Butterworths Ltd (now LexisNexis). Cases from these reports are cited, for example, as *Smith v Jones* [2005] 2 All ER 455. As cases are published in date order, and without separation into different series for different courts, there are often at least two volumes for each year. The popularity of these reports among solicitors (and students) arises from the editorial material that is included in the report, such as references to relevant passages in *Halsbury's Laws of England*, which is also published by Butterworths. The formal rule is that a case can only be cited in court from the *All England Reports*, if it has not been published in *The Law Reports*.

It is necessary to remember that not all decisions are reported in either of these two main series of reports. A case which is merely an example of the application of a well established principle to a new set of fact will not be considered to be worth reporting. There are many examples of complaints by judges of the unnecessary reporting of cases where no new principle or interpretation is established.

Decisions in Tax Cases

Once appeals in tax cases to the ordinary courts were introduced in 1874, reports of tax appeals where important points of tax law or general law had been decided were included in *The Law Reports*. However, not all cases of interest to tax practitioners would be published in that series and, in order to fill the gap, from 1874 the Board of Inland Revenue started to publish their own series of *Reports of Tax Cases* in which all tax appeals deciding substantive points of tax law were included. These reports were stated to be "published under the direction of the Board of Inland Revenue" and so were an official publication; but as the cases were not formally reported by a member of the bar, in theory they could not be cited in court. However, where there was no report of a case in the main series of Law Reports, judges tended to ignore this rule and it became customary for citation of cases from *Reports of Tax Cases* to be accepted and, in

more recent times, this exception to the general rule has been noted in Practice Directions issued by the courts.

One of the main advantages of the reports in *Reports of Tax Cases* has been that, where a case goes through more than one level of appeal, the "case stated" and the decisions at all levels are printed together, so that the reader can see the full story of the case in one place, rather than look at separate reports, which could be in a number of different volumes. The disadvantage, however, is that readers have to wait for a case to go through all levels of appeal before they can read a report of the case at the first level. For this reason the Inland Revenue also issues a "tax case leaflet" as soon as a decision is given at each level. Decisions of the Special Commissioners since 1985, when publication became possible, have not been published in *Reports of Tax Cases* unless there is also a decision at a higher level.

Cases in *Reports of Tax Cases* are usually cited as, for example, *Smith v Jones (H M Inspector of Taxes)* 54 TC 483. Sometimes the year of the decision is added after the names of the parties (e.g. "(1968)"), though this is not a necessary, or even a particularly useful, item of information in locating the report of the case, as the important data are the volume and page numbers. The volumes are published as parts before being bound and the current volume is Volume 79, Part 1 of which was published in August 2007. No parts were published in 2008 and consequently there seems to be a question mark over the continuation of this publication.

The importance, indeed the uniqueness, of *Reports of Tax Cases* has diminished since 1973, when Butterworths Ltd, the legal publishers now part of LexisNexis, started the publication of *Simon's Tax Cases* ("STC"), which is also issued in parts during the course of the year and as an annual volume. STC covers the same ground as Reports of Tax Cases, though it prints decisions in a single case as they are reached rather than at the conclusion of all stages of an appeal. Cases in STC have the formal advantage of being reported by a member of the bar and are cited, for example, as *Jones v Smith (H M Inspector of Taxes)* [1998] STC 543, the square brackets framing the year indicating that there is a separate volume for each year. Since the publication of decisions of the Special Commissioners began in 1985, Butterworths have published a separate series of decisions of that body, which are cited, for example, as *Jones v Smith (H M Inspector of Taxes)* [1998] STC (SCD) 364. Decisions published in STC are available on the internet to those subscribing to LexisNexis' complete tax service.

Since 1982 a further series of reports of decisions in tax cases has been published by CCH under the name of *British Tax Cases.* This series is cited as [1998] BTC and follows the same practice as STC in publishing decisions, as they are issued without waiting for all appeal stages to be completed.

Neutral citation

On 11 January 2001 the lord Chief Justice of England and Wales issued a Practice Direction, which for the first time specified the form in which judgments (decisions) of the Court of Appeal and the Administrative Court should be prepared for delivery or issued as approved judgments and for the attribution of an official number to each such judgment (the neutral citation). From that date all judgments were to be prepared with single spacing, paragraph numbering (in the margins) but no page numbers. Where there was more than one judgment, the paragraph numbering was to continue sequentially through each judgment without starting again at the beginning of the second judgment.

The neutral citation would incorporate the names of the parties, the year of issue in square brackets, the name of the court in which the judgment was delivered and the number of the judgment in the year in question. If a reference to a particular paragraph were required, it would be included in square brackets after the number of the judgment. For example, if *Smith v Jones* was the tenth decision issued by the Civil Division of the Court of Appeal in 2001, the neutral citation would be *Smith v Jones* [2001] EWCA Civ 10 and, if the passage required was in paragraph 35, the citation would continue "at [35]". The Lord Chief Justice emphasised, however, that when a judgment was cited in court, it should still be cited from *The Law Reports* in preference to any other source.

A further Practice Direction was issued on 14 January 2002 extending the requirements of form and of neutral citation to all judgments given by the High Court in London. A separate numerical sequence would be used in each division of the High Court, so that the eighteenth judgment given by the Chancery Division of the High Court in 2002 would be cited as [2002] EWHC 18 (Ch) and the forty-second judgment of the Administrative Court in that year would be cited as [2002] EWHC 42 (Admin).

British and Irish Legal Information Institute

Since 2001 an important new way of accessing full text versions of decisions of the Special Commissioners and the higher courts has been through the website of the British and Irish Legal Information Institute at www.bailii.org. Decisions are arranged under the names of the parties and the neutral citation number in monthly lists for each year in each court and can be accessed either by reference to the names of the parties or that number.