



Taxing Matters

HMRC appealable decisions with Costa Christofi

Alice Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alice Kemp and I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a fortnightly roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at www.rpc.co.uk/taxingmatters.

Here to explain to us how the appeals process from an HMRC decision works, is Costa Christofi.

Costa is a Senior Associate in RPC's Tax Dispute Team where he plays a key role in achieving settlement outcomes for major corporate clients and has conducted complex litigation before Tribunals and Higher Courts.

Costa has been described as extremely knowledgeable of regulations and precedents.

In addition to all of that and possibly because of his attention to detail Costa is an amazing cook and I've been dying of envy at the photographs of his creations that his household got to enjoy during lockdown.

Alice **Costa, welcome to Taxing Matters.**

Costa Hi great to be here.

Alice **What kinds of decisions are we talking about as a baseline that are appealable decisions?**

Costa Ordinarily you're looking at conclusions stated in closure notices which come at the end of an HMRC inquiry or alternatively assessments to tax which are not self-assessments, so you're looking at discovery assessments principally so those are the two main substantive things you're going to be appealing.

Other things you can appeal are things like requests for information issued under Schedule 36 which I think you've covered in a previous podcast.

There are other things which aren't appealable but applications you can make include things like applying for a closure notice and things like whether or not the Revenue are agreeing to postpone collection of tax whilst the appeal is pending although those latter applications are increasingly rare because the Revenue ordinarily do accept postponement applications.

Alice **So, if those are the kind of decisions which are appealable, are there any kinds of decisions which aren't appealable?**

Costa Yes, I mean ordinarily you need to look at the statute to decipher if it's something which is appealable but things which generally aren't appealable things which statute does not confer a right of appeal for are things which give the Revenue discretion to do. There are, the classic type of thing which taxpayers are familiar with now is things like accelerated payment notices, follower notices, so these are anti-avoidance which require payment of the tax upfront pending the appeal. The only way to challenge those sorts of decisions is through judicial review which again I think you've covered on a previous podcast.

Alice **So, what are your options if you don't like a decision which has been made and does have a right of appeal?**

Costa Well your option is to appeal it in the first instance to HMRC.

Typically, you have 30 days to do that but it's always best just to double check what type of decision you're appealing and what the statute says. The Revenue will then consider the appeal and render its conclusions.

You then have the opportunity to accept or request a review and that is conducted by HMRC but by an officer which is unconnected to the original appeal and you have 30 days to request that review and the Revenue will have 45 days to conduct that review unless it's said that timeframe's extended by agreement between the parties.

	Then again if you're dissatisfied with the outcome of the review you have 30 days to appeal to the independent Tax Tribunal and I'm going on the basis that this is all direct tax it's obviously very similar for VAT but there are some more nuances for indirect tax.
Alice	You've just talked about the distinction between a review and appeal. Why might a taxpayer want to select a review over going straight for an appeal?
Costa	To be honest, in a lot of cases a review isn't worthwhile in my opinion. It really depends on the decision that you've appealed. I think if it's something like a penalty I think reviews can be quite useful because the Revenue generally have a bit more leeway whether or not to apply a penalty and it's based in the first instance on the views of the officer imposing the penalty so having an independent view on that from an "unconnected officer", can be useful, and I think the stats show that the penalties reviews are significantly more useful than for others types of tax decision.
Alice	You've talked about a couple of different time limits for appeals. Are there any other time limits that are generally applicable to your decision-making process?
Costa	30 days from the date of the decision in question is the kind of default one in most cases. The only other one which is important is the JR deadline which I think you've covered on a previous podcast but just to reiterate it's three months from the date of the decision as a longstop but the claim must be otherwise be brought promptly. There's obviously case law on when claims should have been brought promptly.
Alice	Obviously 30 days is a very tight timeframe. What happens if you miss it?
Costa	So if you miss the deadline to appeal to HMRC they can accept a late appeal and basically have to do that if you have a reasonable excuse and that you've notified or you've asked for permission to appeal out of time without reasonable delay after the excuse ceased. If they refuse you can ask the Tribunal to give you that permission. Likewise, on a review if you've missed the review request deadline that can have quite draconian effects because, if the Revenue offer a review and you don't accept within time the matter is deemed determined in favour of HMRC and final. In that case you can't ask the Revenue to give you permission to appeal out of time but you can ask the Tribunal and the factors that they will consider and whether or not you will be given permission will be very similar if not the same to the factors that they will apply in determining whether you should be given permission to appeal late as opposed to whether or not you should be given permission to appeal after the review deadline's been missed.
Alice	What are the factors that the Tribunal will take into account in assessing this?
Costa	Invariably it's an overall balancing exercise. I mean the kind of three stage test is to establish first the length of the delay and whether it was serious. The second is to establish the reason why and third is to conduct an overall evaluative exercise. And I think really the main, the main kind of factor in all this is the prima facie case that the taxpayer has in the substance of its appeal. So in other words, if a taxpayer can show in its grant of appeal – which will go in at the time it's making its request for permission to appeal late – that its underlying case is very strong (and I won't come up with an example of that, but you can all imagine the types of very strong on cases) the Tribunal is almost you know going to go out of its way I think to give you permission to appeal late because otherwise it would be unfair and unjust not to do so. But as ever it's a balancing exercise so there will be, on the other hand prejudice to the Revenue if there's been significant delay and they've treated the matter as settled.
Alice	So, assume that you've filed your appeal and you did it in time. What happens next?
Costa	If you've filed your appeal with the Tribunal what will happen next is they will categorise the appeal on a track ie basic, standard or complex. In particularly standard and complex, the operative difference between the categorisations is that in complex cases the costs regime will be deemed to apply and that means that, as in ordinary litigation, the winning party will be able to recover their reasonable costs in the appeal from the unsuccessful party. However the taxpayer does have the opportunity to opt out of that costs regime – and the taxpayer only – but HMRC cannot opt out of it so in other words if you're on the complex track and you think you have a very strong case then you can be within the costs regime.

Alice	So, once you've allocated it to a particular track what happens next?
Costa	<p>So, once the case has been allocated the Tribunal will issue directions and this is effectively the roadmap to take the appeal forward through to a hearing. A standard set of directions will proceed as follows:</p> <ul style="list-style-type: none"> ○ You'll be invited to exchange a list of documents; these are documents on which each party intends to rely on in the appeal. ○ You will then have to exchange witness evidence so these will be your witness statements and the witnesses of fact that you intend to call and support your case. ○ There will be cases particularly complex cases where expert evidence may be required. You can adduce expert evidence with the permission of the Tribunal. ○ Another factor particularly in complex cases that is particularly useful is you will be directed, or you can be directed to agree a statement of facts and that cuts down the number of facts which the Tribunal needs to find, and which are in dispute. ○ Then you will be directed to provide your listing information and that is the information the Tribunal needs to list the hearing and then off you pop to the Tribunal.
Alice	Sounds incredibly straightforward. So, what do you actually need to do if you're a taxpayer preparing a case?
Costa	<p>Well the first thing you need to do is to make sure you're satisfied that your case is sound on the law and, depending on whether or not you're represented, that will involve a number of different things.</p> <p>But assuming that you think you have a strong legal case, you will need to decide what (if any) evidence you need to marshal to support your case.</p> <p>And that invariably takes the most time in terms of preparing an appeal because just gathering documents, particularly if it's a historic case over you know a potentially longer period of time or a long time ago you need to gather everything you need together and you need to prepare your witness statements from yourself – if you're the taxpayer potentially – and potentially third parties who can you know give corroborating evidence.</p> <p>And again it all depends on what type of decision and tax you're appealing but particularly at first instance where the First Tier Tribunal will find facts you need to get that part of your case absolutely right – you can appeal points of law, if you think the First Tier Tribunal has made an error of law, but facts that are found at first instance are particularly difficult to overturn on appeal.</p>
Alice	So, what kind of evidence do you need to be thinking about collecting specifically in order to be able to rely on it at hearing. You've talked about witness statements. Where do you need to look?
Costa	<p>I think it really depends on the case, but what you need to do, just on witness statements – if you are talking about witnesses of fact they merely need to put down in writing their recollection and understanding of events: it's there to give a narrative, it's not there to give opinion, it's not there to argue the case importantly, it should be, where possible, a dispassionate note on the facts and that can be from anywhere really, provided it's relevant.</p> <p>And the Tribunal, I should say is, is informal; that's codified in its rules, so the scope of and type of evidence the Tribunal can hear is actually broader than in ordinary litigation in England and Wales.</p>
Alice	What about if you have documents that you think are going to be helpful that are actually held by HMRC. Is there any way for you to get hold of those documents as part of your evidence?
Costa	<p>Yes, this is relevant in cases, like discovery cases or potential penalty cases, where the Revenue bear the burden of proof, or at least the initial burden of proof, and they have to satisfy the Tribunal, and make a positive case that their assessments or penalties are good, so cases where the taxpayer needs to know what the Revenue officer for example was thinking and doing.</p> <p>So, if you think about those types of cases, the Revenue potentially might talk about systems and processes they had in place, what internal discussions they were having about points of law – if you think of discovery, for example, where the Revenue often say they've made a discovery because they've changed the way they thought about the law, and in particular concepts of staleness, which is a still a hot topic, that's time difference between the Revenue making the discovery of an under assessment, and then issuing the assessment to the taxpayer. So that type of factual evidence that the Revenue will hold is critical and in those cases, you can ask HMRC for those documents voluntarily and if they refuse to disclose them you can make an application to the Tribunal and they can direct HMRC to disclose it, disclose those documents to you and there is obviously case law and guidance on when they should do that. It will attach to whether or not it is fair and just to do so.</p>

Alice	So assuming we've got to the Tribunal and the hearing has now been conducted. How is that hearing held, is it in public or private?
Costa	<p>It will be a public hearing unless the Tribunal directs that the hearing should be held in private and, without going into too much detail on that, it will ordinarily be an uphill task to convince the Tribunal to hold the hearing in private because open justice is a very powerful principle which runs through even the Tribunal system.</p> <p>So you should always proceed on the basis that if you're going ahead with a hearing you will get a published decision that will have your name on it and people will be able to see what you've been arguing over.</p> <p>I think previously this was more of an issue for taxpayers because there maybe concerns that having their name up in lights. I don't want to overstate the position, because I don't think people trawl through tax decisions unless you're a tax freak, like me.</p> <p>But nowadays I think it's less of an issue because clearly there are umpteen technical disputes on the law which taxpayers and HMRC can very honestly become tangled up in and they need to be resolved by an independent impartial Tribunal.</p>
Alice	You talked earlier about the consequences for costs and the differences between the complex track and other tracks. What are the ongoing cost implications?
Costa	So the general rule in FTT litigation is that it's a no costs jurisdiction so in other words each party bears their costs in the appeal irrespective of the outcome. However as I said earlier if you're in the complex track and you haven't opted out then the losing party ordinarily will be liable for the winning party's costs.
Alice	That can have the advantage to the taxpayer if they do have a strong case and they want to seek costs at the end of it, is that right?
Costa	That's right.
Alice	So, what can you do if you get a decision from the Tribunal that you don't agree with? Is there a further right of appeal?
Costa	<p>Yes. So, you must seek permission from the First Tier Tribunal to appeal its decision to the Upper Tribunal, which is the next step.</p> <p>If it doesn't grant you permission, you can ask the Upper Tribunal itself to give you permission to appeal and you have 56 days from the First Tier Tribunal's decision to ask for permission to appeal.</p> <p>You can appeal points of law to the Upper Tribunal. You cannot appeal facts although big caveat there is that there's a principle established in <i>Edwards v Bairstow</i> which is that if the Tribunal has misdirected itself on the law in finding the facts, then that will amount to an error of law and those facts can effectively be challenged and appealed.</p> <p>Also, if the Tribunal has been found effectively to have found facts which no reasonable and objective Tribunal could have found then those facts will also be appealable. I think it's interesting to see how this phenomenon, if I can call it that, is being treated in the Upper Tribunal because I do think they are overturning primary facts with increasing frequency. So I think that principle has been somewhat diluted in the last couple of years.</p>
Alice	So has there been any impact from the coronavirus and lockdown on the Tribunal hearings?
Costa	<p>Yes I think it's fair to say there was an initial kind of jolt as I think happened everywhere when the kind of lockdown hit because all hearings effectively were vacated and up to the summer I think.</p> <p>Then they have been slowly relisted over video hearing technology which obviously, has its inherent problems, but on the whole, I think, in the circumstances, has been fine, it's worked pretty well.</p> <p>And I think the Tribunal is going to proceed to list hearings remotely for the remainder of this year, with a view to dual listing them going forward – so that is where they will say "we're happy to list it in person provided you know Government guidance etc means that we can conduct the hearings in person safely, but if we can't be ready to conduct your hearing via, I don't want to say Skype because it's not always Skype, via video link."</p>
Alice	So, what's your own personal experience been of conducting these hearings via video link?
Costa	It was fine. Obviously not as good as face to face but it, you know, it was conducted smoothly. Some technical faults here and there as you'd expect, but, you know, I think they're doing a good job out of a very bad situation.

Alice

Thank you very much Costa for taking us through the appeal rights.

As ever a big thank you goes to a miracle working producer Mary Mitchell, Josh McDonald, who does all the work pulling this together, and our music is from musical genius Andrew Waterson. And, of course, a big thank you to all of our listeners for joining us.

A full transcript of this episode together with our references can be found on our website www.rpc.co.uk/taxingmatters.

If you have any questions for me or for Costa or any topics you'd like us to cover in a future episode please email us on taxingmatters@rpc.co.uk we'd love to hear from you.

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Thank you all for listening and talk to you again in two weeks.



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