



Taxing Matters

Tax disputes with Judge Sinfield

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.

Today we are honoured to be joined by a very special guest; Judge Sinfield, President of the Tax Tribunal.

After a long and illustrious career and practice, working for both the solicitors office at HM Customs & Excise and in private practice, Judge Sinfield was appointed to the Tax and Chancery Chamber of the Upper Tribunal in early 2012 and made President of the First Tier Tribunal in 2017.

Judge Sinfield welcome to Taxing Matters.

Judge Sinfield Well thank you very much for having me Alice.

Alice **Now the Tax Tribunals, in broad terms, what are they and how do they work?**

Judge Sinfield Well, in very broad terms the Tax Tribunals are just Courts by any other name. Indeed Section 3(5) of the Tribunals, Courts and Enforcement Act 2007 states that the Upper Tribunal – which includes the Tax and Chancery Chamber – is a superior Court of record.

Now, like all Courts, our overriding objective is to deal with cases that come before us fairly and justly.

But what marks out Tribunals as different from the Courts is the combination of informality and flexibility that's built into our rules, together with special expertise – in our case in tax primarily – and that enables us to deal with the matters that come before us, we hope, not only effectively, but also efficiently.

Alice **So, you've just mentioned there a couple of different parts of it, the Upper Tribunal and I think there was also a First Tier Tribunal; how do they relate; how do they interlink?**

Judge Sinfield The First Tier Tribunal is just the first instance Court. It's where people come when they first have a dispute, usually with HM Revenue & Customs, but I'll mention in a moment some of the other things we do, because it's not just tax, although it is mostly tax.

And we make the first instance decision and if either party is dissatisfied with our decision, then they have the opportunity to appeal to the Upper Tribunal, if they are granted permission.

Appeals are only possible on a point of law, and for that permission is required either from the First Tier Tribunal, or if the First Tier Tribunal refuses permission, from the Upper Tribunal itself.

Alice **So, you've mentioned that these are specialist expertise in tax and that you have other functions as well. What kind of other functions do you have?**

Judge Sinfield Well, actually it's broader than some people might imagine when we just say 'tax'. So, I ought to say, anyway, that when we talk about tax, we're talking about the whole range of tax; so the direct taxes, such as Income Tax and Corporation Tax or Capital Gains Tax, and the indirect ones, and those are VAT (as most people know), but also Stamp Duty Land Tax.

We also deal with the duties, such as Customs Duty and Excise Duty disputes. And further than that, we hear appeals brought against decisions of HMRC or the Border Force relating to the restoration of seized goods. So, if someone tried to smuggle goods across the border and they are caught, not only will they face sanctions for that, but they will have the goods, and possibly vehicles that the goods have been transported in, confiscated. And, after a process, those goods can be condemned as forfeit to the state. And we deal with requests for the goods to be restored.

Also, and this is little known, we have a jurisdiction to deal with appeals from decisions of the Compliance Office for the Independent Parliamentary Standards Authority. What that really means is we deal with appeals against disputes or concerning MPs' expenses. I have to say that we've never made any decisions in relation to such matters because, I think, since the jurisdiction was given to us, the MPs have all been very, very careful.

Alice **They know you have too much expertise.**

Judge Sinfield Well possibly. I like to think they're just naturally good.
But the majority of our work is, in fact, in relation to tax. That's the day job and that's the vast majority of work that comes across the threshold.

Alice **So, you've mentioned that you have specialist expertise. Why is that so important for this jurisdiction?**

Judge Sinfield Because, I suppose, tax is very complicated and, as lots of people often admit, they find it difficult to reach agreement with HM Revenue & Customs. That doesn't mean that either party is being unreasonable it's just there's a lot of law to apply.

The current edition of the legislation in relation to tax, which is published by Butterworths and are known as the yellow and orange books, exceeds 18,000 pages. Or at least it did last year. Someone has told me that this year the new edition (which I haven't yet received) is considerably shorter. But no one has been able to tell me whether that is because the Government has reduced the size of the legislation, or Butterworths have reduced the size of the print.

Alice **So, in terms of the Tax Tribunals, how are they different from what might be regarded by our listeners as the 'normal' civil process?**

Judge Sinfield I think that for anyone who comes to see one of our hearings (and most of our hearings are in public), the first thing they would notice is the informality of those proceedings.

Although we do sometimes have appeals where there may be Leading Counsel and Junior Counsel and other lawyers instructing them, and it seems a very formal process of submissions and witness evidence, those sorts of cases are a minority. Mostly it will be litigants in person, ordinary taxpayers, who have a dispute with HM Revenue & Customs. And on the other side the Officer of HM Revenue & Customs, possibly the one who made the decision that is being appealed. And the objective there of the Tribunal is to ensure that both sides – both the Revenue and, of course, the taxpayer – have an opportunity to participate fully in the appeal process and make their case. And that is different from the Courts where there is a greater degree of formality.

That greater degree of formality, of course as listeners will know, includes barristers who dress up in wigs and gowns, and possibly the judge in a gown and a wig too. We simply wear business clothes and the Counsel who appear before us would wear the same.

Equally very often as I said before it won't be lawyers it will be ordinary people who just want to come, ensure that they can be heard, and have justice.

Alice **So, we've talked a lot in this podcast about the rules that apply in terms of various different parts of the civil procedure. Does this degree of informality translate through to how the Tax Tribunals are run and operated?**

Judge Sinfield That's a very good question. We operate in accordance with our procedural rules which are specific to the Tax Chamber of the First Tier Tribunal. And those rules encourage us to operate in ways that are both flexible and informal.

They're flexible as to the application of the rules so as to ensure that there are no traps that people can fall into, and so therefore we have a very flexible procedure for bringing proceedings, and the requirements for producing evidence are equally flexible.

As I've said before some cases are not like that. The very large tax appeals that we hear will be run in exactly the same way as a large civil action and there'll be exchanges of witness statements, exchanges of pleadings as well, and towards the end, bundles of documents and authorities and skeleton arguments. So, in that sense, it's very, very much like an ordinary civil action.

But at the other end when someone has a dispute or perhaps a penalty for submitting their Self-Assessment Tax Return late, they simply want to come along and explain why that happened, and why they feel they should not be subject to the tax or penalty. And in those circumstances, there are no witness statements or not usually. There are no formal pleadings. They've simply submitted a notice of appeal and they do that online.

Most of our appeals now, some 70 or 80%, are submitted using this online facility. It's very easy to fill out and that starts the process off; pretty much like ordering something from Amazon, except in this case you don't get the delivery of some exciting goods. But you will get a decision eventually.

Alice **Thinking about the informality that we've talked about, how does this translate to the differences that might be taken in approach by the Tax Tribunals in terms of case management and procedure, versus how it might happen in the civil jurisdiction?**

Judge Sinfield Well, we try to be as flexible as possible in our approach to case management, but at the same time there does have to be a certain amount of formality.

We tailor the directions that we give in proceedings to the type of proceedings; so, we categorise cases into four separate types.

At the high end are the complex cases. Complex cases form about 3-4% of our workload. The lower end are what we call 'default paper cases' and those are cases which we think, as the name suggests, can be dealt with on the papers. And in between those are two other categories; the standard category (which is the bulk of our work) and the basic category cases.

The complex, standard, and basic cases are all cases that will be determined, in the usual course of things, at a hearing and we have directions that are issued that differ depending on the type of case. So, as you might imagine, the complex cases have directions which are much closer to the sort of directions you get in the High Court for a case. At the other end for paper cases there's a very, very informal approach with no formal pleadings or witness statements at all; essentially, it's a matter of the parties (in particular, the taxpayer) writing to the Tribunal and explaining their side of things. And in between, the standard cases and the basic cases, have again slightly modified directions depending on the nature of the case.

But overall, we try to be flexible when we deal with these matters. So if an Appellant has some sort of issue, or does not understand something in relation to the directions, then they can write to us, and it will be passed to a judge, usually, and the judge will consider whether or not to modify the direction, or simply write to the Appellant and say 'this is what we need'. And that very often happens in the basic and paper cases where, perhaps, they don't quite understand what they're meant to be doing.

Alice **We are of course in day one of the second lockdown due to Coronavirus and both are recording now in our various lockdown locations. So, thinking about that and reflecting on the first lockdown, how did the Tax Tribunals cope with the onset of lockdown volume one?**

Judge Sinfield Well, I think the first thing to say, because it wasn't universally appreciated, is that we didn't close; we kept on working and, indeed, we even kept all our main premises open, although it's true to say that not very many people went into them and only did so as necessary.

So, we kept going in a way that I'm quite proud of because although the workload naturally reduced, it didn't stop. What did stop, however, is all face to face hearings during that initial period. I issued directions, principally to cancel all face to face hearings up to the end of August, and also to change the basic cases that I referred to a moment ago, into paper cases and that was to enable them to be dealt with without a hearing more easily.

The other big change that was to our ways of working which was caused by the pandemic was the move to video hearings. To set that in context the Tax Tribunal was part of a pilot for video hearings and we'd been doing that for about 18 months before lockdown. But we were only doing it as a very small scale pilot. So, we had in total, I think, probably only had about 20 or 30 such hearings and each one was followed up by academic research: they interviewed the judge, and the Appellant, and the HMRC people, and it was written up in a report by the London School of Economics to see whether video hearings were something that should be taken forward in the Tribunals and the Courts.

Of course, that was all very interesting, and I read the report, and we were wondering how we were going to develop it. And then lockdown happens and suddenly it's the only way forward and we are catapulted into using the pilot system, which is really very good, for video hearings on a much bigger scale than we had imagined.

Of course, that didn't happen overnight because the parties – both the Revenue and the taxpayers – were not ready to have video hearings straight away. But, actually, as time has gone on, we've built and built. We're still not holding as many hearings by video as we held face to face before lockdown, but it's building. And I think that it will build even further in the future because what this has shown us is that we don't need to wait for an academic study of the pilot to know that video hearings are really fantastically useful for the right sort of case.

It should be made clear that video hearings are not the complete answer to every case. I do see that there have to be face to face hearings and when circumstances allow, we will go back to a system which is much more finely balanced between video and face to face hearings.

Equally, if we need to have a face to face hearing now, notwithstanding lockdown, we can. We've already had one; it was held in Edinburgh a couple of weeks ago.

I've found however that most parties, and I think probably most judges and members, would rather not have a face to face hearing at the moment during lockdown if it can be avoided and we can still deal with the appeal in some other way.

Alice

How has the Tribunal responded to the changing nature of the Government's guidance and the quick changes of position that have happened?

Judge Sinfield

I don't think that we've found that the changes in position have made any great difference to us. Obviously, as lockdowns were lifted and then further restrictions introduced, we have to abide by them, but just as in the Courts, the Tribunals have operated throughout, and we are exempt from observing those restrictions; if we need to go into work, we can. And even now that we have just entered the second lockdown which applies throughout England, it's true that there are people at this moment in our building in Islington, Taylor House, because they need to be there for work purposes.

As you have already, I think, indicated to people listening to this, I'm working remotely today – as are you I can gather – and I think that I encourage my judges and members and the Tribunal staff to work from home if they can.

We are a largely paper based organisation and therefore people have to go into the office to work with the papers that are there, and they do. Indeed, I had a meeting before this where I was talking to some of the administrative staff who were based in Birmingham – where our administration is centred – and some who are also in Taylor House today. And I have regular conversations with people who are going into the office, and have done since the very, very beginning of the pandemic, notwithstanding the lockdown restrictions.

Alice

You mentioned there that this is a largely paper based system. Has the lockdown encouraged more of an online move and do you see this potentially ending up as an entirely electronic system? Or is there always going to be a home for paper?

Judge Sinfield

I would like it to be a wholly or mainly electronic system. I was quite surprised when I first became a judge in 2012 – having left private practice immediately before – just how little was done electronically compared with my time in private practice. And I think that we should be moving towards a greater use of technology, not just because of the pandemic, but because that's a sensible way to move forward.

Indeed, we are. There has been a project for some two years now called Reform, which is designed to bring the Courts and Tribunals, in particular, into the modern world of technology. We lost a bit of focus on that during the pandemic. But, actually, the pandemic is probably the biggest driver towards the use of technology, and in some ways it's shown that we were being a little slow before in taking up the advantages that things like video hearings and electronic file management systems can give you. So, what I hope is that, actually, moving forward, we will increase the use of technology in our Tribunal and move away from a purely paper-based system.

To give you an example, at the moment I am working remotely, but I have just down here a paper file that was sent to me by a courier because it couldn't be sent for some reason electronically. Quite often things can just be scanned, and I can be sent scans, which is sufficient, but this, I think, was too large. I've done the work, I've produced a short decision, and I have sent that decision off electronically. But now, in order to return the file, I've got to wait for a courier to come from Birmingham to here, pick it up and physically take it back. That's obviously not sensible as a way to operate in every case; it would bring everything to a grinding halt.

So, I do hope that, when we move out of the lockdown period, that we can actually get together and spend some time really exploring how we can ensure that should we have to go into further lockdowns, or even just for the sake of efficiency, we can increase our use of electronic systems.

Alice **And how do you think that's going to be impacted by those taxpayers who are currently not able to access the facilities that are online, is there still going to be provision for those people to be able to engage with the systems?**

Judge Sinfield That's a really good question. I think that people who are, as the phrase has it 'digitally disadvantaged' have to be helped; of course they do. Just because they don't have access to, perhaps, a computer or a broadband connection cannot be a reason for them not to receive exactly the same justice as other Appellants receive.

So, just today, I was talking to a group of HMCTS that's, HM Courts and Tribunal Service people, who are looking at how we can enable people who do not have access to, say, a laptop and reasonable broadband, to take part in video hearings.

One solution that we are implementing at the moment – it's not quite ready yet – in Taylor House is the concept of a video booth. In fact, that name makes it sound more exciting than it is. It's really just a room, where we will provide access to a laptop or similar device, and a quiet space and, most importantly, some technical assistance from a clerk or IT person to enable people to come to us and participate in a video hearing using our facilities because they don't have them themselves.

In relation to engaging with the Tribunal online, I mentioned earlier that some 70 or 80% of our notices of appeal are submitted online using our online facility, which is very popular and guides people through the process. So, in fact, we reject far fewer of those notices of appeal than we used to in the case of paper appeals, because the paper appeals people often would make mistakes, whereas it's more difficult to make a mistake with the online version because it's guiding you all the time.

However, of course, some people don't have access to that, so we need to find a way – rather than just sending them a paper copy – of enabling them to do that. And I think that's something we're going to have to explore further as we move beyond the 70% or so, to try to have much closer to 100% of the notices filed online, because that's the beginning of the electronic journey to getting a decision in your appeal.

Alice **You've talked about the Reform Project. If you were to throw the budget out the window – complete blue sky thinking – what would you love to see implemented that you haven't currently been able to offer?**

Judge Sinfield Well that's a very interesting question. If Christmas came early, I would, of course, like to have a really good electronic case management and listing system. I am aware that sounds just very technical and boring, doesn't it? But what I mean by that is that I would like to be able to manage appeals from cradle to grave electronically and, given current situation, remotely.

One of the problems we have which is the listing system that I mentioned is that at some point a case is going to have to be heard; whether by video or face to face (except for the paper cases which I mentioned earlier).

One source of delay, and there are many, many sources of delays in the system, unfortunately, but one source of delay is actually getting a case listed in front of a judge sitting alone or a judge and member (which is the way the Tribunal operates). It can be very difficult to find dates where both sides and the Tribunal can come together for a hearing.

At the moment that is still done by the Tribunal staff engaging with the parties, and then checking with the judge, and the diary to check a court room is free. It's a very cumbersome process which could be simplified enormously, in my view, if we had an efficient scheduling and listing system.

One is, apparently, being developed. I have not seen it yet, but one of my colleagues is on a committee which is reviewing this product at the moment. I very much hope that that can be introduced very quickly and, as I've said a moment ago if I could have Christmas come early, then I'd like it introduced now. Unfortunately, I think that's it more than a year away, which is unfortunate.

The other thing that I would like to see if you have the power to grant my wishes, is that I would like to see us be able to recruit more staff to work in our administrative centre in Birmingham, because unfortunately, they have a constant battle to maintain the level of staffing that they need to operate at peak capacity. And there is a very good reason for that, it's because actually our staff are very good and keep getting poached.

But it's difficult; recruitment is always a struggle. Similarly, for judges and members. We are very lucky in that I think the Tax Chamber has an extraordinarily high-quality body of judges and members, but those people are difficult to find. So, in recent recruitment campaigns for judges, I am afraid to say that I haven't been able to find all the judges that I sought because, of course, we won't compromise on quality, and there just aren't enough good people applying for these jobs. I know they are out there. I know that there are really good people who have the abilities that I am looking for, and I would really like to encourage more of them to think about applying to become fee paid or salaried judges in the Tax Tribunals.

In relation to our members, I haven't actually had a campaign to recruit lay members who sit with the judges. I say lay members; they all have some sort of specialism or expertise or experience in relation to tax, so they contribute fully to the decision of the Tribunal.

But recently I was reviewing the situation, and I was alarmed to find that of the 61 or 60 members that we have at the moment, almost half of them retire in the next five years. Because they've reached the mandatory retirement age of 70.

Alice **Wow.**

Judge Sinfield So, my focus in the next year or two will be to recruit replacements for those who are about to retire. Otherwise we won't have enough members.

Alice **So, from your point of view, what do our listeners need to know, what do they need to have in mind and be thinking about when they are starting an appeal to the Tax Tribunal?**

Judge Sinfield Well that's a really good question. And I think the rather unhelpful immediate answer is that it all depends on the nature of the proceedings and the appeal, because I've seen cases where the taxpayer, in particular, is perhaps supported by a really large accounting firm or a large law firm; they've got the best advice; they've got fantastic documentation in folders that go round the room, and the Revenue are pretty much the same so it's like a really heavyweight piece of litigation, and you would approach that in exactly the same way as if it was a big commercial litigation.

But, of course, that's massively inappropriate for the corner shop that perhaps has a dispute about whether Jaffa Cakes are standard rated or zero rated. And you wouldn't want to get into that. Although the Jaffa Cake case actually involved a lot of documentation, and biscuits which were even better; or cakes I should say. That's a joke and I'm giving nothing away, for those who know about Jaffa Cakes.

But I think that in most cases, what I would say is that you should approach it first of all as a process in which there is the possibility of reaching some agreement. It seems to me that far too often matters come before me where the parties, both sides, both the Revenue and the taxpayer, have not done enough work to narrow the areas of dispute. And so we spend a lot of time dealing with matters which perhaps we didn't need to deal with. Now that doesn't matter so much to me, my job is to facilitate the appeal and to ensure that parties are dealt with fairly and justly, but it does matter to the parties because they are wasting their time and perhaps wasting costs.

Judge Sinfield

So, I encourage parties to explore all the avenues that are available to them to resolve disputes before they come to us. And just earlier this year, I issued a statement on the use of alternative dispute resolution in the Tribunals. And that is something which the Tribunal is bound to facilitate because there is a rule in our procedural rules that says we have to do that.

And in those circumstances I would not restrict it to alternative dispute resolution as a formal process, but I encourage parties to engage just through correspondence or having a meeting, to ensure that before it gets to the door of the Tribunal they have agreed as much as they possibly can.

So, I think that my biggest tip would be; please do the work in advance, try to reach as much agreement as you can, so that if you have to have a tax appeal, it's on defined issues and as limited issues as possible, so it can be dealt with as efficiently and quickly and cheaply as possible.

Alice

Thank you so much.

And thank you very much for taking us through the Tribunals and how this all works, and for giving us an insight into what we need to be thinking about.

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

Now as ever 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 Judge Sinfield or any topics you would like us to cover in a future episode, please do email us on taxingmatters@rpc.co.uk. We would love to hear from you.

If you like this episode please take a moment to rate, review and subscribe and remember to tell a colleague about us.

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



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