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CAPITAL MARKETS TAX COMMITTEE OF ASIA

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17 September 2015

The Honorable Mr. Kenneth Leung
Chairman
Bills Committee on Inland Revenue (Amendment) (No.3) Bill 2015
Legislative Council Secretariat
Hong Kong

Dear Mr. Leung,

Submission on the Inland Revenue (Amendment) (No.3) Bill 2015

We are replying to your request for an explanation of the position in Australia and UK with respect to appeals from their lowest-level tax tribunals to the courts.

Attached are two summaries accordingly.

In broad outline, the position in Australia is that a taxpayer has an automatic right of appeal from the Administrative Appeals Tribunal (AAT) to the court. No leave is required from either the AAT or the court.

In the UK –

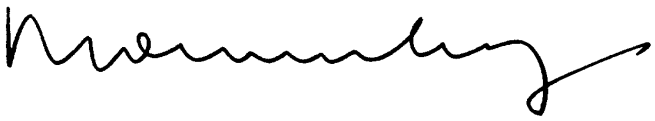
- Leave to appeal is required for an appeal from the First-Tier Tribunal to the Upper Tribunal. Either of these bodies can grant leave. To obtain leave, the appellant must demonstrate that it has a "real prospect of success". As per the case cited in the attachment, this means that the appellant must demonstrate that is has an "arguable" case (which is the criterion in Hong Kong under the current legislation).

- The UK case demonstrates that perhaps it is possible that a court in Hong Kong would interpret "reasonable prospect of success" in this limited manner to mean "arguable". However, this is not certain and uncertainty remains. The change in language in the Hong Kong context from "arguable" to "reasonable" would usually suggest that the legislature intended to change the criterion, so it would be odd if a court were to take the view that no change was in fact intended.

- For an appeal from the Upper Tribunal to the Court of Appeal, leave is also required from one of them. The appellant must demonstrate that (i) the proposed appeal would raise some important point of principle or practice; or (ii) there is some other compelling reason for the relevant appellate court to hear the appeal.

We hope you find these comments helpful.

Yours sincerely,



Michael Olesnicky
Chairman
For and on behalf of
The Joint Liaison Committee on Taxation

AUSTRALIA

1. There is an automatic right to a review by the AAT of an objection decision of the ATO or, as an alternative, an appeal to the Federal Ct. The taxpayer chooses – see section 14ZZ of the Taxation Administration Act 1953: http://www5.austlii.edu.au/au/legis/cth/consol_act/taa1953269/s14zz.html
2. If the matter goes to the AAT, a person can appeal from there as regards a question of law – see section 44 of the Administrative Appeals Tribunal Act 1975: http://www5.austlii.edu.au/au/legis/cth/consol_act/aata1975323/s44.html. There is no leave requirement mentioned. (The only issue of discretion is whether the Federal Court will sit as a single judge or as a full bench.)
3. What qualifies as a question of law has been recently extended to in effect cover a mixed question of law and fact – see Haritos v Commissioner: http://www.austlii.edu.au/au/cases/cth/FCAFC/2015/92.html. In some instances, an appeal from the AAT on a question of law goes directly to a Full Court of the Federal Court.
4. The Federal Court may on appeal make findings of fact.
5. There is an automatic right of appeal from a single judge of the Federal Court to the Full Federal Court (regardless of whether the appeal is from an appeal under section 14ZZ or from an appeal under section 44) . I have had a quick look at the Federal Court Act 1976 and the related rules and I believe the relevant provision is section 24 of the Act: http://www5.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/s24.html - in this instance, the section limits appeals in relation to interlocutory matters, so by definition because the matter is not an interlocutory one an appeal does not require leave. I note that Haritos was an interlocutory matter as the judge at first instance who was hearing an appeal from the AAT on a question of law said there was no question of law which is why leave to appeal was required.
6. A subsequent appeal to the High Court of Australia requires special leave of the High Court – see section 33 of the Federal Court Act 1976: http://www5.austlii.edu.au/au/legis/cth/consol_act/fcoaa1976249/s33.html

(Provided by John Balazs of Balazs, Lazanas & Welch LLP, Lawyers, Sydney.)

Overview of tax tribunal system

With effect from 1 April 2009, the old tax tribunals have been unified into a two tier tribunal comprising of a First-tier Tribunal and an Upper Tribunal. The First-tier Tribunal is organised into Chambers with the Tax Chamber hearing tax and National Insurance Contributions (NICs) appeals. The Upper Tribunal is a single tribunal organised into Chambers. The Tax and Chancery Chambers hears tax and NICs cases. The purpose of the Upper Tribunal is effectively to replace the old right of appeal to the High Court. Appeals from the First-tier Tribunal go to the Upper Tribunal, with leave, and then, again with leave, to the Court of Appeal.

A small number of appeals may be heard by the Upper Tribunal in the first instance. When the Tax Chamber receives a notice of appeal or application it will allocate the case to one of the following categories: Default Paper; Basic; Standard; or Complex. Complex cases are those: (i) that require lengthy or complex evidence or a lengthy hearing; (ii) involving a complex or important principle or issue; or (iii) involving a large financial sum. If the case is treated as Complex, it means that the case may be considered for transfer to the Upper Tribunal and that a special costs regime will apply.

Appeal from First-tier Tribunal to Upper Tribunal

The unsuccessful party at first instance (i.e. generally, in the First-tier Tribunal) can seek permission to appeal to the Upper Tribunal on an arguable point of law. It follows that questions of fact are not appealable, e.g. questions of degree; business and accountancy questions; questions as to witness evidence in general as well as questions relating to credibility; and matters of expert opinion. In this regard, section 11(2) of the Tribunals, Courts and Enforcement Act 2007 (the "**Act**") provides that any party to a case has a right of appeal. Section 11(1) clarifies that, for the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal. Section 11(4) provides that permission may be given by the First-tier Tribunal or the Upper Tribunal.

Despite the wording of section 11(2), the First-tier Tribunal in *Invicta Foods Ltd v HMRC* [2014] UKFTT 456 (TC) did not accept that the right of appeal is absolute where the appellant has identified a point of law in dispute. The Tribunal cautioned that such a low threshold would mean that the "Upper Tribunal would be in danger of being swamped". Instead, the Tribunal looked to Rule 52.3(6) of the Civil Procedure Rules for guidance, which provides that permission to appeal may be given only where the court considers that the appeal would have a real prospect of success. The Tribunal explained:

> *In this context it should be noted that "real prospect of success" amounts to considering whether there is a realistic, rather than a fanciful, prospect of success (see Tanfern Ltd v Cameron McDonald (Practice note)* [2000] 1 WLR 1311 *at paragraph 21). It does not require the tribunal to agree with the arguments put forward in favour of the application for permission to appeal or to believe that they will, in fact, prevail but simply to accept that those points of law are arguable.*

In terms of procedure, an unsuccessful party has 56 days from the date of the tribunal's decision in which to appeal. An application for permission to appeal must identify the decision to which it relates, identify the alleged error(s) and state the result sought. On receiving an application for permission, the tribunal must consider whether it is appropriate to conduct a review of its decision. It may undertake a review of the decision if it is satisfied that there was an error of law in it. If the tribunal decides not to review its decision or does not take any action consequent on a review, the tribunal must then consider whether to grant permission to appeal and notify the parties accordingly. Where the First-tier Tribunal

refuses permission to appeal, an application for permission to appeal may be made direct to the Upper Tribunal. If permission is refused by the Upper Tribunal on the papers, the applicant has a final opportunity to secure permission at an oral hearing before the Upper Tribunal.

Appeal from Upper Tribunal to Court of Appeal

The appeal process from the Upper Tribunal to the Court of Appeal is governed by section 13 of the Act and The Appeals from the Upper Tribunal to the Court of Appeal Order 2008 (the "**Order**"). Section 13 provides that any party to a case has a right of appeal and that permission may be given by the Upper Tribunal or the relevant appellate court. Article 2 of the Order provides that permission to appeal shall not be granted unless the Upper Tribunal or, where the Upper Tribunal refuses permission, the relevant appellate court, considers that (i) the proposed appeal would raise some important point of principle or practice; or (ii) there is some other compelling reason for the relevant appellate court to hear the appeal. This test is borrowed from Rule 52.13(2) of the Civil Procedure Rules.

The leading case dealing with the interpretation of Rule 52.13(2) is *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60. In relation to the first limb ("important point of principle or practice") of the grounds for appeal, Dyson LJ stated:

> *In our judgment, it is clear that the reference in CPR r 52.13(2)(a) to "an important point of principle or practice" is to an important point of principle or practice that has not yet been established. The distinction must be maintained between (a) establishing and (b) applying an established principle or practice correctly. Where an appeal raises an important point of principle or practice that has not yet been determined, then it satisfies CPR r 52.13(2)(a). But where the issue sought to be raised on the proposed appeal concerns the correct application of a principle or practice whose meaning and scope has already been determined by a higher court, then it does not satisfy CPR r 52.13(2)(a).*

In relation to the second limb ("some other compelling reason") of the grounds for appeal, it is helpful to quote Dyson LJ's *dicta* in full.

> *(1) A good starting point will almost always be a consideration of the prospects of success. It is unlikely that the court will find that there is a compelling reason to give permission for a second appeal unless it forms the view that the prospects of success are very high. That will usually be a necessary requirement, although as we shall explain, it may not be sufficient to justify the grant of permission to appeal. This necessary condition will be satisfied where it is clear that the judge on the first appeal made a decision which is perverse or otherwise plainly wrong. It may be clear that the decision is wrong because it is inconsistent with authority of a higher court which demonstrates that the decision was plainly wrong. Subject to what we say at (3) below, anything less than very good prospects of success on an appeal will rarely suffice. In view of the exceptional nature of the jurisdiction conferred by CPR r 52.13(2), it is important not to assimilate the criteria for giving permission for a first appeal with those which apply in relation to second appeals.*
>
> *(2) Although the necessary condition which we have mentioned at (1) is satisfied, the fact that the prospects of success are very high will not necessarily be sufficient to provide a compelling reason for giving permission to appeal. An examination of all the circumstances of the case may lead the court to conclude that, despite the existence of very good prospects of success, there is no compelling reason for giving permission to appeal. For example, if it is the appellant's fault that the first appeal was dismissed, because he failed to refer to the authority of a higher court which demonstrates that the decision on the first appeal was wrong, the court may conclude that justice does not require this court to give the appellant the opportunity to have a second appeal. There is a*

reason for giving permission to appeal, but it is not compelling, because the appellant contributed to the court's mistake. On the other hand, if the authority of a higher court which shows that the decision on the first appeal was wrong post-dated that decision, then there might well be a compelling reason for giving permission for a second appeal.

(3) There may be circumstances where there is a compelling reason to grant permission to appeal even where the prospects of success are not very high. The court may be satisfied that there are good grounds for believing that the hearing was tainted by some procedural irregularity so as to render the first appeal unfair. Suppose, for example, that the judge did not allow the appellant to present his or her case. In such a situation, the court might conclude that there was a compelling reason to give permission for a second appeal, even though the appellant had no more than a real, as opposed to fanciful, prospect of success. It would be plainly unjust to deny an appellant a second appeal in such a case, since to do so might, in effect, deny him a right of appeal altogether.

In terms of procedure, if the unsuccessful party wishes to appeal against a decision of the Upper Tribunal, the party must apply to the Upper Tribunal for leave to appeal within one month of receiving the written reasons for the decision. If the Upper Tribunal refuses leave to appeal, leave may be sought from the Court of Appeal.

(Provided by Baker & McKenzie, Hong Kong.)