WHY THE FIRST-TIER TAX TRIBUNAL DEFINITELY HAS JUDICIAL REVIEW JURISDICTION

by Michael Firth

Introduction

The Tax Tribunals have made a fundamental error of law with far-reaching consequences and to the significant disadvantage of taxpayers, particularly those with modest means. The error took hold in two Upper Tribunal decisions *(HMRC v. Noor* [2013] STC 998 and *HMRC v. Hok Ltd* [2013] STC 225), heard by the same Judges and in neither of which (astonishingly) was the taxpayer represented. Since then, the error has been repeated numerous times and, unlike the physical realm, the legal realm is one where it is indeed possible for something to become true simply because it has been said enough times. The purpose of this article is to fully explain the error in the hope that it is corrected before it ceases to be an error.

It will not have escaped the attentive reader's attention that a clue as to what error is referred to was hidden in the title of the Article: it is, indeed, the error of holding that the First-tier Tax Tribunal does not have judicial review jurisdiction. The, now classic, exposition of this (with respect) error is *HMRC v. Hok Ltd* [2013] STC 225, where Warren J and Judge Bishopp entertained absolute certainty as to the correct conclusion:

> "There is in our judgment no room for doubt that the First-tier Tribunal does not have any judicial review jurisdiction." (§41).

In support, five reasons were given:

(1) The Tribunal is a statutory body, and neither the statute

creating it, nor the statutes it is required to apply, give it jurisdiction to apply public law principles (§36) or to apply "common law principles" (§56).

(2) The structure of the legislation, in conferring a judicial review function on the Upper Tribunal but not the First-tier Tribunal makes it "perfectly plain" that Parliament did not intend to confer judicial review jurisdiction on the First-tier Tax Tribunal (§43). Parliament must be taken to have understood the difference between statutory, common law and judicial review jurisdictions. (§57).

(3) A taxpayer who relies on a public law principle is not saying that the facts necessary to give rise to a tax liability do not exist but that, because of some further facts, it would be oppressive to enforce that liability (§§39 – 40, relying on *Aspin v. Estill (Inspector of Taxes)* [1987] STC 723).

(4) The decision of the House of Lords in *CEC v. JH Corbitt (Numismatists) Ltd* [1980] STC 231 ("*Corbitt*") binds the Tribunals to conclude that they may not apply public law principles. (§41).

(5) Cases such as *Wandsworth London BC v. Winder* [1984] 3 All ER 976 concerned the validity of the act of a public authority and thus raised different questions to those in issue in *Hok* (§52).

Each of these reasons, however, discloses a single, fundamental misunderstanding as to the constitutional basis for judicial review. Once that misunderstanding is corrected, it becomes clear that the FTT definitely has judicial review jurisdiction. Indeed, it would require very clear statutory words to stop the FTT having such jurisdiction.

One clarification that should be made at the outset is the meaning of "jurisdiction", which is a word of "some ambiguity":

> "Both the deputy judge and the Vice-Chancellor referred to the issue as one of "jurisdiction". But jurisdiction is a word of some ambiguity. The ambiguity was referred to

by Pickford LJ in *Guaranty Trust Co of New York v Hannay & Co* [1915] 2 KB 536 at 563. He said:

> "The first and, in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that, although the Court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances." (Fourie v. Le Roux [2007] UKHL 1, §25)

The argument in the main part of this article is that the FTT has jurisdiction in the "only really correct sense". In the conclusion it is briefly considered whether the FTT ought not to use the jurisdiction that it has (jurisdiction in the broader sense).

The constitutional basis of judicial review

As all students of constitutional law are taught, Parliament is sovereign. In practical terms, that means that Parliament can make any law it likes, and the Courts must give effect to the laws properly passed by Parliament. Statutory interpretation is part of this process as it is aimed at discerning Parliament's intention. In exercise of this sovereignty, Parliament often gives powers to public authorities, including HMRC. When a power is so given, it logically follows that there will be acts that are within the scope of the power, properly interpreted, (*intra vires*) and acts that are outside the scope of the power, properly interpreted, (*ultra vires*). If an act is outside of the scope of the power, then – quite obviously – it is unlawful, and the Courts can and should intervene. On the other hand, if a particular act is within the scope of the power, it would be a subversion of the principle of Parliamentary sovereignty for

Parliamentary sovereignty, they are required by it (because they give effect to the presumed intention of Parliament).

At this point, the reader may be sceptical as to how realistic it is to be able to find an intention on the part of Parliament that each power it confers on a public authority should be exercised in accordance with the varied and nuanced principles of public law. Those principles themselves, it may be noted, do not stand still, yet Parliament does not appear to prompt such changes. Such sceptical readers are, in fact, in good company. There are those out there who argue that the foundations of judicial review are in the common law, as developed by the judges, rather than the doctrine of *ultra vires* based on presumed Parliamentary intention.

Two points needs to be made in response. First, despite the fact that you will not find any consideration of these issues in the cases on the jurisdiction of the Special Commissioners or the FTT, it is not a new debate. It has been a live topic in academic circles for decades (at least), there are entire books devoted to the topic (for example, Judicial Review and the Constitution (2000), Forsyth ed.) and all the major textbooks on administrative law address the issues (for example, Wade and Forsyth, 11th edition, at pp.27 – 31). Second, whilst there is an academic debate on the proper constitutional justification for judicial review, the authorities are clear that the answer is the doctrine of *ultra vires*:

> "But in 1969, the decision of your Lordships' House in *Anisminic Ltd v. Foreign Compensation Commission* made obsolete the historic distinction between errors of law on the fact of the record and other errors of law. It did so by extending the doctrine of *ultra vires*, so that any misdirection in law would render the relevant decision *ultra vires* and a nullity…" (*Boddington v. British Transport Police* [1999] 2 AC 143 at 154, Lord Irvine with whom Lord Hoffmann agreed).

the Courts to strike down or otherwise interfere with that act - by definition it is an act that Parliament has authorised the public authority to perform and thus lawful.

How, then, does one fit the principles of judicial review within this constitutional framework? The answer, supported by high authority, is the doctrine of "*ultra vires*". According to this doctrine, when Parliament enacts a statute giving a public authority a power, there will be some limits on that power that are expressly set out in the statute, but there are others that are implied in to the statute on the basis that Parliament is presumed to have intended such limits. For example, when Parliament gives a public authority the power to make a decision, it is presumed that Parliament did not intend to authorise that public authority to make a decision that was wholly unreasonable in the sense that no reasonable public authority could have taken such a decision. Similarly, Parliament is presumed to have intended that decisions by public authorities must be reached by a procedure that respects the principles of natural justice.

What this means, in constitutional terms, is that the limits imposed on public authorities by the principles of public law/ judicial review come from within the statute conferring the power itself. They arise through the process of statutory interpretation and as a result of the exercise of Parliament's intention. It is as if in the specific legislation conferring the power Parliament included an additional section or subsection specifying further conditions to the effect that the public authority may only make a decision that is reasonable and complies with the principles of natural justice. What it means in practical terms is that any purported exercise of the power that fails to comply with public law principles is outside the scope of the power granted by parliament (i.e. ultra vires) and thus void. Following this point through to its logical conclusion, the principles of judicial review are not only consistent with

> "I adhere to my view that the juristic basis of judicial review is the doctrine of *ultra vires*." (*Boddington* at 164, Lord Browne-Wilkinson)
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> "I see no reason to depart from the orthodox view that ultra vires is 'the central principle of administrative law' as Wade and Forsyth, Administrative Law, 7th ed, p.41 described it." (*Boddington* at 171, Lord Steyn with whom Lord Hoffmann also agreed)

Other cases are equally clear that the foundation of public law principles is Parliament's presumed intention:

> "Where wide powers of decision-making are conferred by statute, it is presumed that Parliament implicitly requires the decision to be made in accordance with the rules of natural justice: Bennion on Statutory Interpretation, p.737." (*R v. Home Secretary ex p. Pierson* [1998] AC 539 at 550)
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> "In all cases…this intervention by way of prohibition or *certiorari* is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense… reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting *ultra vires* his powers and therefore unlawfully: see Wade, Administrative Law, 6th ed (1988) pp.39 et seq." (*R v. Lord President of the Privy Council, ex parte Page* [1993] AC 682 at 701, Lord Browne-Wilkinson).
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> "…it is to be implied, unless the contrary appears, that Parliament does not authorise by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in the particular procedures, compliance with those principles." (*Fairmount*

Investments Ltd v. Secretary of State for the Environment [1976] 1 WLR 1255 at 1263, Lord Russell).

The purpose of setting out so many authorities is to show that the point is beyond doubt, as a matter of law: public law principles limit public authorities, because they are implied into the power-conferring statute as a matter of statutory interpretation in order to give effect to the presumed intention of Parliament. Furthermore, a purported exercise of a power that is contrary to public principles is not a valid exercise of the power at all – it is a nullity:

> "The break-through that the *Anisminic* case made was the recognition by the majority of this House that if a tribunal whose jurisdiction was limited by statute or subordinate legislation mistook the law applicable to the facts as it had found them, it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported 'determination', not being 'a determination' within the meaning of the empowering legislation, was accordingly a nullity." (*O'Reilly v. Mackman* [1983] 2 AC 237 at 278).
>
> "It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. As Lord Selborne said as long ago as 1885 in *Spackman v. Plumstead District Board of Works* (1885) 10 App.Cas. 229, 240: "There would be no decision within the meaning of the statute if there were anything…done contrary to the essence of justice." See also *Ridge v. Baldwin* [1964] AC 40." (*AG v. Ryan* [1980] AC 718 at 730, Privy Council).

With the proper constitutional basis of judicial review in mind, it is now possible to understand, first, why the FTT definitely

has judicial review jurisdiction (in the sense of the ability to adjudicate on the application of public law principles to the facts before it); and, second, why the decisions holding that the FTT has no judicial review jurisdiction are wrong.

The FTT's judicial review jurisdiction

What is true of the constitutional basis for judicial review of public authorities decisions generally must also be true of judicial review of HMRC decisions. It follows that when, for example, HMRC purport to exercise their power in TMA 1970 s.29 to raise a discovery assessment, they do so against a background of public law requirements implied into s.29. Further, the effect of a breach of one of those public law requirements is that the purported assessment is a nullity – there is no assessment within the meaning of s.29. In light of the above, if it is accepted that the FTT has power to determine whether a purported assessment is a valid assessment based on the explicit requirements of TMA s.29 (whether it is in time, whether there was a discovery etc.) then it must be accepted that the FTT also has power to determine whether a purported assessment is a valid assessment based on the implicit requirements. Once implied into the statute, the public law requirements are just as much requirements of the statute as the explicit requirements.

In practice, it is clear that the FTT does have power to consider whether the purported assessment is a valid assessment. That it has such power is so obvious that in most cases it does not need to be considered. In statutory terms such appeals proceed on the basis of (usually) TMA s.49G:

> "(2) The appellant may notify the appeal to the tribunal within the post-review period.
>
> (3)…
>
> (4) If the appellant notifies the appeal to the tribunal, the tribunal is to determine the matter in question [i.e. the matter to which the appeal relates – s.49I]."

If the Tribunal decides on such an appeal that there is no valid assessment, for instance, because it is out of time, that is a binding decision on the parties, with the effect that HMRC have nothing to enforce through collection proceedings.

Note, in this respect, that TMA s.50(6) (which gives a power to reduce assessments where the taxpayer is overcharged) does not restrict the FTT's jurisdiction – that subsection applies where there is a valid assessment but the amount is too high. A declaration to that effect would not, in many cases, have the desired legal effect, because, ex hypothesi, there is a valid assessment. Section 50(6) is a necessary additional power, as it allows effect to be given to the Tribunal's decision and, in fact, it appears that it is HMRC rather than the FTT that exercises the power under s.50(6):

> "The draftsman must in my judgment have considered that any alteration of the assessment consequent on an appeal fell to be made by the assessing body and not by the appellate body. The fact that Parliament has taken the trouble to alter [TMA s.50(6)] so as to delete the express requirement that the commissioners are to alter the assessment is a clear indication that they are not the body which henceforward would be responsible for making the necessary alterations. This statutory history is wholly consistent with the conclusion that following an appeal, the necessary amendments fall to be made by the inspector or the Board as the assessing body." (*Hallamshire Industrial Finance Trust Ltd v. IRC* [1979] STC 237 at 243)

Returning to the question of whether the FTT has power to determine the validity of an assessment, not only is this borne out by the legislation, it is confirmed by the authorities:

> "The jurisdiction of the Special Commissioners is not limited to situations where the taxpayer claims to have been overcharged by a valid assessment. The jurisdiction

> covers situations where the taxpayer contends that there is no charge on grounds that the document purporting to be the assessment is invalid or ineffective. The most usual case is where the assessment is challenged as being out of time. Another example is where the taxpayer contends that the assessment is on the wrong person (eg where the assessment is on him as an individual whereas he claims he should have been assessed as a trustee). A further example of a challenge to the validity of the assessment that falls within the Special Commissioners' jurisdiction is where the taxpayer contends that the assessment officer did not have had the Board's authority to make the assessment. The words of s 50(6) do not, expressly or by necessary implication, restrict the scope of the appeal commissioners and prevent them from examining the validity of the assessment on those grounds. Indeed, s 29(8) expressly provides for an appeal on the grounds that neither of the conditions in subsections (4) and (5) are fulfilled." (*Khan v. Director of the Assets Recovery Agency* [2006] STC (SCD) 154 at §15).
>
> "However, it is said that the inspector was not entitled to make assessments at all because the profits of prostitution are not assessable to tax, and that accordingly such assessments were ultra vires and of no effect. In my opinion there are two objections to that submissions. The first is that it is not open to the taxpayer, in collection proceedings, to raise such a contention. If it is to be raised, it must be raised on the appeal and argued therein." (*IRC v. Aken* [1990] STC 497).

In conclusion of this section, it has been established that:

(a) A purported assessment that is contrary to public law principle is not, as a matter of statutory interpretation, an assessment within the meaning of the relevant provision of TMA 1970; and

(b) Tax Tribunals have jurisdiction (indeed an obligation) to determine whether there is a valid assessment.

Combining these conclusions leads to the further conclusion that Tax Tribunals do have jurisdiction to determine whether an assessment is invalid due to it being contrary to public law principles. The following sections explain why none of the reasons relied upon by the Upper Tribunal in *Hok* affect this conclusion.

Reason 1: the FTT is a statutory body with no judicial review jurisdiction/jurisdiction to apply common law principles

An important part of the reasoning in cases such as *Hok Ltd* is that the FTT is a statutory body which only has the jurisdiction conferred upon it by statute:

> "Once it is accepted, as for the reasons we have given it must be, that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither course is within its jurisdiction. As we explain at paras 36 and 43 above, the Act gave a restricted judicial review function to the Upper Tribunal, but limited the First-tier Tribunal's jurisdiction to those functions conferred on it by statute. It is impossible to read the legislation in a way which extends its jurisdiction to include – whatever one chooses to call it – a power to override a statute or supervise HMRC's conduct." (§56).

The flaw in this reasoning should now be readily apparent – public law principles absolutely do not entail a Court or Tribunal "overriding a statute" because Courts have no more authority to override statutes than Tribunals do. This is the very essence of the *ultra vires* principle: Parliamentary sovereignty is only respected if the limits on the power are found, expressly or implicitly, in the provision conferring the

power. The FTT undoubtedly has the power to apply the provisions of TMA 1970 and thus undoubtedly has power to apply the public law limits implied into that statute.

For the same reason, references to the common law are misconceived (paragraphs 12, 26, 38, 44, 50 and 52 of *Hok*).

Confirmation that the fact that the FTT was created by statute does not prevent it applying public law principles can be found by looking at other statutory bodies so created (and thus lacking the "inherent" jurisdiction of the High Court). *Wandsworth London BC v. Winder* [1985] AC 461 was a case in which it was held that a county court was entitled to dismiss a claim for possession due to arrears of rent on the basis that the local authority's purported exercise of its power to increase rent (under the Housing Act 1957) was contrary to public law principles. County courts were established by statute and thus were statutory bodies (at the time County Courts Act 1959, s.1, now repealed). Jurisdiction was granted in respect of:

- Contract and tort claims for less than £400 (s.39).
- Actions for the recovery of land (s.48).
- Specified proceedings relating to equity (s.52).
- Probate (s.62).

There was no "jurisdiction" in respect of judicial review and no power to grant any judicial review remedy. This is now further emphasised by County Courts Act 1984 s.38(3), which states that a county court shall not have power to order *mandamus*, *certiorari* or prohibition, whereas s.29 of the Supreme Courts Act 1981 expressly grants such remedies to the High Court, and s.31 provides that applications for such remedies "shall be made in accordance with rules of court by a procedure to be known as an application for judicial review". Also similar to the FTT is the fact that the county court, as a creature of statute, has no inherent jurisdiction (see, for example, *Re B* [1996] 1 WLR 716).

Despite this, the House of Lords held in *Winder* that the county court was entitled to hear and decide the question of

whether the decision to increase rent was invalid on public law grounds. The questions of whether the county court had "a general supervisory jurisdiction" or a "judicial review jurisdiction" were irrelevant because the defendant was not asking for a judicial review remedy, simply that it be recognised that the purported increase in rent was invalid on public law grounds and thus the claim dismissed:

> "Apart from the provisions of Order 53 and section 31 of the Supreme Court Act 1981, he would certainly be entitled to defend the action on the ground that the plaintiff's claim arises from a resolution which (on his view) is invalid." (Lord Fraser at 509).

Instead, the question was whether it was an abuse of the process of the court for the tenant to take the invalidity point in the county court by way of defence rather than commence judicial review proceedings. The House of Lords held that there was no abuse of process.

Precisely the same result was reached in respect of a claim to collect tax in *Pawlowski v. Dunnington* [1999] STC 550 where it was accepted that the question of whether a determination under PAYE regulations was invalid on public law grounds could be raised in the county court. Oddly, the Upper Tribunal seemed to understand *Winder* in *Hok* (§52) but did not go on to apply the same logic to the result of finding that a penalty determination in the context of taxation violated public law principles. Technically the upper Tribunal was right that there was no power to "discharge" a penalty determination (§58), but there was power to decide whether there was a valid penalty determination in the first place.

Reason 2: the structure of the legislation makes it plain that the FTT was not intended to have judicial review jurisdiction

The Upper Tribunal explained as follows in *Hok*:

> "That the First-tier Tribunal has no judicial review

> function is, in addition, the only conclusion which can be drawn from the structure of the legislation which brought both that Tribunal and this into being. The 2007 Act conferred a judicial review function on this Tribunal, a function it would not have had (since it, too, is a creature of statute without any inherent jurisdiction) had the Act not done so; and it hedged the jurisdiction it did confer with some restrictions. It is perfectly plain, from perusal of the Act itself, that Parliament did not intend to, and did not, confer a judicial review jurisdiction on the First-tier Tribunal, and there is nothing in the more detailed legislation relating to tax appeals, the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, SI 2009/56, which points to a contrary conclusion."

In fact, what Parliament did in the TCEA 2007 was to grant the Upper Tribunal power to award judicial review remedies:

> "The Upper Tribunal has power, in cases arising under the law of England and Wales or under the law of Northern Ireland, to grant the following kinds of relief—
> (a) a mandatory order;
> (b) a prohibiting order;
> (c) a quashing order;
> (d) a declaration;
> (e) an injunction."

This is no different to Parliament confirming the High Court's power to grant such remedies but explicitly prohibiting the county courts from doing so. As explained above, that in no way affects the county courts' ability to apply the public law principles implied into statutes and recognise that the effect of a breach of such requirements renders the purported exercise of the power a nullity. Similarly, the FTT does not need to able to grant a "quashing order" in order to recognise that a purported assessment is invalid due to public law requirements implied into the TMA 1970. That is not to say

that the conferring of a power to grant these remedies on the Upper Tribunal was pointless. On the contrary where, for example, a taxpayer insists that HMRC must take positive action due to public law principles, only a judicial review remedy (a mandatory order) will assist. Put another way, whilst public law principles can render a purported decision a nullity, finding that a decision not to do something is a nullity does not mean that the public authority has done the thing that they were supposed to do.

Reason 3: A taxpayer who relies on public law principles is not alleging that the tax liability has not arisen

The Upper Tribunal sought support for its own view from the Court of Appeal decision in *Aspin v. Estill* [1987] STC 723. Specifically, they cited the following passage:

> "The taxpayer is saying that an assessment ought not to have been made. But in saying that, he is not, under this head of complaint, saying that in this case there do not exist in relation to him all the facts which are prescribed by the legislation as facts which give rise to a liability to tax. What he is saying is that, because of some further facts, it would be oppressive to enforce that liability. In my view that is a matter in respect of which, if the facts are as alleged by the taxpayer, the remedy provided is by way of judicial review." (at 727)

With respect, this passage is wrong, because a taxpayer who relies on public law grounds in relation to an assessment necessarily is (whether he states it expressly, or not) saying that the facts giving rise to a liability to tax do not exist: he is, necessarily, arguing that the assessment is invalid in light of the implied public law conditions. Without a valid assessment, there is nothing to enforce (and thus nothing to ask HMRC not to enforce). In the absence of any consideration of the numerous House of Lords authorities on the constitutional

basis and effect of judicial review principles, the decision is *per incuriam*.

The Court of Appeal's reliance on *Preston v. IRC* [1985] AC 835 in support of their conclusion in *Aspin* does not assist, because that was triggered only by the taxpayer's attempt to rely on the case for the opposite conclusion, when in fact the case does not consider the question of the judicial review jurisdiction of the Special Commissioners or FTT at all.

***Reason 4: the decision of the House of Lords in* Corbitt**

Corbitt concerned the application of the VAT margin scheme for works of art, antiques and scientific collections. In order to be entitled to use the margin scheme, a trader had to keep such records and accounts as specified by the Commissioners in a notice. That notice specified the records required to be kept, but reserved a residual discretion to accept other records. The taxpayer wished to take advantage of the margin scheme but had, admittedly, not kept the specified records. The Commissioners refused to exercise their residual discretion in favour of the taxpayer and the House of Lords held, inter alia, that the VAT Tribunal had no jurisdiction to review that decision. The taxpayer in *Corbitt* was in a very different position from that of most taxpayers who seek to rely on public law principles. That taxpayer wanted to take advantage of the margin scheme and, in order to do so, required a positive exercise of the Commissioners' discretion. Until there was such a positive exercise of discretion, the taxpayer could not be said to fulfil the statutory requirements to use the margin scheme. In order to obtain that positive exercise of discretion, it would not be enough to decide that the existing decision on the matter was invalid for public law reasons, because that would simply mean that there was no decision on the question. Only a positive order of *mandamus* could thus achieve what the taxpayer wanted, and it is not suggested here that the FTT has any such power.

On the contrary, what is argued here is that where the taxpayer relies on public law principles solely to show that a purported decision by HMRC is invalid, and does not require anything more, the tax tribunal does have jurisdiction to recognise that invalidity and decide the case before it accordingly. *Corbitt* does not decide otherwise.

Reason 5: Cases such as* Winder *concerned whether a public authority's decision was valid and thus raised a different question

The relevant passage from the Upper Tribunal decision in *Hok* is at paragraph 52:

> "In our judgment neither *Wandsworth v Winder* nor *Rhondda Cynon v Watkins* offers any support to the proposition that the First-tier Tribunal is able to apply (to use the judge's terminology) 'sound principles of the common law' in order to reduce or discharge penalties imposed pursuant to statute. What was in issue in both of those cases was not whether the councils' actions were fair or reasonable, or indeed any general principle of the common law, but whether the actions they had taken had the effect for which they argued—that is, whether the rent had been validly increased, and whether the compulsory purchase order had been vitiated by a subsequent change of mind. Those questions may well have given rise to issues of public law, but they did not give rise to matters for which the only possible remedy is by way of judicial review; and they went, in each case, to the core of the individual's defence of the claims made against him."

This passage, above all others, illustrates why it is so disappointing that the Upper Tribunal took such an important decision in a case where the taxpayer was unrepresented. The Upper Tribunal was absolutely correct when it said that *Winder* concerned the validity of a decision to increase rent, and had

it appreciated that that is exactly what the taxpayer was, as a matter of law, saying when it challenged the penalty determination on public law grounds, the course of history might have been different. Instead, the Upper Tribunal understood the taxpayer to be asking it to discharge penalties, validly imposed, on public law grounds. Had the argument been put correctly, based on a proper understanding of public law principles, the taxpayer would have been asking the Upper Tribunal to recognise that there was no valid penalty determination – the same point as in *Winder* and other cases.

Conclusion

For all the reasons set out above, it is beyond doubt that the FTT does have jurisdiction to apply public law principles, as long as the result desired by the taxpayer is that HMRC's decision is a nullity. In the vast majority of cases, that will be exactly what the taxpayer is asking for, whether it be in respect of a purported assessment or a purported amendment to a tax return. Only if the taxpayer wants more than that, for example, a positive order requiring HMRC to take a decision in his or her favour, can it be said that the FTT's jurisdiction is insufficient.

That is not the end of the matter, however. It may come as a surprise to those reading the tax cases on the question of the FTT applying public law principles, but there is a large body of case law, including many cases of high authority, considering precisely the issue of when a litigant may rely on public law principles against a public authority otherwise than in a claim for judicial review (again, all administrative law textbooks deal with the issue at length – see, for example, Wade and Forsyth, 11th Edition, pp.568 – 583). Crucially, however, and by way of confirmation of the points above, these cases consider whether it would be an abuse of process of the court for the public law matter to be raised outside a claim

for judicial review. The question of abuse necessarily presupposes that the Court has jurisdiction but may decide not to exercise it, and it is precisely the same question that arises whether the public law issue appears in a tort claim in the High Court or a contractual claim in the County Court.

The starting point, in light of cases such as *O'Reilly v. Mackman* [1983] 2 AC 237, is that it is an abuse of process to raise public law issues outside of a claim for judicial reviews because the protections built into the judicial review procedure are thereby sidestepped (in particular, the three month time limit and the permission stage). There are exceptions, however. In respect of tax appeals in the FTT, two exceptions are relevant:

(1) Public law issues relied upon by way of defence.

(2) Public law issues arising as collateral issues where the person raising them did not select the procedure.

The *Winder* case illustrates these exceptions as it concerned an action for possession by a local council after the tenant refused to pay a rent increase. The tenant's defence was that the decision to raise the rent was void for unreasonableness. In the House of Lords it was held as follows:

> "In any event, the arguments for protecting public authorities against unmeritorious or dilatory challenges to their decisions have to be set against the arguments for preserving the ordinary rights of private citizens to defend themselves against unfounded claims.
>
> It would in my opinion be a very strange use of language to describe the respondent's behaviour in relation to this litigation as an abuse or misuse by him of the process of the court. He did not select the procedure to be adopted. He is merely seeking to defend proceedings brought against him by the appellants. In so doing he is seeking only to exercise the ordinary right of any individual to defend an action against him on the ground that he is not liable for the whole sum claimed by the plaintiff.

> Moreover, he puts forward his defence as a matter of right, whereas in an application for judicial review, success would require an exercise of the court's discretion in his favour." (at 509)

Furthermore, in *Pawlowski v. Dunnington* [1999] STC 550, the Court of Appeal adopted the following principle from *Dennis Rye Pension Fund v. Sheffield CC* [1998] 1 WLR 840:

> "If the choice has no significant disadvantages for the parties, the public or the court, then it should not normally be regarded as constituting an abuse."

The Tax Tribunals have never gotten this far in the analysis, because they have repeatedly taken a wrong turn at the jurisdiction question. If and when they come to consider the abuse question it is submitted that the reasoning in *Winder* and *Pawlowski* lead to the conclusion that raising public law arguments before the Tribunal is not an abuse of process. In particular:

- The procedure is one that is commenced by HMRC by deciding to make an amendment/assessment (hence why the taxpayer is the "appellant");
- The taxpayer is entitled to raise the defence as of right before the FTT, whereas judicial review is subject to an element of discretion;
- There is no significant disadvantage to HMRC from the tax tribunal procedure – indeed, the time limit for challenging an assessment/amendment is 30 days, which is shorter than the judicial review time limit of three months.
- Forcing taxpayers to fight two sets of proceedings in order to raise both substantive tax arguments and public law arguments is likely to significantly restrict access to justice.
- The supposed informality of the FTT procedure lures taxpayers of more modest means into thinking that they can argue their case without taking legal advice

and thus renders them less likely to be properly informed of their public law options.

- If the taxpayer is not entitled to raise public law arguments in the FTT, he or she must be able to do so in proceedings to collect the tax (where the arguments will obviously be by way of defence), hence the FTT refusing to exercise its jurisdiction ought, in theory, to achieve nothing.

Only, perhaps, where the public law argument is the sole argument before the FTT might it be considered an abuse not to have commenced a claim for judicial review.

It follows that not only does the FTT definitely have judicial review jurisdiction, it should use it.