



FACULTY OF ADVOCATES

Faculty of Advocates response on First-tier Tribunal Rules

Note

- (a) The UK First-tier Tribunal (Tax Chamber) is referred to below as “the UK FTT” and its procedural rules – the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (SI 2009/273) - are referred to as “the UK FTT rules”.
- (b) The First-tier Tax Tribunal for Scotland is referred to as “the Scottish FTT” and the Draft First-tier Tax Tribunal for Scotland Rules 2015 are referred to as “the draft Scottish FTT rules”.

1 **General comment**

The UK FTT rules have been in operation since 1 April 2009 and have become familiar to members of the UK FTT and to the representatives of taxpayers and of HMRC. For the most part, the UK FTT rules appear to work satisfactorily. They have not required significant modification or extensive supplementation by Practice Statements. The fact that the draft Scottish FTT rules are largely based on the UK FTT rules is therefore to be welcomed.

2 **Rule 2 Overriding Objective**

The overriding objective of the UK FTT rules is to deal with cases “fairly and justly”. In the draft Scottish FTT rules this becomes “accessibly, fairly, quickly and effectively”. In both the UK FTT rules and the draft Scottish FTT rules one next finds the same five points mentioned as examples of what is included in the overriding objective. One might therefore suppose that, in practice, there is unlikely to be any significant difference between the two overriding objectives, despite the obvious differences in their wording. However, for the following reasons we recommend that the overriding objective of the Scottish FTT should, like its UK counterpart, be to deal with cases “fairly and justly”;

- (a) The words “fairly and justly” are brief, but powerful. The two notions of fairness and justice overlap, but are not identical. “Fairly” invokes a very wide range of concepts relevant to dealing with a case even-handedly, having regard to the characteristics of

the parties and the nature of the dispute before the tribunal. “Justly” invokes, in particular, the notion of “justice *according to law*”. Therefore – whatever else happens to the definition of the overriding objective in the draft Scottish rules – we strongly recommend that it should require the Tribunal to act “justly”.

(b) “Overriding objectives” should be readily understandable objectives, relevant and applicable to all cases before the Tribunal, being objectives which the Tribunal itself can take steps to further and which do not conflict with each other. The “fairly and justly” overriding objective of the UK FTT meets all of those tests, whereas the more complex “overriding objective” of the Scottish FTT, as presently framed, meets none of them. The reason for this failure appears to be that the Scottish “overriding objective” is intended to summarise, in more general terms, notions inherent in the five specific examples which are set out in rule 2(2). But that is the wrong approach to the framing of an overriding objective; the five specific examples will be relevant to some cases, but not all, and an overriding objective should be more than a list of matters that may or may not be relevant to any given case and, where they are relevant, may conflict *inter se*.

(c) “**Accessibly**”.

- In the first place, we do not readily understand what it means to say that a Tribunal should deal with cases “accessibly”.
- We suspect this is a compressed reference to a more complex notion, which might, more comprehensibly, be stated along the following lines, ie that in dealing with cases before it the Tribunal should ensure open and equal access to justice for all parties. If that is right, we think that such a complex notion would be more at home not as part of the “overriding objective” itself but, rather, as part of the specific illustrations of what is included in that objective.
- Another reason for thinking that “accessibility” is not appropriate for inclusion in the overriding objective of the Scottish FTT is that it will only be in relatively rare cases (involving, for example, disabilities or language difficulties) that the Scottish FTT will be faced with, and able to do anything about, issues of accessibility. Wider issues of access to justice are beyond the power of the Tribunal to address.
- If, on the other hand, one considers whether an expanded version of “accessibility” should be included in the specifications of what is included in the overriding objectives, one finds that it is already there, in (c); “ensuring, so far as practicable, that the parties are able to participate fully in the proceedings”.
- In short, we think that it is inappropriate to include “accessibly” as part of the overriding objective and that it is unnecessary to include it in the specific illustrations of what the overriding objective means.

(d) “**Fairly**”. We agree that this should be part of the overriding objective.

(e) “**Quickly**”. A tribunal is not a racing car, whose *raison d’etre* is to go quickly. Speed, pure and simple, should not be part of the overriding objective of any judicial body. Outright speed may obviously conflict with fairness (and indeed with accessibility). The relevance of speed is sufficiently stated in the specification of matters included in

the overriding objective, at (e) “avoiding delay, so far as compatible with proper consideration of the issues”.

- (f) **“Effectively”**. This is an obscure concept – too obscure, in our view, to be included as part of the overriding objective. Does it mean that the Tribunal should get through its case load without unnecessary delay or expense, while producing the least possible numbers of appeals from its own decisions? If it means something like that, there is obvious potential for conflict between effectiveness, fairness and accessibility. In our opinion “effectiveness” should not be elevated to become part of the overriding objective, but should be left where it is in the specification of matters included in the overriding objective, at (d) “using any special expertise of the First-tier Tribunal effectively”.

4. Rule 3 Mediation.

We are generally in favour of wider use of mediation to resolve tax disputes, provided the parties agree to it. The UK FTT rules impose an obligation on the UK FTT, not dissimilar to draft Rule 3, to seek to facilitate the use of Alternative Dispute Resolution. In our experience, however, that obligation is often ineffective in practice because the Tribunal only becomes seriously engaged with cases at a relatively late stage, by which time the parties may well be too far down the track towards a Tribunal hearing to be diverted towards mediation. It is to be hoped that the working practices of the Scottish FTT will enable the obligation imposed on it by Rule 3 to be discharged more effectively.

5. Rule 7(3)

This rule grants the same powers to the Scottish FTT as are possessed by the courts in relation to failures to comply with requirement imposed by the FTT in relation to the attendance of witnesses, recovery of documents etc. By contrast, the UK FTT has no such powers and must refer any such failure to the Upper Tribunal (see the UK FTT rules, rule 7(3)). We think it is unlikely that Scottish FTT members will have the right background, support or experience to feel comfortable using the courts’ powers to impose sanctions on persons who have failed to comply with an order. In our view the appropriate course is to replicate the UK FTT rule, so that in a case where sanctions are necessary they may be imposed by the Scottish Upper Tribunal which is likely to consist of, or include, a judge who can be expected to select the appropriate sanction (if any) with the benefit of sentencing experience.

6. Rule 8 – striking out.

This draft Rule repeats the wording of Rule 8 of the UK FTT rules. However, in Scotland it is not clear what consequences flow from the act of striking out. If, for example, the

Tribunal strikes out the whole of an appellant's case, is the appeal still extant, or is it deemed to have been decided in favour of Revenue Scotland? We assume that the intention is that striking out a party's case is tantamount to the appeal being decided against that party, subject to certain limited possibility of reinstatement; but we suggest that some re-drafting of Rule 8 is required to make achieve this.

7. **Rule 9.**

We suggest that the italicised words should be added to the present draft of Rule 9(1)(b); “the substitution, *addition or removal* has become necessary because of a change in circumstances since the start of the proceedings”.

8. **Rule 14.**

Rule 14(2) et seq contain rules about circumstances in which information or documents may be withheld from a party. There is no equivalent of these in the UK FTT rules. We consider the inclusion of rules 14(2) et seq in the rules of the Scottish FTT to be inappropriate. The procedural rules of the UK Upper Tribunal do contain equivalent rules, but that is because the UK Upper Tribunal hears appeals in cases concerning a wide range of subjects, such as safeguarding vulnerable groups, in which such rules may be necessary and appropriate. We do not think that such provisions should appear in the procedural rules of a Tribunal which will only hear tax appeals.

A particular point, relating to rule 14(8), is that we cannot envisage any circumstances in which it would be appropriate for a Tribunal to have disclosed to it documents which it could not disclose to any other person whatsoever. If rules 14(2) et seq are to remain part of the rules of the Scottish FTT, we would therefore recommend that in the last line of rule 14(8) the words “*other persons, or*” should be deleted, so that the Tribunal can only direct that documents be disclosed to it on the basis that it will not disclose them to specified other persons.

However, our clear preference is that rules 14(2) to 14(10) should all be deleted. If they are deleted, rule 32(4)(ca) would also fall to be deleted. (Note – rule 32(4)(ca) refers to the *Upper* Tribunal whereas we think it should refer to the *First-tier* Tribunal.) Rule 35(7) would also require consequential amendment to delete the reference to rule 14(2).

9. **Rule 18C.**

This Rule has no equivalent in the UK FTT rules. It implements section 47 of the Revenue Scotland and Tax Powers Act 2014.

The circumstances in which it is envisaged that the Scottish FTT would make “an order for the payment of a sum payable in pursuance of a decision” of the tribunal are not immediately apparent. Is it intended that such orders would routinely follow as part of deciding an appeal, or is it intended that such orders would normally be restricted to particular circumstances, such as the imposition of penalties or an award of expenses?

If the former, more general scope of rule 18C is intended, this will be a distinct change in practice compared to the present system. Clearly, before making an order that any sum should be payable (or indeed repayable – rule 18C appears equally apt to cover both sums payable to and repayable by HMRC) the Scottish FTT would have to have satisfied itself, on evidence led, that the sum was indeed unpaid, or had been paid, as the case may be. At present, evidence as to whether tax has or has not been paid is not routinely led in tax appeals to the UK FTT. Although in some cases the tax payment position may be uncontroversial, in other cases it may be complicated. We do not think it desirable that tribunal time should be taken up with investigation of such matters, nor, if payment orders were to be sought in some cases but not others, that such an inconsistent system should emerge. We therefore suggest that rule 18C should be modified in order that its intended scope of operation is more narrowly defined.

We are not aware of any provision in the Scottish tax legislation or draft regulations which explicitly requires tax to be paid or repaid on the basis of the decision of the Scottish FTT irrespective of the fact that the unsuccessful party (whether the taxpayer or Revenue Scotland) may appeal to the Upper Tribunal. We suggest that it would be appropriate for such a rule to be expressly stated.

In any event, we recommend that the draft Scottish UT rules should make clear that in the event of a decision being set aside under draft rule 38 (setting aside a decision which disposes of proceedings) any order based on that decision which has been made under rule 18C automatically becomes of no effect.

10. Rule 35(7).

We agree that the Scottish FTT should be obliged to publish its decisions, including on a website.