DO I REALLY HAVE A RIGHT OF APPEAL?

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A trader's rights of appeal against certain VAT matters are listed in s.40 VATA 1983. It is well known that not all VAT matters are appealable. Some are totally within Customs' powers subject only to judicial review by the High Court.

What is less well known is that one's right of appeal is severely curtailed by the judgment in the *Corbitt* case.[2] The outcome of this case is that certain decisions of Customs are regarded as "administrative matters" which only a finding of "no reasonable body of men could have come to this decision" can overturn on judicial review. Judicial review would also apply if Customs' decision was based on irrelevant factors or failed to take into account relevant matters.

The *Corbitt* case splits into two parts:

(a) whether Customs were the sole arbiter of what records were required for a second-hand scheme, and

(b) whether the trader's actual records met Customs' standard [or only marginally failed to meet them - *obiter* of Lords Simon and Scarman].

The House of Lords decision was that (a) could not be the subject of a *de novo* appeal [where the Tribunal could substitute its own view] but only a judicial review for unreasonableness. Point (b) was conceded by the trader as his records were very poor. Although s.40(6) VATA 1983 was enacted in 1981 to enable a Tribunal to consider an appeal whose foundation was based on an unappealable prior decision, the position is in my opinion unsatisfactory.

The House of Lords decision in *Corbitt* relied heavily on the judgment in *Wednesbury*.[3] This case concerned the grant of a licence for a Sunday cinema. I would differentiate this case as the Sunday Entertainment Act 1932 provided no right of appeal whatsoever. Thus the only way Parliament wanted an "appeal" against the decision of the local authority was by way of judicial review. In contrast, Parliament

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2 *Customs & Excise v JH Corbitt (Numismatists) Ltd* [1980] STC 231, [1981] AC 22.

3 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680.

provided a considerable appeals mechanism against VAT decisions. There is no suggestion in the VAT Act that any of the appeals should not be a full *de novo* hearing. The only exception, and that is specifically legislated in s.40(3A), applies to business splitting. If Parliament had wanted judicial review to apply to other appealable matters it would have specifically said so in the Act.

The later judgment (of 1988) in *Jeunehomme* throws considerable doubt on the earlier (1980) decision in *Corbitt*. The European dimension was unfortunately not argued in *Corbitt*. In the case of *Léa Jeunehomme v Société Anonyme d'Étude et de Gestion Immobiliére v Kingdom of Belgium* [1988] STI 598, a trader had been refused a deduction of input VAT because of irregularities in the particulars of the tax invoices. The Belgian authorities had argued that the contents of a valid tax invoice was wholly an administrative matter at the sole discretion of the Member State. This was based on Article 22(3) (c) and Article 22(8).

The European Court ruled that

> "The requirement on the invoice of particulars other than those set out in Article 22 of the Sixth Directive, as a condition for the exercise of the right to deduction, must be limited to what is necessary to ensure the correct levying of VAT and permit supervision by the tax authorities. Moreover, *such particulars must not, by reason of their number or technical nature, render the exercise of the right to deduction practically impossible or excessively difficult.*"
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> [my italics]

The decision whether the requirements of a second-hand scheme (as in *Corbitt*) meets the doctrine of proportionality [on which the above judgment was based] is not one which can be dealt with by judicial review (i.e., tested for unreasonableness) but requires a *de novo* hearing.

Unfortunately, the decision in *Corbitt* [that Customs' decisions can only be the subject of judicial review] has been extended to matters which appear in the Act as fully appealable. In the case of *Mr. Wishmore Ltd v C&E* [1988] STC 723, it was admitted that Tribunal Chairmen had been instructed to apply *Corbitt* to a wide variety of cases, here one involving the need to supply security. Tribunals try to salvage their conscience by stating that had they been in the position of a *de novo* hearing, they would have come to the same decision as Customs. In most cases, the trader's defects are so blatant that one wonders what Customs has to fear from a *de novo* hearing. For discussion of judicial review on the need to provide security, see the article in Tax Journal of 24th October 1991.

Let me now put forward a heretical hypothesis. It may be possible to turn *Corbitt* on its head to the trader's advantage. The power of judicial review is given to the High Court by the Supreme Court Act 1981. It is a potentially expensive procedure, about £5,000 has been suggested, which puts it out of the reach of many traders and will often not be commercially viable in respect of the amount of tax at stake. If you accept that the House of Lords decision in *Corbitt* gives the VAT Tribunal the power of judicial review, then a trader could ask the VAT Tribunal to exercise that power under a s.40(1)(o) appeal against a Customs decision under s.152 Customs and Excise Management Act 1979 not to mitigate a default surcharge under s.19 FA 1985. For further discussion of the latter, see the author's article on page 4 of the Tax Journal of 4th October 1990.

A word of warning: most of what is said here goes against the party line. The erosion of the right of appeal in tax matters is a matter of serious concern. Neither the Inland Revenue nor Customs have anything to fear from a full right of appeal if they are living up to the standards of their respective Charters.