

## SCHEDULE 2

### The Upper Tax Tribunal for Scotland Rules of Procedure 2015

## PART 2

### General Powers and Provisions

#### Delegation to staff

4.—(1) Staff of the Scottish Courts and Tribunals Service may, with the approval of the President, carry out functions of a judicial nature permitted or required to be done by the Upper Tribunal.

(2) The approval referred to at paragraph (1) may apply generally to the carrying out of specified functions by members of staff of a specified description in specified circumstances.

(3) Within 14 days after the date on which the Upper Tribunal sends notice of a decision made by a member of staff pursuant to an approval under paragraph (1) to a party, that party may make a written application to the Upper Tribunal for that decision to be considered afresh by a member of the Upper Tribunal.

#### Case management powers

5.—(1) Subject to the provisions of RSTPA 2014 and these Rules, the Upper Tribunal may regulate its own procedure.

(2) The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may by direction—

- (a) extend or shorten the time for complying with any rule, practice direction or direction, or regulation 3(2) or 4(2) of the Scottish Tax Tribunals (Time Limits and Rules of Procedure) Regulations 2015 (time limit for permission to appeal to the Upper Tax Tribunal for Scotland or to the Court of Session);
- (b) conjoin or take concurrently two or more sets of proceedings or parts of proceedings raising common issues, or treat a case as a lead case (whether in accordance with rule 18 (lead cases) or otherwise);
- (c) permit or require a party to amend a document;
- (d) permit or require a party or another person to provide documents, information, evidence or submissions to the Upper Tribunal or a party;
- (e) deal with an issue in the proceedings as a preliminary issue;
- (f) hold a hearing to consider any matter, including a case management issue;
- (g) decide the form of any hearing;
- (h) adjourn or postpone a hearing;
- (i) require a party to produce a file of documents for a hearing;
- (j) sist proceedings;
- (k) transfer proceedings to another court or tribunal if that other court or tribunal has jurisdiction in relation to the proceedings and—
  - (i) because of a change of circumstances since the proceedings were started, the Upper Tribunal no longer has jurisdiction in relation to the proceedings; or

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- (ii) the Upper Tribunal considers that the other court or tribunal is a more appropriate forum for the determination of the case;
- (l) suspend the effect of its own decision pending an appeal of that decision;
- (m) in an appeal, or an application for permission to appeal, against the decision of the First-tier Tribunal, suspend the effect of that decision pending the determination of the application for permission to appeal, and any appeal;
- (n) require the First-tier Tribunal to provide reasons for the decision, or other information or documents in relation to the decision or any proceedings before the First-tier Tribunal.

### **Procedure for applying for and giving directions**

**6.—**(1) The Upper Tribunal may give a direction on the application of one or more of the parties or on its own initiative.

(2) An application for a direction may be made—

- (a) by sending or delivering a written application to the Upper Tribunal; or
- (b) orally during the course of a hearing.

(3) An application for a direction must include the reason for making that application.

(4) The Upper Tribunal must send notice of any direction to every party and to any other person affected by the direction.

(5) If a party or any other person sent notice of the direction under paragraph (4) wishes to challenge a direction which the Upper Tribunal has given, they may do so by applying for another direction which amends, suspends or sets aside the first direction.

### **Failure to comply with rules etc.**

**7.—**(1) An irregularity resulting from a failure to comply with any requirement in these Rules, a practice direction or a direction, does not of itself render void the proceedings or any step taken in the proceedings.

(2) If a party has failed to comply with a requirement in these Rules, a practice direction or a direction, the Upper Tribunal may take such action as it considers just, which may include—

- (a) waiving the requirement;
- (b) requiring the failure to be remedied;
- (c) exercising its power under rule 8 (striking out a party's case); or
- (d) restricting a party's participation in the proceedings.

### **Striking out a party's case**

**8.—**(1) The proceedings, or the appropriate part of them, will be struck out if the appellant has failed to comply with a direction that stated that failure by the appellant to comply with the direction would lead to the striking out of the proceedings or part of them.

(2) The Upper Tribunal must strike out the whole or a part of the proceedings if the Upper Tribunal—

- (a) does not have jurisdiction in relation to the proceedings or that part of them; and
- (b) does not exercise its power under rule 5(3)(k)(i) (transfer to another court or tribunal) in relation to the proceedings or that part of them.

(3) The Upper Tribunal may strike out the whole or a part of the proceedings if—

- (a) the appellant has failed to comply with a direction which stated that failure by the appellant to comply with the direction could lead to the striking out of the proceedings or part of them;
- (b) the appellant has failed to co-operate with the Upper Tribunal to such an extent that the Upper Tribunal cannot deal with the proceedings fairly and justly; or
- (c) in proceedings which have been transferred from the First-tier Tribunal, the Upper Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

(4) The Upper Tribunal may not strike out the whole or a part of the proceedings under paragraph (2) or (3)(b) or (c) without first giving the appellant an opportunity to make representations in relation to the proposed striking out.

(5) The effect of proceedings being struck out is that all issues are determined against the appellant. The effect of proceedings being partially struck out is that the relevant issues are determined against the appellant.

(6) If the proceedings, or a part of them, have been struck out under paragraph (1) or (3)(a), the appellant may make a written application for the proceedings, or a part of them, to be reinstated.

(7) An application under paragraph (6) must be received by the Upper Tribunal within 30 days after the date on which the Upper Tribunal sent notification of the striking out to the appellant.

(8) This rule applies to a respondent as it applies to an appellant except that—

- (a) a reference to the striking out of the proceedings is to be read as a reference to the barring of the respondent from taking further part in the proceedings; and
- (b) a reference to an application for the reinstatement of proceedings which have been struck out is to be read as a reference to an application for the lifting of the bar on the respondent taking further part in the proceedings.

(9) If a respondent has been barred from taking further part in proceedings under this rule and that bar has not been lifted, the Upper Tribunal need not consider any response or other submission made by that respondent, and may summarily determine any or all issues against that respondent.

#### **Addition, substitution and removal of parties**

**9.—**(1) The Upper Tribunal may give a direction adding, substituting or removing a party as an appellant or a respondent including where—

- (a) the wrong person has been named as a party; or
- (b) the addition, substitution or removal has become necessary because of a change in circumstances since the start of proceedings.

(2) If the Upper Tribunal gives a direction under paragraph (1) it may give such consequential directions as it considers appropriate.

(3) A person who is not a party may make a written application to the Upper Tribunal to be added or substituted as a party under this rule.

(4) If the Upper Tribunal refuses an application under paragraph (3) it must consider whether to permit the person who made the application to provide submissions or evidence to the Upper Tribunal.

#### **Orders for expenses**

**10.—**(1) The Upper Tribunal may not make an order in respect of expenses in proceedings transferred or referred by, or on appeal from, the First-tier Tribunal except to the extent and in the circumstances that the First-tier Tribunal had the power to make an order in respect of expenses.

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- (2) In other proceedings, the Upper Tribunal may not make an order in respect of expenses except—
- (a) in relation to wasted expenses and expenses incurred in applying for such expenses; or
  - (b) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings.
- (3) The Upper Tribunal may make an order for expenses on an application or on its own initiative.
- (4) A person making an application for an order for expenses must—
- (a) send or deliver a written application to the Upper Tribunal and to the person against whom it is proposed that the order be made; and
  - (b) send or deliver with the application a schedule of the expenses claimed in sufficient detail to allow summary assessment of such expenses by the Upper Tribunal.
- (5) An application for an order for expenses may be made at any time during the proceedings but may not be made later than 30 days after the date on which the Upper Tribunal sends—
- (a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or
  - (b) notice under rule 17(2) that a withdrawal which ends the proceedings has taken effect.
- (6) The Upper Tribunal may not make an order for expenses against a person (the “paying person”) without first—
- (a) giving that person an opportunity to make representations; and
  - (b) if the paying person is an individual, considering that person’s financial means.
- (7) The amount of expenses to be paid under an order under this rule may be ascertained by—
- (a) summary assessment by the Upper Tribunal;
  - (b) agreement of a specified sum by the paying person and the person entitled to receive the expenses (the “receiving person”); or
  - (c) assessment of the whole or a specified part of the expenses, including the expenses of the assessment, incurred by the receiving person, if not agreed.
- (8) Following an order for assessment under paragraph (7)(c)—
- (a) the paying person or the receiving person may apply to the Auditor of the Court of Session (as specified in the order); or
  - (b) the Upper Tribunal may make a remit to the Auditor of the Court of Session,
- for the taxation of the expenses according to the fees payable in that Court.
- (9) Upon making an order for the assessment of expenses, the Upper Tribunal may order an amount to be paid on account before the expenses are assessed.
- (10) In this rule, “wasted expenses” means any expenses incurred by a party—
- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any representative or any employee of such a representative; or
  - (b) which, in the light of any such act or omission occurring after they were incurred, the First-Tier Tribunal considers it is unreasonable to expect that party to pay.

## **Representatives**

**11.—**(1) A party may appoint a representative to represent that party in the proceedings.

(2) If a party appoints a representative, that party must send or deliver to the Upper Tribunal and to each other party to the proceedings notice of the representative’s name and address.

(3) Anything permitted or required to be done by a party under these Rules, a practice direction or a direction may be done by the representative of that party, except signing a witness statement.

(4) A person who receives due notice of the appointment of a representative—

(a) must provide to the representative any document which is required to be provided to the represented party, and need not provide that document to the represented party; and

(b) may assume that the representative is and remains authorised as such until they receive notification that this is not so from the representative or the represented party.

(5) At a hearing a party may be accompanied by another person whose name and address has not been notified under paragraph (2) but who, subject to the permission of the Upper Tribunal, may act as a representative or otherwise assist in presenting the party's case at the hearing.

(6) Paragraphs (2) to (4) do not apply to a person who accompanies a party under paragraph (5).

### **Calculating time**

**12.**—(1) An act required by these Rules, a practice direction or a direction to be done on or by a particular day must be done by 5pm on that day.

(2) If the time specified by these Rules, a practice direction or a direction for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day.

(3) In this rule “working day” means any day except a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday in Scotland under section 1 of the Banking and Financial Dealings Act 1971.

### **Sending and delivery of documents**

**13.**—(1) Any document to be provided to the Upper Tribunal under these Rules, a practice direction or a direction must be—

(a) sent by pre-paid post or by document exchange, or delivered by hand, to the address specified for the proceedings; or

(b) sent or delivered by such other method as the Upper Tribunal may permit or direct.

(2) Subject to paragraph (3), if a party provides a fax number, email address or other details for the electronic transmission of documents to them, that party must accept delivery of documents by that method.

(3) If a party informs the Upper Tribunal and all other parties that a particular form of communication, other than pre-paid post or delivery by hand, should not be used to provide documents to that party, that form of communication must not be so used.

(4) If the Upper Tribunal or a party sends a document to a party or the Upper Tribunal by email or any other electronic means of communication, the recipient may request that the sender provide a hard copy of the document to the recipient. The recipient must make such a request as soon as reasonably practicable after receiving the document electronically.

(5) The Upper Tribunal and each party may assume that the address provided by a party or its representative is and remains the address to which documents should be sent or delivered until receiving notification to the contrary.

### **Use of documents and information**

**14.**—(1) The Upper Tribunal may make an order prohibiting the disclosure or publication of—

(a) specified documents or information relating to the proceedings; or

(b) any matter likely to lead members of the public to identify any person whom the Upper Tribunal considers should not be identified.

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(2) The Upper Tribunal may give a direction prohibiting the disclosure of a document or information to a person if—

- (a) the Upper Tribunal is satisfied that such disclosure would be likely to cause that person or some other person serious harm; and
- (b) the Upper Tribunal is satisfied, having regard to the interests of justice, that it is proportionate to give such a direction.

(3) If a party (“the first party”) considers that the Upper Tribunal should give a direction under paragraph (2) prohibiting the disclosure of a document or information to another party (“the second party”), the first party must—

- (a) exclude the relevant document or information from any documents that will be provided to the second party; and
- (b) provide to the Upper Tribunal the excluded document or information, and the reason for its exclusion, so that the Upper Tribunal may decide whether the document or information should be disclosed to the second party or should be the subject of a direction under paragraph (2).

(4) If the Upper Tribunal gives a direction under paragraph (2) which prevents disclosure to a party who has appointed a representative, the Upper Tribunal may give a direction that the documents or information be disclosed to that representative if the Upper Tribunal is satisfied that—

- (a) disclosure to the representative would be in the interests of the party; and
- (b) the representative will act in accordance with paragraph (5).

(5) Documents or information disclosed to a representative in accordance with a direction under paragraph (4) must not be disclosed either directly or indirectly to any other person without the Upper Tribunal’s consent.

(6) The Upper Tribunal may, on its own initiative or on the application of a party, give a direction that certain documents or information must or may be disclosed to the Upper Tribunal on the basis that the Upper Tribunal will not disclose such documents or information to other persons, or specified other persons.

(7) A party making an application for a direction under paragraph (6) may withhold the relevant documents or information from other parties until the Upper Tribunal has granted or refused the application.

(8) The Upper Tribunal must conduct proceedings and record its decision and reasons appropriately so as not to undermine the effect of an order made under paragraph (1) or a direction given under paragraph (2) or (6).

### **Evidence and submissions**

**15.—**(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Upper Tribunal may give directions as to—

- (a) issues on which it requires evidence or submissions;
- (b) the nature of the evidence or submissions it requires;
- (c) whether the parties are permitted or required to provide expert evidence, and if so whether the parties must jointly appoint a single expert to provide such evidence;
- (d) any limit on the number of witnesses whose evidence a party may put forward, whether in relation to a particular issue or generally;
- (e) the manner in which any evidence or submissions are to be provided, which may include a direction for them to be given—
  - (i) orally at a hearing; or

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- (ii) by written submissions or witness statement; and
- (f) the time at which any evidence or submissions are to be provided.
- (2) The Upper Tribunal may—
  - (a) admit evidence whether or not—
    - (i) the evidence would be admissible in a court in Scotland; or
    - (ii) the evidence was available to a previous decision maker; or
  - (b) exclude evidence that would otherwise be admissible where—
    - (i) the evidence was not, without reasonable excuse, provided within the time allowed by a direction or a practice direction;
    - (ii) the evidence was, without reasonable excuse, otherwise provided in a manner that did not comply with a direction or a practice direction; or
    - (iii) it would otherwise be unfair to admit the evidence.
- (3) The Upper Tribunal may consent to a witness giving, or require any witness to give, evidence on oath, and may administer an oath for that purpose.

#### **Citation of witnesses and orders to answer questions or produce documents**

- 16.**—(1) On the application of a party or on its own initiative, the Upper Tribunal may—
- (a) by citation require any person to attend as a witness at a hearing at the time and place specified in the citation; or
  - (b) order any person to answer any questions or produce any documents in that person’s possession or control which relate to any issue in the proceedings.
- (2) A citation under paragraph (1)(a) must—
- (a) give the person required to attend 14 days’ notice of the hearing or such other period as the Upper Tribunal may direct; and
  - (b) where the person is not a party, make provision for the person’s necessary expenses of attendance to be paid, and state who is to pay them.
- (3) A person who receives a citation or order may apply to the Upper Tribunal for it to be varied or set aside if the person did not have an opportunity to object to it before it was made or issued.
- (4) A person making an application under paragraph (3) must do so as soon as reasonably practicable after receiving notice of the citation or order.
- (5) A citation or order under this rule must—
- (a) state that the person on whom the requirement is imposed may apply to the Upper Tribunal to vary or set aside the citation or order, if the person did not have an opportunity to object to it before it was made or issued; and
  - (b) state the consequences of failure to comply with the citation or order.

#### **Withdrawal**

- 17.**—(1) Subject to any provision in RSTPA 2014 relating to withdrawal or settlement of particular proceedings, a party may give notice to the Upper Tribunal of the withdrawal of the case made by it in the Upper Tribunal proceedings, or any part of that case—
- (a) by sending or delivering to the Upper Tribunal a notice of withdrawal; or
  - (b) orally at a hearing.
- (2) The Upper Tribunal must notify each party of its receipt of a withdrawal under this rule.

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(3) A party which has withdrawn its case may make a written application to the Upper Tribunal for the case to be reinstated.

(4) An application under paragraph (3) must be received by the Upper Tribunal within 30 days after—

- (a) the date on which the Upper Tribunal received the notice under paragraph (1)(a); or
- (b) the date of the hearing at which the case was withdrawn orally under paragraph (1)(b).

### **Lead cases**

**18.**—(1) This rule applies if—

- (a) two or more cases have been started before the Upper Tribunal;
- (b) in each such case the Upper Tribunal has not made a decision disposing of the proceedings; and
- (c) the cases give rise to common or related issues of fact or law.

(2) The Upper Tribunal may give a direction—

- (a) specifying one or more cases falling under paragraph (1) as a lead case or lead cases; and
- (b) sisting the other cases falling under paragraph (1) (“the related cases”).

(3) When the Upper Tribunal makes a decision in respect of the common or related issues—

- (a) the Upper Tribunal must send a copy of that decision to each party in each of the related cases; and
- (b) subject to paragraph (4), that decision shall be binding on each of those parties.

(4) Within 30 days after the date that the Upper Tribunal sent a copy of the decision to a party under paragraph (3)(a), that party may make a written application for a direction that the decision does not apply to, and is not binding on the parties to, that case.

(5) The Upper Tribunal must give directions in respect of cases which are sisted under paragraph (2)(b), providing for the disposal of or further steps in those cases.

(6) If the lead case or cases are withdrawn or disposed of before the Upper Tribunal makes a decision in respect of the common or related issues, the Upper Tribunal must give directions as to—

- (a) whether another case or other cases are to be heard as a lead case or lead cases; and
- (b) whether any direction affecting the related cases should be set aside or amended.

### **Chairing member**

**19.** Where a matter is to be decided by two or more members of the Upper Tribunal, the President must determine the chairing member.

### **Venue for hearings**

**20.** The Upper Tribunal is to be convened at such time and place in Scotland as the President may determine.

### **Enforcement of decisions**

**21.** An order for the payment of a sum payable in pursuance of a decision of the Upper Tribunal, or a copy of such an order certified by the Upper Tribunal, may be enforced as if it were an extract registered decree arbitral bearing a warrant for execution issued by the Sheriff Court of any sheriffdom in Scotland.