JUDICIAL REVIEW AND ACCESS TO JUSTICE - AN UPDATE

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Synopsis

The line between the right of appeal to the Tax Tribunals and the right to judicial review in the Administrative Court leaves cracks down which the unwary taxpayer can go missing.

HMRC have, in a number of recent cases, adopted a wholly unmeritorious stance in arguing that an application for judicial review is either too early or it is too late.

A simple change to the time limit for an application for judicial review would provide a solution to this problem.

HMRC show a dispiriting habit of taking every procedural argument available to them, no matter how meritorious the underlying claim.

1. Introduction

There are a number of bars to the right of appeal against Revenue decisions. An appeal may be late, or no closure notice may have been issued, etc. But those bars are principled, simple, and the courts have procedures and discretion to deal with them sensibly.

However, it is equally possible to become involved in extensive and time-consuming satellite litigation on questions of jurisdiction and the right to appeal, and unfortunately, not only does the cross-over between the Tax Tribunal's jurisdiction and the rules regarding permission to bring judicial review ('**JR**') make this more likely, but HMRC seem intent on gaining as much of an advantage from this area as possible.

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2. The Problem

The architecture of tax litigation deliberately creates a world to itself. The First Tier and Upper Tax Tribunals – specialist courts dealing with the very specialist issues of tax liability – have purposefully been set aside from the civil court system. They have been given their own rules and their own jurisdiction.

They have also taken a firm line with policing the boundary of that jurisdiction, rejecting any attempts to widen it beyond the powers laid down by parliament[2]. This would be fine, were it not for two things:

1. the tax legislation does not provide a right of appeal in respect of every decision the Revenue makes that materially affects taxpayers; and
2. the attitude of the Administrative Court to the admissibility of judicial review claims is equally strict.

This leaves cracks down which the unwary taxpayer can go missing. What is perhaps surprising is the ruthless attitude of HMRC (and some Judges) to these rules of jurisdiction, and their willingness let that happen.

This is despite the clear words of Lord Reed in the Supreme Court's decision in *Unison*[3], where the principle of access to justice was restated in the clearest and broadest terms.

This article looks at three cases where these problems have surfaced, and the tactics for addressing them:

1. *An Ongoing VAT matter*
2. *M-Sport CO/2278/2019 - ongoing*
3. *R (on the application of Mark Reid and others) v HMRC [2020] UKUT 61 (TCC)*

3. Too Late and Too Early?

In a number of recent cases HMRC has argued both that an application for judicial review is both too early and too late:

a. too early either because no decision has been made that can be reviewed, or because there is a suitable alternative remedy;

b. too late because the three-month time limit for JR has expired.

2 See e.g *Noor v HMRC [2013] UKUT 71 (TCC)* at [87]

3 *R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51*

In one ongoing matter concerning an assessment to VAT on a supplier of grass seed products. HMRC notice 701-38 and guidance VFOOD3540 clearly state that, despite it not being the law, they will treat any grass seed as zero rated. The law is clear that only grass seed for agricultural use is zero rated.

In 2015, HMRC assessed the supplier to VAT on the basis that one of their products, a lawn treatment, was not grass seed (and so zero rated) but a kit, and so standard rated. This was appealed.

In the First Tier Tax Tribunal, HMRC put forward a new argument: that the product was not zero rated because, although it was grass seed, it was not for agricultural use. This was undoubtedly true, and the Tribunal agreed.

The supplier has appealed to the Upper Tribunal, on the grounds that this result is incompatible with EU VAT law. However, since the main dispute was now about whether or not HMRC should stick to their guidance or not, they also initiated proceedings for judicial review.

Despite this obviously being an important question of public law (similar, for example, to that taken to the Supreme Court in *Gaines Cooper*[4]), HMRC resisted the application for permission to appeal on the basis that:

1. The claim was out of time, since the decision being challenged was taken in 2015;
2. The claim was too early, since the appeal to the UT had not been finalised and so there was an alternative remedy.

Both these positions are clearly unmeritorious.

HMRC had taken the same view in *Zeeman and Murphy v HMRC*, part of the loan charge litigation. They had argued that the claim was too late, since it could have been brought as soon as the legislation was passed, and too early, since the taxpayers were not yet subject to the loan charge when the claim was filed.

Yet in neither case did the courts simply dismiss the timing challenges as unmeritorious, despite the dicta of the Court of Appeal in Gaines Cooper[5]:

> *"The sifting procedure in CPR Part 54 was designed to protect public bodies against weak and vexatious claims ... It was not designed for lengthy inter partes hearings; it was to enable judges to decide whether a case might be*

4 *R (on the application of Gaines-Cooper) v HMRC [2011] 1 WLR 2625*

5 *R (on the application of Davies and another) v HMRC Commissioners and R (on the application of Gaines-Cooper) v HMRC Commissioners [2010] EWCA Civ. 83; [2010] STC 860*, per Moses LJ at [11]. See also *R. v Inland Revenue Commissioners Ex p. National Federation of Self-employed and Small Businesses Ltd [1982] A.C. 617* at p.642 per Lord Diplock)."

> *arguable on a quick perusal of the material available … Nor, I suspect, was the process intended to afford an opportunity to a public body, such as the Revenue, to resist full consideration of matters of great importance not just to the taxpayer but to the Revenue itself."*

In Ze*eman and Murphy*, the Court decided that the timing points would be dealt with in the substantive hearing – at which point HMRC quietly dropped them.

In the VAT case, permission was refused on the papers on the basis that the challenge should have been brought against the decision to change HMRC's arguments in the FIRST TIER TAX TRIBUNAL, and that this was out of time. This decision will be reconsidered at an oral hearing in December.

The lesson?

Despite *Unison*, HMRC will insist that you do not have a right of access to the courts, even where there is an obviously important substantial point.

One cannot therefore be complacent about addressing procedural hurdles, and ensuring that they are met, no matter the obviousness of any underlying injustice.

4. Archer and M-Sport:

Follower Notices(FNs) and accelerated payment notices (APNs) present another version of the 'too late and too early' problem: If you do not file a claim for JR before the 90 day period for representations expires under the statutory procedure, you are out of time; if you do not wait until HMRC provide a response to the representations, which will normally take longer than 90 days, you are too early, because you have not exhausted your alternative remedy.

M-Sport is a revival of the issue taken to the Court of Appeal in *Archer*[6], which considered this conflict in the context of the question of whether costs were recoverable following a successful challenge against an APN. The court refused the successful taxpayer any costs because she had not properly engaged with the representations process before issuing her JR claim.

In doing so, it found that the proper course for the tax payer was to allow the time period for JR to expire, and rely on an application for a late claim, thereby putting their right to access to the courts at the discretion of the Judge dealing with permission on the papers.

6 *R (on the application of Shirley Archer) v HMRC* [2019] EWCA Civ 1021

In *M-Sport*, HMRC issued FNs and APNs to M-Sport, who then made representations. Not receiving a response to those representations within the 3 month period for JR, and mindful of the decision in *Cockayne*[7], they issued a claim for judicial review.

In their response to the letter before claim HMRC entirely ignored the substantive points and simply asserted that the claim was premature because the response to the representations was not yet delivered. They then gave in, withdrawing the APNs and FN's on one of the grounds argued (in both the claim and representations) and asked for their costs, which the High Court promptly gave then in an unreasoned decision.

The case went before the Court of Appeal in December 2020.

The lesson?

The mismatch between the statutory jurisdiction (or lack of it) of the First Tier Tax Tribunal, and the right to JR, create unnecessary traps for the taxpayer (a simple change to the time limit for JR in tax cases would be an obvious solution).

Meticulous adherence to the procedural rules is essential. In *Archer*, a complete failure to do so ultimately doomed *Mrs Archer's* costs appeal.

5. Partnerships Consequential Amendments – no Right of Appeal?

In *Reid*[8], HMRC have successfully argued that they can make an assessment to tax against which there is no right of appeal.

Section 28B TMA provides for issuing partnership closure notices following an enquiry into a partnership return. Subsection 28B(4) provides that 'consequential amendments' shall be issued to the individual partners:

> *(4) Where a partnership return is amended under subsection (2) above, the officer shall by notice to each of the partners amend*
>
> *(a) the partner's return under section 8 or 8A of this Act, or*
>
> *(b) the partner's company tax return, so as to give effect to the amendments of the partnership return.*

HMRC have long considered that an amendment issued to a partner under 28B(4) is unappealable[9]. A trio of First Tier Tax Tribunal cases originally flip-flopped on the

7 *Cockayne v Revenue and Customs Commissioners [2016] Lexis Citation 706*

8 *R (on the application of Mark Reid and others) v HMRC [2020] UKUT 61 (TCC)*

9 EM7205

issue. In *Phillips v HMRC*[10], Judge Mosedale decided that a partner could appeal consequential amendments, before changing her mind three years later in *Gibbs v HMRC*[11], a decision with which Judge Cannan agreed in *MCashback Software 6 LLP v HMRC*[12].

Authority has recently been provided by the Upper Tribunal in *Reid v HMRC*[13], which agreed that there is no right of appeal by an individual partner.

The problems with this are obvious: a minority partner may have no influence over the partnership, which may unilaterally decide to accept an amendment despite there being a valid case to appeal it. The partnership may even be in liquidation. Yet the partner apparently has no access to the courts to challenge the amendment to their return and the liability imposed: the tribunal has no jurisdiction; JR is not available (because there is no doubt that HMRC *must* issue the consequential amendment under section 28B); and enforcement proceedings will be of no use either, since the liability cannot be questioned at that stage.

Despite section 28B not containing any such clear words, the Court of Appeal has twice, both without the point being argued, confirmed that this is the position[14]. In *Knibbs*[15], the Court even states that JR is the appropriate course for challenging such a notice.

Clearly something has gone wrong here. A fundamental principle as access to justice has been skirted by unclear drafting of procedural legislation and an over-zealous attitude by HMRC to resisting claims on procedural grounds.

The lesson?

You will have to fight for you right of access to the courts!

6. Conclusion

HMRC show a dispiriting habit of taking every procedural argument available to them, no matter how meritorious the underlying claim. Clients must be prepared for the

10 *[2009] UKFTT 335 (TC)*

11 *[2013] UKFTT 236 (TC)*

12 *[2013] UKFTT 679 (TC)*

13 *R (on the application of Reid and others) v HMRC [2020] UKUT 61 (TCC)*

14 In *R (on the application of Amrolia) v HMRC [2020] EWCA Civ 488* at [51] and *Knibbs v HMRC [2019] EWCA Civ 719* at [23].

15 Ibid at [25]

increased cost and time taken by these satellite disputes (which are also hard to explain to them).

Proper advocacy before a real-life judge is crucial to making progress when these issues arise – decisions on the papers alone tend to be stricter and more formulaic. Oral advocacy provides an opportunity to get to the merits of the claim that should not be missed.