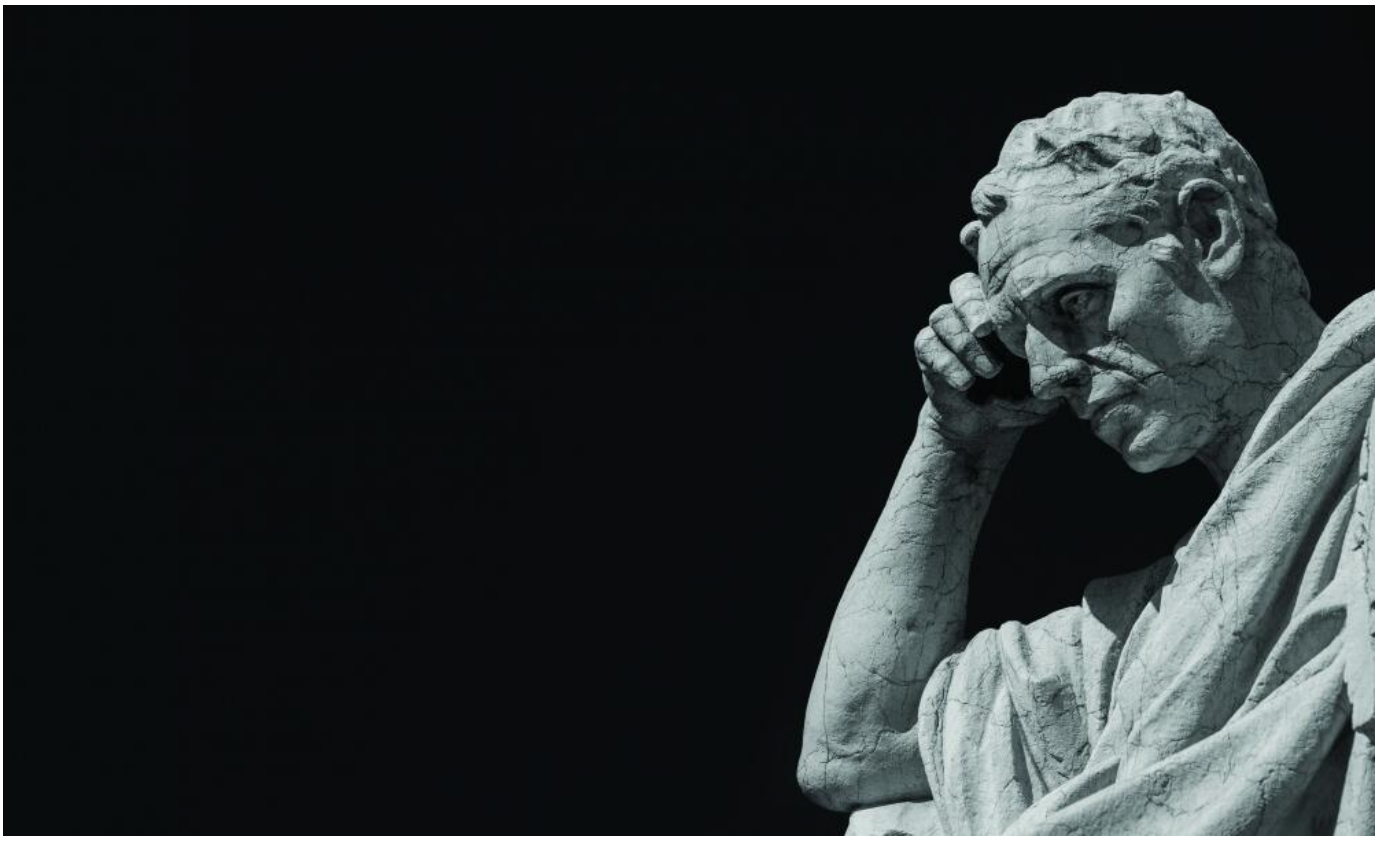
On the way to the forum…

OMB Personal tax



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Keith Gordon looks at a High Court decision in which the taxpayer was considered to have started proceedings in the wrong forum

Key Points

What is the issue?

There are certain issues which, at least on the basis of the law as it stands at the moment, cannot be addressed by the tribunal at all and must be raised, if at all, by way of judicial review.

What does it mean for me?

If a taxpayer has a dispute which, in part, turns on questions of fairness, it is essential to consider promptly whether or not a judicial review is needed as well as or instead of a statutory appeal.

What can I take away?

Whatever the true position in law might be, it might be prudent to commence multiple proceedings in different jurisdictions so as to pre-empt procedural arguments that HMRC might make and to ensure that time limits are not missed in the meantime.

Over the past decade or so, a procedural issue that has arisen from time to time is whether or not proceedings have been commenced in the right forum. For example, in the case of Beadle [2020] EWCA Civ 562, the Court of Appeal accepted HMRC's arguments that the taxpayer could not challenge the validity of a partner payment notice (PPN) in the course of an appeal against the penalty issued for non-compliance with the notice. This was despite the fact that the tribunal had full appellate jurisdiction over the penalty, and that penalty's own validity turned on the validity of the underlying PPN. According to the Court of Appeal, the taxpayer should have started a judicial review against the PPN and, having failed to do so, the PPN must be assumed to be valid.

On the other hand, in Higgs [2020] UKFTT 117 (TC), the First-tier Tribunal was considering an appeal against discovery assessments which were similarly dependent on the effect of prior decisions taken by HMRC (in this case, under ITEPA 2003 s 684(7A)(b)). However, in that case, HMRC persuaded the tribunal that the arguments were not suitable for determination by the First-tier Tribunal but had to be raised instead in the County Court as a defence against any subsequent enforcement proceedings. Added to this is the fact that there are certain issues which, at least on the basis of the law as it stands at the moment, cannot be addressed by the tribunal at all and must be raised, if at all, by way of judicial review. These are public law arguments such as fairness (including arguments about legitimate expectation) where an HMRC assessment might well be correct in (black letter) law – the well-established legal rules that are no longer subject to reasonable dispute – but where the decision to make the assessment offends an overarching public law principle.

In such cases, it can be contrary to principle for HMRC to insist upon the full amount of tax strictly due. Although it was tentatively suggested in 2009 that such matters could be raised in the tribunal (in the course of a statutory appeal), the case law has moved on and HMRC makes it very clear that these arguments may not be considered by the First-tier Tribunal.

Accordingly, in such cases (see, for example, Aozora GMAC Investment Ltd [2019] EWCA Civ 1643), the taxpayer had to start two separate sets of proceedings – one in the tribunal and another in the High Court, so that the two different strands of the same case could be separately argued in the appropriate forum. (See my article ‘Stuck in second gear’ in the December 2019 issue of Tax Adviser.)

That then leads to the question as to which set of proceedings should be heard first. This dilemma was particularly acute in the parallel cases of Gaines-Cooper and Davies & James, which were eventually brought together at the Court of Appeal and the Supreme Court ([2010] EWCA Civ 83, [2011] UKSC 47 respectively). In Gaines-Cooper, HMRC successfully ensured that the statutory appeal was heard before the judicial review proceedings, whereas in Davies & James, HMRC argued that the judicial review should proceed first and then the statutory appeal (if still appropriate) afterwards.

It is with this background that I consider the recent judicial review proceedings of R (oao Boulting) v HMRC [2020] EWHC 2207 (Admin).

The facts of the case

Mr Boulting was a major shareholder of a company which had traded successfully for a number of years.

In 2013, Mr Boulting (who by then had passed retirement age) and the company proposed a succession strategy whereby Mr Boulting would transfer some of his shares to his son, and the company would buy back some further shares held by Mr Boulting.

It was considered by the taxpayers that the circumstances satisfied the conditions in the Corporation Tax Act 2010 ss 1033 onwards for the sale proceeds to be treated as capital and not as an income distribution. However, many taxpayers are advised to seek the reassurance of a pre-transaction clearance from HMRC, as provided for by s 1044. Mr Boulting’s company duly sought and obtained a clearance from HMRC.

As s 1044 continues to set out, such a clearance has the effect of deeming (irrespective of the actual strict legal position) Mr Boulting's sale proceeds as capital and not as income from a distribution.

However, upon receipt of Mr Boulting's tax return, HMRC decided to withdraw the clearance, relying upon s 1045(6) which provides that 'if particulars provided [in the application or in response to any request by HMRC for further information] do not fully and accurately disclose all facts and circumstances material for [HMRC's] decision [the subsequent clearance given] is void'.

> Judicial review claims are at the discretion of the court rather than a matter of inherent right. The court has to give permission before the judicial review can proceed.

HMRC justified its decision on the basis that it had not appreciated how valuable the shares were, and so it did not realise how much tax was saved by treating the share buyback as capital rather than as income. HMRC argued that the company's failure to disclose the company's value amounted to a material lack of candour so as to allow it to treat the clearance as void.

That decision by HMRC is not in itself capable of appeal. On the other hand, the subsequent closure notice given by HMRC (in which it treated the share sale proceeds as income and not capital, significantly increasing the tax payable) may be the subject of appeal in the tribunal. HMRC's position in the closure notice is that the true amount of tax at stake means that the transaction is a part of a tax avoidance arrangement, thereby negating the condition in s 1033(2)(b). Consequently, HMRC's closure notice treats the proceeds as income and not (as per Mr Boulting's tax return) as capital.

In accordance with the current consensus (with which both HMRC and Mr Boulting concurred), any challenge to HMRC decisions (whether appealable or not) on the basis of public law principles must be made by way of judicial review in the High Court and cannot be advanced in the course of a statutory appeal in the tribunal. Accordingly, Mr Boulting (and the company) commenced two sets of proceedings: a judicial review to challenge the withdrawal of the clearance; and a statutory appeal in the tribunal against the additional tax charged by the closure notice.

Unlike statutory appeals, however, judicial review claims are at the discretion of the court rather than a matter of inherent right. One consequence of this is the fact that the court has to give permission before the judicial review can proceed. When a judicial review claim is commenced, the defendant (the public body whose decision is being challenged) has the right to make a brief reply (rather than a full submission with evidence) to assist the court in making its decision as to whether the claim should be permitted to proceed. Initially, permission is considered by a judge on the papers. However, sometimes the court can order an oral permission hearing (and, in any event, if the permission application is rejected on the papers, the applicant usually has the right for an oral hearing to consider permission).

As noted by the Court of Appeal in the Gaines-Cooper case, this permission process ‘was designed to protect public bodies against weak and vexatious claims … it was to enable judges to decide whether a case might be 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.’

However, my own experience is that HMRC routinely ignores this guidance and invests as much energy as possible in trying to prevent judicial reviews from proceeding. This is precisely what happened in Mr Boulting’s case.

The court’s decision

The case came before His Honour Judge Jarman QC, sitting in the High Court in Cardiff (virtually, at least, given the Covid-19 restrictions).
The judge focused on one of HMRC’s principal objections, being that a judicial review was inappropriate in the present case because the taxpayer had an alternative remedy. As I noted my article ‘Last chance HMRC’ (in the September 2015 issue of Tax Adviser), judicial review claims should not be commenced if the applicant has an alternative route of challenge. In other words, the process represents a residual right to strike down a public body’s decision where there is no available alternative.

The judge then considered the respective roles of the two sets of proceedings. So far as the statutory appeal is concerned, he recognised that the tribunal’s role is to ensure that the correct amount of tax is paid. He felt that the correctness of the closure notice represented the substance of the dispute between the parties. As that was a matter that was squarely within the First-tier Tribunal’s jurisdiction, the judge

considered that the judicial review proceedings should not be permitted to proceed as there was an alternative forum for the resolution of the dispute.

Commentary

I have no doubts at all that the judge was trying to deal with this case fairly. However, it is my respectful view that he has been led astray.
The purpose of the judicial review was to challenge the withdrawal of the clearance. Mr Boulting had raised a number of public law challenges to that decision (citing, for example, a breach of a legitimate expectation and irrationality). For example, Mr Boulting questions the relevance of the value of the shares to the matter of whether the transaction was undertaken for commercial purposes.

As both parties had accepted, those questions cannot be addressed by the First-tier Tribunal and can be raised only in judicial review proceedings.

I fully accept, of course, the importance of determining the true amount of tax payable in any particular case. Furthermore, I accept that the tribunal's ultimate role is to determine this and, in cases such as Mr Boulting's, this will turn on whether or not the conditions in s 1033 are met. I therefore accept that in many ways this can be described as the essence of the dispute between the parties.

However, when a clearance is given, s 1044 effectively overrides s 1033 because the conditions are 'treated' as having been met. As noted above, this is a deeming provision that overrides (where necessary) the actual facts of the case. Accordingly, even if HMRC is right to say (now) that the conditions in s 1033 are not met, this is irrelevant once a clearance has been given.

> If a taxpayer has a dispute which, in part, turns on questions of fairness, it is essential to consider promptly whether or not a judicial review is needed.

It is true that HMRC's withdrawal of the clearance deprives the taxpayer from relying upon the deeming provision in s 1044. But the decision to withdraw the clearance is a public law decision against which there is no right of appeal and therefore, even as the judge accepted, must be challenged by way of judicial review.

Despite the additional procedural hurdles required to commence a judicial review, once permission has been given by the court, such claims are usually far more

streamlined and cost-efficient than statutory appeals. In this case, it is my firm view that permission should have been given to proceed with the judicial review claim so that the court could then subsequently decide whether or not, as Mr Boulting sought to argue, to reinstate the clearance. If Mr Boulting were to be successful in that, the statutory appeal would fall by the wayside, with a considerable saving of time and costs for both sides.

Furthermore, in this case there is clearly a good argument to say that HMRC has unfairly withdrawn the clearance. In other words, this was not a ‘weak’ or ‘vexatious’ claim. If HMRC had observed the guidance given by the Court of Appeal in Gaines-Cooper, it would not have resisted ‘full consideration of matters of great importance not just to the taxpayer but to the Revenue itself’.

Had the judicial review been allowed to proceed, we would be able to learn what the court would have made of HMRC’s various justifications for withdrawing the clearance, including the argument (which I consider to be the most astonishing one) that to leave the clearance in place precluded HMRC’s right to enquire into Mr Boulting’s affairs.

I sincerely hope that Mr Boulting will realise how wrong the decision is and that he will decide to appeal against it. However, my even greater hope is that HMRC would stop treating litigation as a Kafka-esque game of chess and not repeatedly rewrite the rules to suit its own ends at every occasion.

I should, however, conclude this section by recording my own personal view that what I described above as the ‘current consensus’ is wrong and that, in fact, the First-tier Tribunal has full powers to hear public law arguments in the course of statutory appeals. Accordingly, if my view were correct then it would mean that in a case such as this the First-tier Tribunal could consider a challenge to HMRC’s decision to withdraw the clearance on the basis that it was that decision on which the closure notice depends. This would avoid a multiplicity of proceedings and allow all relevant issues to be determined by the specialist tribunal allocated by Parliament to hear tax disputes. However, I recognise that I am currently in a small minority on this point.

What to do next

If a taxpayer has a dispute which, in part, turns on questions of fairness, it is essential to consider promptly whether or not a judicial review is needed as well as

or instead of a statutory appeal. However, whatever view is taken in any particular case, taxpayers should expect HMRC to put procedural obstacles in their way. Accordingly, whatever the true position in law might be, it might be prudent to commence multiple proceedings in different fora/forums so as to pre-empt procedural arguments that HMRC might make and to ensure that time limits are not missed in the meantime.