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# **Tax Litigation in the current climate**

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# OVERVIEW

What is going on in the First-tier Tribunal?

Other tax litigation: the Upper Tribunal, the Chancery Division and the Administrative Court.

Recent cases and hot topics.

Residence and revenue matters in the light of COVID-19.

# The FTT

- Existing litigation with existing directions on 24/3/20
- Stayed for 30 days – 24/3/20
- Additional stay to 30 June & extended deadlines by 70 days – 21/4/20
- Statement by Chamber President – 11/5/20

# The FTT

- Avoiding the stay: bespoke directions.
- Missing out on the stay: appeals brought after 24/3/20 or those with bespoke directions agreed after 24/3/20.

# The FTT

- Judge Sinfield's statement of 11/5/20
- *“Contrary to the impression given ... the Tax Chamber is open for business and working both remotely and in person at its administrative centre in Birmingham to process new appeals and list existing appeals to be dealt with by judges either without a hearing on the papers or at a hearing by telephone and video.”*

## The FTT

- Judge Sinfield's statement of 11/5/20
- Is it true that all or most of the cases in the Tax Chamber have been frozen for 98 days?  
*"In fact, only a minority of cases are affected by the extended stay, issued on 21 April, in certain proceedings to the end of June. At least 60% of cases were already stayed on the application of one, often both, of the parties pending decisions of the tribunal in lead cases or of higher courts, and all default paper and basic cases are excluded from the further stay."*

## The FTT

- Judge Sinfield's statement of 11/5/20
- Is the Tax Chamber is unable to cope with its current caseload and is falling further behind?  
*“Actually, the number of outstanding cases at the end of March 2020 was less than the number outstanding at the end of the previous quarter and was lower than the figure for all of the last six years except 2018.”*

# The FTT

- Judge Sinfield's statement of 11/5/20
- Is there is a general stay on hearings until 30 June 2020?  
*"Hearings ... continue, and new hearings are being listed. ... The Tax Chamber continues to liaise with parties to rearrange cancelled face to face hearings and to list other cases that were close to being ready to be heard when the country went into lockdown. In consequence, the number of cases heard is expected to rise in the future."*



# The FTT

- Judge Sinfield's statement of 11/5/20
- *"The Tax Chamber is not geared up to hear cases involving many witnesses remotely."*
- *"The Tax Chamber has held video hearings with 15 or more participants."*

# The UT

- Business as normal, but directions providing for flexibility.

# The High Court

- Chancery Division: deadlines as normal. The Chancellor is keen to stress that business is very much continuing.
- Administrative Division: deadlines as normal. Remember: judicial reviews against HMRC can be heard by the Upper Tribunal for judges with tax expertise. The strict 3 month limit for J.R. actions remains firmly in place.

# Recent cases and hot topics

- Domicile remains a target area.
- *Epaminondas Embiricos v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKFTT 236 (TC) is currently under appeal (closure notice application: hearing expected in October 2020). The issue is how much information HMRC need to close domicile enquiries, e.g. do they need figures?

# Recent cases and hot topics

- Domicile remains a target area.
- *Henkes v HMRC* [2020] UKFTT 159 (TC). Closure notice application – Judge Tony Beare held he could decide domicile at the application as a preliminary matter, and proceeded to do so.

## Recent cases and hot topics

- *Henkes*

Fundamentally, the judge accepts the propositions that a taxpayer ***needs to have formed an intention to remain indefinitely in the UK before he acquires a domicile of choice here; and that in the absence of a domicile of choice in most cases the domicile of origin will revive.***

## Recent cases and hot topics

- *Henkes*

And yet on the facts of *Henkes*, the judge found that a taxpayer had acquired a domicile of choice here when his sworn evidence was that he intended to leave; when he had a house in Spain where he spent time with his family; when he had never acquired UK citizenship or a passport; and when the taxpayer asserted that he intended to leave the UK on a given contingency - when he stopped working.

## Recent cases and hot topics

- *Henkes*
- Multifactorial approach is confirmed.
- Questionable approach to balancing factors – e.g. weight placed on connections to jurisdiction of domicile of origin.
- Sceptical of statements of intention: too sceptical without good reason to doubt sworn evidence?
- Note HMRC carry burden of proof in proving domicile of choice in the UK.
- Note *Henkes* not binding at this level (FTT).



# Residence

- SRT day counts can disregard days spent here in exceptional circumstances.
- Statutory limit of 60 exceptional days.
- What is exceptional in the current climate?
- What if you are stuck here for more than 60 days?

# Residence

- Exception for people here to work on COVID—19 treatments, etc, by letter of the Chancellor of the Exchequer 9 April 2020:

*“We will amend the Statutory Residence Test (SRT) to ensure that any period(s) between 1 March and 1 June 2020 spent in the UK by individuals working on COVID-19 related activities will not count towards the residence tests.”*

- What is a “related activity”?
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## Residence

- For other people the 60 day limit remains but the guidance says:

*“Whether days spent in the UK can be disregarded due to exceptional circumstances will always depend on the facts ...However, if you are quarantined or advised by a health professional or public health guidance to self-isolate in the UK as a result of the virus, find yourself advised by official Government advice not to travel, are unable to leave the UK as a result of the closure of international borders, or are asked by your employer to return to the UK, the circumstances are considered as exceptional.”*

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# Dealing with HMRC

- Much publicised delays in public facing roles.
- Suspension of some enquiries. In particular, there is a concessionary delay in expecting people to comply with information notices.
- But, time limits for filing remain and there is a lack of clarity about the effect of time limits in specific cases: do you have a reasonable excuse on the facts of a case?
- Payment deadlines unaffected except VAT payments and July self employment instalment payments.

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