Judicial review remedies in tax disputes

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Introduction

• Significant rise in JR against HMRC.

• Can be a quick and efficient method of overturning HMRC decisions including quashing or forcing the withdrawal of assessments.

• Can be used strategically in dispute resolution/settlement negotiations.

• But will need to be a robust claim with a change of success because the work (beyond the mere prospect) is front-loaded.

• Requires clear understanding of procedural issues and evidential rules in the High Court, and a close eye on time limits.
When is JR relevant?

- For most tax matters there are appeal procedures set out in law. But in some cases there is no right of appeal to the tribunal against HMRC actions.
- This is mainly where the decision made is in relation to a discretionary matter, for example a decision on whether a late claim should be accepted, or the application of Extra-Statutory Concessions.
- Sometimes appeals from FTT decisions are not allowed, e.g. DOTAS applications. Then JR of the FTT decision can be considered.
- Or, for example, where there tribunal has refused a late appeal.
When is JR relevant?

- JR may also be appropriate to challenge HMRC decisions where the dispute is not about whether the decision is technically correct but where a taxpayer claims that they were misdirected and in consequence suffered disadvantage, for example that a return is wrong because they relied on incorrect advice received from HMRC.

- The Court of Appeal has reaffirmed the existence of a statutory right of appeal will preclude JR save in exceptional circumstances: *Glencore Energy UK Ltd v HMRC* [2017] Civ 1716.
When is JR relevant?

- Sometimes, there will be a limited right of appeal and a wider challenge will need to be by way of JR. E.g. in follower notice cases, where the penalty can be appealed but not the notice itself.
- See, e.g., *PML Accounting Ltd v HMRC [2017] EWHC 733 (Admin)*, in which the judge held that the validity of an information notice could not be challenged before the FTT in an appeal against penalties for non-compliance with the information notice.
Don’t miss the boat!

- *Beadle* [2020] EWCA Civ 562: a partnership payment notice cannot be challenge before the FTT.
Forum: three preliminary points

- **Point 1: Limited statutory jurisdiction of the FTT**
  - Wholly a creature of statute: TCEA 2007
  - By contrast, JR grounded in inherent supervisory jurisdiction of the court

  “We remain of the view that it is perfectly plain, from perusal of the Act itself, that Parliament did not intend to, and did not, confer a judicial review jurisdiction on the F-tT...” Abdul Noor v HMRC [2013] UKUT 071 (Mr Justice Warren & Judge Colin Bishopp):
• **Point 2: Limited statutory jurisdiction of the UT**
  
  – TCEA 2007 confers UT with a very limited JR jurisdiction in respect of certain “excluded decisions”
  
  – Decisions of the FTT where there is no right of appeal to the UT, namely those specified at s.11(5)(d) or (e) TCEA 2007
  
  – However, s.19 TCEA 2007 - claims transferred to the UT by the High Court where “just and convenient” to do so.
Point 3: The exclusivity principle

- It is an abuse of process to bring public law claims otherwise than by JR: see House of Lords in Mackman v O’Reilly [1983] 2 AC 237.

- Alive and well: see Carnwarth LJ in Trim v North Dorset District Council [2010] 1 WLR 1901:

  “in general it is an abuse of process to challenge the validity of public law actions or decisions other than by judicial review. Among the factors leading to this conclusion was the streamlined procedure by then available for judicial review, the requirement for leave, and the short time-limit (normally three months) for commencing proceedings”

- Exception when asserting defence to enforcement proceedings: Wandsworth v Winder [1985] AC 461
Forum: 3 cases

- **Knibbs v HMRC [2019] EWCA Civ 1719**
  - Participants in tax avoidance schemes via LLPS.
  - Notices issued to partners under s.28B(4) TMA 1970 following resolution of LLP issues
  - Part 7 claim in High Court challenging the validity of the notices
  - Struck out by the High Court (and upheld by CoA) on grounds of exclusivity principle
“The partnership can appeal against the conclusion in or amendments made by the closure notice, but the individual partners have neither that right nor a right to appeal the notice given to them under section 28B(4)…We are satisfied that, in the present case, the correct procedure for individual partners to challenge the amendments made to their returns was by judicial review, and not by ordinary civil proceedings.”

– See also *Reid & Emblin v HMRC* [2020] UKUT 0061 - Section 28B(4) notices were not closure notices and could not be appealed to to the FTT under s. 31 TMA 1970. Instead amenable to challenge by way of JR.
• **Birkett v HMRC [2017] UKUT 0089**
  
  – Mr and Mrs Birkett fail to comply with Schedule 36 information notice.
  – Penalty imposed. Appeal to FTT in accordance with paragraph 47, schedule 36 FA 2008
  – Mr and Mrs Birkett run a legitimate expectation argument.
  – UT found, in agreement with the FTT, that the taxpayer had no jurisdiction to run the point in the FTT.
  – FTT’s jurisdiction is confined to whether the statutory requirements for imposing a penalty are met.
“In each case, therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in exercising that jurisdiction, or deciding whether it has jurisdiction. Since the FTT’s jurisdiction is statutory, this is ultimately a question of statutory construction” [30]

- Not always a straightforward question
• **Beadle v HMRC [2020] EWCA Civ 562**
  
  – Participant in Ingenious Film Partners LLP
  
  – Partner Payment Notice ("PPN") issued in October 2014. Failure to pay.
  
  – Penalty imposed by HMRC in July 2015. Shortly thereafter, paid the sum demanded under the PPN.
  
  – Following unsuccessful representations to HMRC under Para 5 of Schedule 32 FA 2014, appeal of the penalty notice to FTT under Schedule 56, which allows a taxpayer to be excused where they have “reasonable excuse”
  
  – Asserted that PPN was invalid in context of penalty notice appeal proceedings.
• *Beadle v HMRC [2020] EWCA Civ 562*
  
  – The CA found (in agreement with FTT and UT), having regard to the exclusivity principle, that there was no jurisdiction for the FTT to consider the underlying validity of the PPN in the context of appeal to the penalty imposed by HMRC
  
  – *Winder* exception did not apply because it was implicit in the statutory scheme that a public law challenge was excluded.
  
  – Has like application to Accelerated Payment Notices ("APNs")
  
  – See also - *Archer v HMRC*. Representations must be made before JR.
Case where HMRC successfully argued that the taxpayer should have brought challenge to validity of a closure notice in the FTT, and not the High Court: *R (Archer) v HMRC* [2017] EWHC 296:

“Ultimately, I am driven to conclude that Ms Nathan’s submissions on this issue are well-founded, and that the F-tT, on a hypothetical appeal under section 31(1)(b), would and should have deployed section 114(1) to cure the defects in the Closure Notices. It follows – albeit as an end-point in the analysis and not as a starting-point that the taxpayer should have appealed the conclusions in the notices, and that this application for judicial review cannot proceed, it being an abuse of process.” [101]
Forum: concluding remarks

- Generally no JR jurisdiction on the part of the FTT
- Challenges to HMRC decisions w/o statutory right to appeal brought by way of public law proceedings in the High Court (pursuant to Part 54 CPR)
- FTT’s jurisdiction to resolve public law arguments will depend whether, on statutory construction of provisions conferring jurisdiction, it is empowered to do so
- Practical issues:
  - HMRC taking increasingly active stance
  - Not always clear cut
  - May straddle both fora
  - Issuing in both FTT and High Court, and transfer to UT - see *Cobalt v HMRC* [2019] UKUT
Procedure

- JR of tax cases may be referred to and carried out by the Upper Tribunal.

- There will be cases where a tax appeal and a JR can therefore appropriately be heard together. See Cobalt v HMRC [2019] UKUT 342

- This can be efficient. But strategic questions will arise. Often HMRC will agree to stay one or other of the proceedings.
Procedure - permission to appeal

• The taxpayer must then apply to the High Court for permission to bring JR proceedings promptly and in any event within 3 months of the date of the decision the application relates to.

• The High Court will decide the application for permission and may transfer the judicial review to the UT or it may decide the case itself.
Procedure - pre-action letter

• The person who is thinking of taking action against HMRC should normally send a letter before claim under the Pre-Action Protocol to HMRC to identify the issues in dispute and to establish whether litigation can be avoided or the issues narrowed.

• HMRC must reply to the pre-action letter (usually within 14 days).
Procedure - timing issues

• HMRC can take the point that a claim has not been brought “promptly” even when it has been brought within 3 months.

• But this does not (except in exceptional circumstances) override the requirement to comply with the procedural protocol. See Archer [2019] EWCA Civ 1021.

• Consideration will need to be given in any case to the question of what is the decision which is being challenged.
Procedure - grounds, evidence and costs

- The party who applied for permission can only rely on the grounds given in their application unless the High Court/UT gives them permission to include other grounds.
- Both the party applying for permission and the party opposing it may provide evidence and make representations at any hearing.
- The Court/UT can award costs in judicial review proceedings.
Pleading the grounds

• Generally, the courts quash decisions where there has been ‘unfairness amounting to an abuse of power’.
• The courts will not interfere in a decision merely because it is harsh and therefore appears unfair.
• It is for the taxpayer to prove. See Aozora GMAC Investment Limited [2019] EWCA Civ 1643.
Grounds

• Legitimate expectation arising from HMRC statements, either generally published statements of practice (e.g. in the manuals) or made to specific taxpayers.

• In *MFK Underwriting Agencies Ltd* [1989] STC 873 it was accepted that it could be an unfair abuse of power for HMRC to depart from guidance or informal clearances given to individual taxpayers.
Grounds - legitimate expectation

- The two primary conditions set out in *MFK*, which must be satisfied, are:
  - the taxpayer has put all his cards face upwards on the table (which includes providing full details of the specific transaction for which he seeks HMRC’s ruling); and
  - the ruling relied upon must be clear, unambiguous and devoid of relevant qualification.
Legitimate expectation - published documents

• See also re HMRC publications in Gaines-Cooper [2011] STC 2249. Lord Wilson applying Moses LJ in the Court of Appeal [2010] STC 860 at [12]:

• The importance of the extent to which thousands of taxpayers may rely upon guidance, of great significance as to how they will manage their lives, cannot be doubted. It goes to the heart of the relationship between the Revenue and taxpayer. It is trite to recall that it is for the Revenue to determine the best way of facilitating collection of the tax it is under a statutory obligation to collect. But it should not be forgotten that the Revenue itself has long acknowledged that the best way is by encouraging co-operation between the Revenue and the public ...
Legitimate expectation - published documents

- Co-operation requires fair dealing by the Revenue, and frank and open dealing by the public. Of course the Revenue may refuse to give guidance and re-create a situation in which the taxpayers and their advisers are left to trawl through the authorities to find a case analogous to their own, or, if they are fortunate, a statement of principle applicable to their circumstances. But since 1973, in a field fraught with borderline cases relating to an enormous variety of circumstances, the Revenue has chosen to confer what presumably it regarded as a benefit on taxpayers who wished to know whether they were likely to be treated as resident or not.

- SC ultimately held IR 20 was not “clear and unambiguous” and did not cover the taxpayers situation.
Legitimate expectation - limits

- *Hely-Hutchinson* turned on the circumstances when HMRC guidance can be relied on.

- HMRC issued guidance in 2003 (on which the taxpayer relied) and then in 2009, reversing its position. HMRC refused the taxpayer’s claim by applying the 2009 guidance.

- The taxpayer succeeded in the High Court, but lost in the Court of Appeal, Arden LJ recognising that the taxpayer had a legitimate expectation but in considering whether it was legal to frustrate it held:
Legitimate expectation - limits

• ...it is well established that it is open to a public body to change a policy if it has acted under a mistake. The decision whether or not to do so is not reviewed for its compatibility in the public interest: the question is whether or not there has been sufficient unfairness to prevent correction of the mistake. It is clear from the authorities that the unfairness has to reach a very high level: see, in particular, the holding of Simon Brown LJ in Unilever where he held that it was not enough that the change of course by the public body was “mere unfairness“ or conduct which was “a bit rich”. It had to be outrageously or conspicuously unfair.
Legitimate expectation - limits

• High bar.

• But - HMRC’s guidance there was wrong.
Recent JR Cases - HMRC publications and statements

• In Vacation Rentals (followed in Mehan) Fancourt J held:

  "90. It is clear that once a legitimate expectation has been established...It is for the authority to identify any overriding interest on which it relies to justify the frustration of the expectation. If the authority does not place material before the court to justify its frustration of the expectation, it runs the risk that the court will conclude that there is no sufficient public interest and that in consequence of the legitimate expectation created its conduct is so unfair as to amount to an abuse of power: see Paponette at [37] and [38].”

• Mehan [2020] UKUT 213 (TCC) - how do Vacation Rentals and Aozora fit together?
Recent JR Cases - unequal treatment

- This is relevant to rationality but not a distinct ground. See *Gallaher* [2018] UKSC 25.

- It is also relevant to HRA arguments.
Recent JR Cases - FNs and APNs

• A number of recent public law challenges have concerned APNs.
• *Rowe* [2017] EWCA Civ 2105
• *Vital Nut Co Limited* [2017] EWCA Civ 2105 - CA.
• *Walapu* [2016] EWHC 658
• *Dickinson* [2017] EWHC 1943 (Admin)
FN cases

In *Haworth* [2019] EWCA Civ 747, CA allowed a JR against FNs based on *Smallwood* and quashed them.

- HMRC misdirected themselves by:
  - Misunderstanding the *Smallwood* judgment; and
  - Working on the basis that a follower notice could be issued if HMRC were merely of the opinion that it was more likely than not that the principles and/or reasoning in *Smallwood* would deny the asserted tax advantage
  - HMRC were incorrect to believe that Haworth and *Smallwood’s* cases were identical as the places of effective management were different in the two schemes: the question of fact is case specific;
  - Therefore, *Smallwood* could not be used as a basis for issuing follower notices and APNs.

- *Locke* [2019] EWCA Civ 1909 decided for the taxpayer on similar grounds re *Eclipse*.
Information requests

• *JJ Management Consultants* [2020] EWCA Civ 784 dealt with extra-statutory information requests backed by a threat re non-mitigation of penalties.

• Schedule 36 notices are usually appealed to the FTT but consider specifics.
Disclaimer

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Thank you, any questions?