

PUMP COURT  
TAX CHAMBERS

# **HMRC EXECUTIVE POWERS AND JUDICIAL REVIEW**

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**4 November 2021**

# Content of Webinar

1. When to apply for judicial review, when to appeal to the Tribunal and when to do both?
2. Limits on HMRC executive powers (follower notices and APNs, *Haworth*)
3. Challenges to the legislation (the loan charge, challenges based on EU law and Human Rights)
4. HMRC's investigation and information powers

# When to Apply for Judicial Review

Permission for JR will be refused where the claimant has an adequate alternative remedy – **BUT** the FTT has a limited jurisdiction. So:

- (1) Is there a right of appeal to the FTT or a separate right of action against HMRC? Decisions without a right of appeal: e.g. APNs & Follower Notices, claims under ESCs (***Murphy* [2021] EWHC 1914 (Admin)**)
- (2) If so, does the FTT/Court have jurisdiction to determine all of the arguments?
- (3) Can the FTT grant the desired remedy? E.g. declaration of incompatibility with ECHR or injunction (e.g. ***Biffin* [2016] EWHC 2926 (Admin)**).

# Jurisdiction of the Tribunal (1)

- Generally the FTT does not have jurisdiction to consider public law arguments - ***Hok Limited*** [2012] UKUT 363 (TCC):

*"Once it is accepted...that the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, it does not matter whether the Tribunal purports to exercise a judicial review function or instead claims to be applying common law principles; neither source is within its jurisdiction."*

- Public law arguments: breach of legitimate expectation, unreasonableness/irrationality (including unequal treatment), abuse of power (but abuse of process is within jurisdiction: ***Foulser*** [2013] UKUT 038 (TCC); ***Shiner*** [2018] EWCA Civ 31). Can the FTT determine whether an earlier decision was flawed on public law grounds? ***Beadle*** [2020] EWCA Civ 562 vs ***KSM Henryk Zeman*** [2021] UKUT 182 (TCC)
- It may be necessary to issue parallel proceedings (consider transfer under s31A SCA 1981 – ***Samarkand*** [2015] UKUT 211 (TCC), [2017] EWCA Civ 77; ***Cobalt*** [2019] UKUT 342 (TCC)

# Jurisdiction of the Tribunal (2)

Quasi-judicial review/supervisory jurisdiction of the FTT, for example:

- Registered Pension Schemes (Lifetime Allowance Transitional Protection) Regs 2011 – ***Hymanson*** [2018] UKFTT 0667 (TC)
- s16 FA 1994 (e.g. restoration of seized excise goods and warehouse approvals) - ***Ahmed (t/a Beehive Stores)*** [2017] UKUT 359 (TCC):

*"(1) Did the officers reach decisions which no reasonable officer could have reached?*

*(2) Do the decisions betray an error of law material to the decision?*

*(3) Did the officers take into account all relevant considerations?*

*(4) Did the officers leave out of account all irrelevant considerations?"*

In those circumstances, the taxpayer cannot generally apply for judicial review - ***CC & C Ltd*** [2014] EWCA Civ 1653.

# Jurisdiction of the Tribunal (3)

Section 83 VAT 1994 – can the FTT determine legitimate expectation argument?

- ***Oxfam* [2009] EWHC 3078 (Ch)** – s83(1)(c) – Yes
- ***Noor* [2013] UKUT 71 (TCC)** – s83(1)(c) – No
- ***KSM Henryk Zeman SP Z.o.o.* [2021] UKUT 182 (TCC)** – s83(1)(p) – Yes!
  - The FTT does not have a *general* supervisory jurisdiction
  - But taxpayer can defend itself by challenging validity of a decision on public law grounds - the question is whether the statutory scheme expressly or by implication excludes the ability to raise a public law defence
  - HMRC's power to issue assessments is permissive and therefore HMRC need to make a decision to issue one
  - Policy reasons – duplication of proceedings, delay and injustice given the potential for disputes to arise as to which forum any particular challenge should be brought it.

# Timing of Challenge

Time limit – 3 months and without undue delay

(1) When is the decision made?

(2) Should taxpayer wait for the review?

## ***R. (on the application of Archer) [2019] EWCA Civ 1021***

- Mrs Archer commenced judicial review challenging the APN (did not wait for outcome of representations). HMRC withdrew APN and Mrs Archer sought her costs of the judicial review.
- No order for costs – *“section 222 does in general provide an alternative means of redress for the taxpayer in receipt of an APN which should normally be exhausted before the commencement of judicial review proceedings”*

# Challenges to FNs, PPNs and APNs

- *R(oao Vital Nut) v HMRC* [2016] EWHC 1797 (Admin) & [2017] EWCA Civ 2105
- *R(oao Rowe) v HMRC* [2017] EWCA Civ 2105
- *R(oao Locke) v HMRC* [2019] EWCA Civ 1909
- *Beadle v HMRC* [2020] EWCA Civ 562
- *R(oao Haworth) v HMRC* [2021] UKSC 25
- *Sheiling Properties v HMRC* [2021] EWCA Civ 1425

# Follower Notices: Outline of FN Regime

Four Conditions to Issue an FN: FA 2014 s204. Most important is Condition C:

- “HMRC is of the opinion that there is a judicial ruling which is relevant to the chosen arrangements”.
- Judicial Ruling is relevant if it is final, relates to tax arrangements and “the principles laid down, or reasoning given, in the ruling would, if applied to the chosen arrangements, deny the asserted advantage”; s205(3).
- FN must explain why HMRC considers ruling relied upon is “relevant”; s206.
- If FN validly issued, taxpayer has limited period to abandon claim or be exposed to 50% tax-gear penalty if he fights on and loses.
- Issue of FN justifies issue of APN which triggers payment of tax covered by FN, together with a further penalty of up to 15% of the tax if not complied with.

# Haworth Decision

## Background:

- HMRC relied on CA decision in *Smallwood v IRC* which rejected tp's appeal against Special Commissioners' decision that "place of effective management" of trust was in the UK and not Mauritius and so no DTA relief.
- HMRC thought that CA had decided that POEM being in the UK was inevitable result of implementation of particular scheme.
- Identified 7 pointers from the judgment which if present in another case meant it was "likely" that tribunal would find the same way. Thought that such balance of probability was sufficient to justify issue of FN.
- FN identified some of the pointers and stated "corresponding reasoning applie[d]" to Mr Haworth's scheme.

# Supreme Court Decision

Upheld the CA decision quashing the FN and linked APN due to 2 separate misdirections:

- Overstated the significance of the *Smallwood* decision. The pointers were not necessary and sufficient conditions to finding POEM in the UK and not highly likely to have reached the same view if acted on a correct direction; see Rose JSC at [75] & [76]
- Forming the opinion that the application of the ruling was more likely than not to deny the tax advantage was not sufficient to justify a FN. HMRC given a discretion whether to form the opinion but the opinion needed to be that “there is no scope for a reasonable person to disagree that the earlier ruling denies...the advantage”; see Rose JSC at [61].

# Significance of *Haworth* Decision (1)

The SC went on to give guidance on factors relevant to whether HMRC can form the required opinion:

- How fact sensitive is the application of the ruling to the second case and how much do HMRC know about the facts of the second case; Rose JSC at [64];
- If relevance of ruling depends on rejection of tp's evidence in second case, how clear is the untruthfulness? How similar are the fact patterns of the two cases? Rose JSC at [65]-[66].
- Is tp relying on new arguments/different provisions to justify the advantage. If earlier ruling does not address that argument, FN may not be issued. May be same if earlier decision based on concession; see *Locke & Rose* JSC at [67].
- Nature of the ruling: where tp not represented or did not appear or reasoning is brief or unclear, less likely to justify HMRC forming required opinion; Rose JSC at [68].

# Significance of *Haworth* Decision (2)

- The same criteria will apply to FTT hearing an appeal against a FN penalty.
- All *Smallwood* FNs and APNs vacated along with FNs penalties but no refund of tax where tps settled in response to FN.
- HMRC may well have adopted an incorrect lower threshold of balance of probabilities in issuing other FNs and so those FNs may be voidable.
- High % of FN recipients settle rather than risk the penalty. If FN invalidly issued, do they have a right to re-open claim and claim repayment of tax payment?

# OUTLINE OF APN & PPN REGIME

Finance Act 2014 Sections 219-229 & Schedule 32

- APNs can be issued in 3 main circumstances:
  - HMRC have issued a FN in respect of the same tax arrangements for the same period;
  - The tax arrangements are “DOTAS arrangements”; or
  - Various notices have been given GAAR legislation in respect of the tax arrangements.
- The APN requires the recipient to pay an amount equal to the “understated tax” within time period or be exposed to penalties (5% every 6 months).
- APN overrides earlier postponements of tax but payments refunded with interest if appeal subsequently successful.
- No judicial check before issue of APN but no sanction against pursuing appeal.

# Rowe & Vital Nut

Heard separately in Admin Court but together in Court of Appeal.

- HMRC did have to form view that arrangements was ineffective having considered available information. But can take account of “in house” view of scheme.
  - In *Vital Nut*, officer had applied wrong test but no relief because highly likely would have reached same view if correctly directed.
- Broad brush challenges to the APNs largely unsuccessful:
  - APN & PPNs could be issued where claims or appeals made before FA 2014 enacted.
  - Even if APN/PPN regime engaged Article 1 of First Protocol of the EHRC any interference with tp’s possession was provided by law & proportionate in all the circumstances.
  - Ability to make representations and availability of JR as a remedy satisfied the requirements of Article 6.

# ***Beadle & Sheiling Properties***

Court of Appeal held in two separate decisions:

- In *Beadle*:
  - FTT hearing an appeal against a penalty for non-compliance with PPN had no jurisdiction to entertain a public law challenge to underlying validity of PPN.
  - The perceived invalidity of PPN could not be properly considered as a reasonable excuse for non-compliance with a PPN or a claim for reduction of penalties by reason of special circumstances.
- In *Sheiling*:
  - APN regime capable of applying to liabilities for PAYE income tax covered by a determination under Regulation 80 of the PAYE Regulations 2003.
  - Similarly “disputed tax” could include an amount stated in a Regulation 80 determination.

# Using JR to challenge legislation

- Three heads of judicial review: illegality, procedural impropriety and irrationality (*Council of Civil Service Unions v Minister for the Civil Service* [1985] A.C. 374)
- Challenge to legislation falls under illegality head
- Increasing number of challenges to tax legislation especially on the basis of EU and ECHR rights
- Can rely on those rights in a substantive appeal (e.g. *Reeves v HMRC* [2019] 4 WLR 15) but not for s. 4 HRA declaration of incompatibility

# Human rights based challenges to tax law

- Usually brought under Article 1, Protocol 1 to the ECHR:

*“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”*
- Does the taxpayer have a possession?: *R (oao St Matthews (West) Ltd & ors) v HMT & anor* [2015] STC 2272 at [46]: *the money available to pay the SDLT “...is a possession impressed with an arguable claim by HMRC, which prevents it being properly regarded as a possession for A1P1 purposes”*
- Is the legislation “*manifestly without reasonable foundation*”? *James v UK* [1986] 8 EHRR 123

# *R (oao Cartref & others) v HMRC* [2020] STC 516

- First claim to challenge the Loan Charge introduced by Schedules 11 and 12 Finance (No. 2) Act 2017
- Claimants had participated in an arrangement for the acquisition of the distribution rights for films. C1 and C3 were close companies and were potentially subject to the Loan Charge as a result of the close companies gateway in sections 554AA to 554AF ITEPA 2003. C2 and C4 were their respective directors. C5 was an LLP of which C3 had become a member and had been issued with a PFN.
- C2 and C4 refused permission because their claims were hypothetical and/or premature.
- C5 refused permission because the issue of the PFN was not a reviewable decision and did not interfere with a possession.
- C3 refused permission because it did not have a possession.
- C1 granted permission. It had entered the arrangement before Part 7A ITEPA 2003 enacted and had a possession.
- However, claim dismissed because *“it cannot be said that this approach to tax is illegitimate or lacked a reasonable foundation”*; *“the purpose of the legislation is not one which can be sensibly impugned”* and, *“the Claimants’ argument required them to surmount a high hurdle...this was not achieved”*.

# ***R (oao Zeeman & Murphy) v HMRC [2020] STC 828***

- Claimants were contractors subject to the loan charge under Schedules 11 and 12 Finance (No. 2) Act 2017
- Again found not to have a possession for A1P1 purposes
- The legislation “...falls squarely within the margin of appreciation afforded to the State under the second paragraph of A1P1”

# Other developments and further cases

## ***Morse review and FA 2020 amendments***

- Action outside court more effective?
- Permission refused in *Cartref* [2020] EWCA Civ 1744
- Claim was now academic but if brought against amended legislation would be a “rolling” type of judicial review
- Further challenges brought after legislation amended:

## ***In the petition of Neil Andrew Finucane [2021] CSOH 38***

- Alternative remedy so claim refused. Court further held no movement of capital or breach of principle of fiscal legality but if there had been, the legislation was proportionate and justified.

## ***R (oao Clamp & anor) v HMRC [2021] WLR(D) 474***

- HMRC did not have power to agree to “reinstate” loans which had been repaid

# Challenging HMRC Investigations

Can taxpayers challenge HMRC investigations?

- Statutory enquiry – apply for closure notice (or partial closure notice)
- Investigation – FTT has no jurisdiction to supervise HMRC investigation so taxpayer must challenge by judicial review - ***Gold Nuts Ltd* [2016] UKFTT 82 (TC)**
- ***JJ Management Consulting LLP* [2020] EWCA Civ 784** – challenge to HMRC’s decision to open an investigation and make informal requests for information. Court of Appeal held that HMRC had a wide discretion on how best to perform their statutory tax collection function and Court would not interfere if HMRC were acting to promote their statutory function:

*"HMRC, like all public authorities must exercise their powers so as to promote the statutory purpose for which they are given; and must act lawfully, exercising their powers in good faith and on a rational basis. ...in practice it will take a wholly exceptional case on its legal merits to justify judicial review of a discretionary decision by HMRC to conduct an informal investigation of the kind conducted here."*

# Challenging Information Powers

Statutory regime in Schedule 36

- Challenges to limited participation rights have not been successful - ***X Ltd* [2020] UKUT 29 (TCC)**
- Challenge to ex parte hearing to give third party notice - ***R. (on the application of Derrin Brothers Properties Ltd)* [2016] EWCA Civ 15:**

*"Parliament has balanced those extensive rights of HMRC to obtain documents and information from third parties, at the investigatory stage of checking possible tax avoidance or evasion, with a number of protections against abuse and excessive intrusion by the executive."*

- Trying to retrieve information which was provided pursuant to an invalid information notice - ***R. (on the application of PML Accounting Ltd)* [2018] EWCA Civ 2231**
- ***Mattu* [2021] UKUT 0245 (TCC)** – the second case imposing a tax-related penalty under paragraph 50 Sch 36 - £350,000 penalty

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**Questions?**

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