Comment

A concerning erosion of rights to appeal

Speed read

The increasing number of provisions which deny taxpayers an effective right of appeal is an alarming trend. This extends not only to accelerated payment notices and follower notices but also to important anti-avoidance rules, notably those in the new non-resident capital gains tax regime. HMRC is effectively reserving itself a discretion by mitigating the potential impact of anti-avoidance rules through guidance. The resulting uncertainty is unsatisfactory, while when HMRC decides to assess in this situation then a taxpayer has very limited rights to challenge the decision by way of appeal or judicial review.

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The purpose of this article is to highlight what I believe is a disturbing trend in our tax jurisprudence: an increasing number of important decisions made by HMRC are only capable of being challenged on a judicial review basis. The rule of law requires that the application of laws is certain and that there is a right of access to courts to ensure the law is properly applied. The constitutional doctrine of the separation of powers requires that an independent judiciary is able to rule on the correct application of laws enacted by Parliament in disputes between the citizen as taxpayer and the state as executive, in the guise of HMRC. The tax appeals machinery and specialist tribunals have been specifically created for this purpose. A situation where HMRC has discretionary powers as to the application of substantive taxing statutes is inconsistent with all of this. Nevertheless, an increasing number of provisions deny taxpayers an effective right of appeal, most alarmingly a new breed of anti-avoidance rules.

The most glaring example of decisions which do not carry a right of appeal are the issuing of accelerated payment notices and follower notices. Other examples are to be found in the series of cases in which HMRC has had partial success in denying taxpayers a right of appeal by deciding that a reclaim has been made out of time, notwithstanding that the time limits point was capable of being argued over (see *Portland Gas Storage Ltd v HMRC* [2014] UKUT 270 (TCC) and *HMRC v Raftopoulou* [2018] EWCA Civ 818 (in both of these cases the author appeared as counsel for the taxpayer)). However, it is in the application of anti-avoidance rules that the lack of an effective appeal right may be of most concern.

Significant thresholds for appeal

In the new capital gains tax regime for non-residents, the exemption election for property-rich collective investment vehicles, which is extremely important for property funds, can be revoked 'if, in order to safeguard the public revenue, [HMRC] considers it is appropriate to revoke the election' (TCGA 1992 Sch 5AAA para 18(1)).

The relevant guidance states that HMRC will not revoke an election except in response to certain arrangements where tax avoidance is one of the main objects. However, the statute provides that an appeal against the election being revoked can only be allowed where the tribunal considers that HMRC 'could not reasonably have been satisfied that there were grounds for revoking the election' (Sch 5AAA para 19(4)). This is an extremely high threshold and goes beyond even the traditional test for judicial review where an error of law might be sufficient to quash a decision.

Any taxpayer wishing to appeal the revocation of an exemption election will face a very difficult task indeed because the statute has been deliberately framed to prevent taxpayers successfully challenging revocation. The anti-avoidance rule governing indirect disposals of property-rich vehicles is similarly favourable to HMRC because it requires only that the arrangements have a main purpose of obtaining a tax advantage, rather than the higher threshold of tax avoidance (TCGA 1992 Sch 1A para 11). The same applies to the anti-avoidance rules within the transactions in land rules enacted in FA 2016.

Hannover: limited ability to appeal assessments under s 75A

The recent case of *Hannover Leasing v HMRC* [2019] UKFTT 262 (TC), where the author represented the taxpayer, illustrates the dangers to taxpayers and their advisers from this kind of wording. A full discussion of *Hannover* is outside the scope of this article. For present purposes, the key point is that HMRC successfully argued before the FTT that FA 2003 s 75A, the SDLT mini-GAAR, operates as an anti-saving provision.

The FTT rejected the taxpayer's submissions that the statutory references to 'scheme transactions' which are 'involved in connection with' the land transfer require the presence of avoidance in the sense identified by Lord Nolan in *IRC v Willoughby* [1997] STC 995, essentially of a result which runs contrary to the scheme of the tax. Instead, the tribunal agreed with HMRC that all s 75A requires is an SDLT saving, together with transactions that are commercially interdependent. This remains open to argument on further appeals, notwithstanding that there is no appeal in *Hannover* itself. If it is correct, however, then taxpayers will have extremely limited ability to appeal assessments under s 75A, and there will be no ability to argue that the transaction is not of a kind which s 75A is meant to catch because it is entirely innocent.

HMRC's arguments in *Hannover* went against its own published guidance, which states that s 75A 'only applies where there is avoidance of tax [and] HMRC will not seek to apply [it] where it considers transactions have already been taxed appropriately' and includes several examples of such innocent transactions. This guidance was duly cited to the tribunal as academic authority by the taxpayer, effectively disowned by HMRC during the hearing, and found to be 'irrelevant or wrong' by the tribunal. Significantly, the author's understanding is that HMRC considered that the steps taken by the taxpayer in *Hannover* did indeed involve abusive avoidance of the kind which merited bringing s 75A into play. However, once arguments were advanced which explained why what was done fitted the scheme of SDLT, then rather than engaging on this issue HMRC instead simply argued that s 75A is an anti-saving rule.

The practical impact

It seems clear more generally that once HMRC has decided that there is avoidance, it does not want taxpayers to be able to fight the issue. Having statutory wording in an anti-avoidance rule that does not require a result which runs contrary to the scheme of tax is not a new phenomenon (see, for example, CAA 2001 s 123(4) and *Lloyds TSB Equipment Leasing (No. 1) Ltd v HMRC* [2014] STC 2770. Neither is it any coincidence that no appeal has been made against a decision of the GAAR panel when such decisions must be taken into account on appeal. The modern trend is clear.

The practical impact of all this is extremely concerning. First, there is considerable uncertainty as to how anti-avoidance rules which are drafted in the manner of s 75A and Sch 5AAA para 18(1) will be applied by HMRC. Following *Hannover*, HMRC has the ability and arguably a duty to attack a whole raft of transactions using s 75A, including where any kind of commercial step precedes a share sale, de-enveloping transactions and farming partitions which previously would have been considered safe on the basis of HMRC's own guidance, including under the GAAR guidance. Secondly, in the event of an assessment using such an anti-avoidance rule, the taxpayer has a very limited basis on which to appeal.

In *Project Blue Ltd v HMRC* [2018] STC 1355, the Supreme Court reiterated that tax liabilities should be clearly imposed by statute and not as a matter of HMRC's discretion. However, the practical impact of *Hannover* is that unless HMRC is about to apply s 75A much more widely than before, then it will be claiming exactly the sort of discretion which the Supreme Court says it does not have. Understandably, taxpayers will want to take advantage of favourable guidance issued by HMRC, but that does not make the overall position satisfactory.

Similar considerations apply in relation to the anti-avoidance rules for non-resident capital gains tax discussed above. It is especially concerning that HMRC has persuaded Parliament to give it an express discretion to revoke the exemption election. The helpful wording of the guidance will be of limited utility in appealing any decision to revoke the election. It is one thing to deny, rightly or wrongly, a right to appeal for accelerated payment notices and follower notices and quite another for HMRC to have a discretion as to the application of substantive charges to tax.

Obstacles to further action

Taxpayers may consider judicial review actions in the event of HMRC invoking the anti-avoidance rules in the face of its own guidance. However, the obstacles to this include the threshold being notoriously high, as it is necessary to show a clear statement from HMRC upon which the taxpayer reasonably relied, and the fact that the benefit of extra statutory concessions is unavailable in cases of tax avoidance following *R v Inspector of Taxes ex p Fulford-Dobson* [1987] QB 978. A judicial review action will likely be very difficult to bring unless the taxpayer is squarely within a specific example or clear statement in HMRC's guidance. The upshot is that a taxpayer may self-assess in the belief that she is following HMRC's guidance but suddenly find herself assessed to tax under an anti-avoidance rule and with a very limited ability to either appeal or seek a judicial review.

There is no easy solution which is likely to find favour with all interested parties. HMRC, mindful of its experience in fighting schemes, can hardly be blamed for asking Parliament for anti-avoidance rules which are favourably worded. The best solution would be for Parliament to insist on anti-avoidance rules which apply when results would otherwise arise that do not fit the scheme of the relevant tax. Whilst the price of this is some uncertainty, both HMRC and taxpayers can sensibly apply such tests and the courts can rule in disputed cases. This kind of rule works reasonably well in many contexts. The VAT doctrine of abuse of rights operates on a similar basis. Reputational risk is, of course, a significant deterrent to fighting an appeal against an anti-avoidance rule, so a surge in litigation is unlikely.

A further practical point which arises is that those bodies which engage with HMRC over guidance must be aware that HMRC may seek to significantly revise this at a later date. Whilst additional safeguards for taxpayers who rely on the guidance may be sought, obtaining these is likely to be more difficult. Ideally any favourable guidance from HMRC would be clear that it is a binding interpretation and not any kind of concession. A concerning point is that, in *Project Blue*, HMRC relied on 'the safety valve created by s 75C(11) and (12) which empowers the Treasury to disapply s 75A in specified circumstances, including making provision with retrospective effect' as the solution to unintended situations being caught; this may have been more than a throwaway line. Given that the Treasury is not going to act without consulting with HMRC, this kind of power is surely a last resort and not a general solution to rules which operate too widely.

> Hard cases make bad law but badly thought out statutes also make hard cases

It is worth observing that judges tend to push back against attempts to limit their jurisdiction. When quashing follower notices and accelerated payment notices given to a taxpayer in *Haworth v HMRC* [2019] EWCA Civ 747, the Court of Appeal expressly stated that the draconian nature of the powers conferred on HMRC required that these be carefully circumscribed (see especially per Gross LJ at para 66). In *Portland Gas*, the Upper Tribunal took as its starting point the underlying philosophy that the tribunal is the body in which Parliament has vested the jurisdiction to deal with disputes between the taxpayer and HMRC as to the correct amount of tax to be paid.

A further example is to be found in excise duty cases concerning the non-restoration of vehicles seized by Customs officers, where the courts pushed back hard against a statutory right of appeal based on the judicial review threshold only to create something more akin to a traditional appeal (see for example *Lindsay v Commrs of Customs & Excise* [2002] EWCA Civ 267. Nevertheless, judges remain constrained by the statutory framework and judgments in individual cases will depend upon a raft of factors.

The old legal adage says that hard cases make bad law but badly thought out statutes also make hard cases. The width of the drafting of certain anti-avoidance rules, together with the difficulty in relying on HMRC's published guidance, unfortunately produces significant uncertainty for taxpayers where these are in point. ■

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