Why not the Tribunal?

Jeremy Woolf, Barrister, Pump Court Tax Chambers

The Court of Appeal's recent judgment in *John Wilkins (Motor Engineers) Ltd v HMRC* [2011] EWCA Civ 429 is the latest case to touch upon the issue of whether claims for compound interest on overpaid VAT should be commenced in the High Court or in the Tribunal. In that case the appellants sought a reference to the European Court to determine whether European Union law entitled the appellants to commence proceedings in the Tribunal. In the light of the earlier reference by the European Court in *Littlewoods Retail v HMRC* [2011] STC 171 the Court of Appeal considered that no further reference was appropriate at the moment.

The Court of Appeal's judgment does not give any consideration to the arguments in favour of allowing the proceedings to be conducted in the Tribunal. Procedurally it seems less than satisfactory that taxpayers should have to commence two sets of proceedings, one for tax and possibly simple interest in the Tribunal and then to claim compound interest in the High Court. From HMRC's perspective it may currently be tactically advantageous to argue that claims have to be brought in the High Court because they may have stronger arguments for limiting claims. However, going forward the reverse may the position. VATA 1994 s 80 currently only permits claims to recover tax over a four-year period. Any claims for interest before the Tribunal will be similarly limited. However, if restitutionary claims can be commenced in the High Court such claims could relate back at least six years and possibly longer if the claims could be classified as claims based on mistake.

The fact that the case law to date suggests that claims should be brought in the High Court probably owes a lot to the fact that the first case to consider the issue was *Chalke v HMRC* [2009] STC 2027 where neither party had any real interest in arguing that the matter was one that should be brought before the Tribunal. All the cases to date have taken the view that as a matter of purely domestic law neither the Tribunal nor the High Court have jurisdiction to award compound interest. In *Chalke* Henderson J considered that European law required him to disapply this restriction on his jurisdiction. Since the point was not being argued before him, he did not consider whether a similar disapplication should result in the Tribunal having jurisdiction.

In a situation where neither the High Court or Tribunal have jurisdiction as a matter of domestic law, there is surely much to be said for the view that any disapplication should occur in a manner that best accords with Parliament's intent. If such an approach is adopted in this context it results in the Tribunal being the appropriate jurisdiction, since the whole scheme of VATA suggests that the Tribunal is the intended Tribunal to resolve such disputes. This is indeed the approach that the courts have adopted on a number of occasions. So for example in *Marshall v Southampton and South West Hants Health Authority* [1994] QB 136 and [1994] 1 AC 530 the European Court considered that a ceiling on Industrial Tribunal's powers to make awards and its inability to award interest were contrary to EU law. The House of Lords accepted that the Industrial Tribunal had been correct to ignore these limitations on its powers to make awards. Similarly the European Court in *Marks & Spencer v Customs and Excise* [2002] STC 1036 held that the three-year cap on bringing claims for overpaid tax was contrary to European law. It has never been questioned that any claims that arose on account of the implementation of the three-year cap should be brought in the Tribunal. It is difficult to see any good reason why a different approach should be adopted in this case.

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As the Tribunal observed in *Grattan Plc v HMRC* [2011] UKFTT 31 (TC), it is also at least arguable that requiring two sets of proceedings to be instated is inconsistent with European principles of equivalence and effectiveness. Some support for that conclusion is provided by the European Court's decision in *Impact v Ministry of Agriculture* [2008] ECR 1-2483. In that case the Court considered that requiring two sets of proceedings to be commenced could contravene the European principles of effectiveness. However, it left it to the referring Court to determine whether the requirement made bringing the claims excessively difficult. The Tribunal in the *Grattan Plc* case, which was decided before the decision of the Court of Appeal in *John Wilkins (Motor Engineers) Ltd*, considered that the principle of effectiveness was probably not breached by requiring two sets of proceedings to be commenced. However, it accepted that these issues were sufficiently arguable to warrant a reference to the European Court of Justice. However, HMRC have subsequently appealed against that decision.

Given the demands on the Court of Appeal's time, it is understandable that the Court did not give further consideration to these issues in *John Wilkins*, since any decision would be academic if the European Court holds that there is no European Union right to compound interest. However, it is disappointing that the issue has been left unresolved since guidance on these issues might prove useful not only in this case but in other cases where national procedures do not give full effect to European rights. For example, similar issues arose in the direct tax context in the *FII Test Claimants v HMRC* [2010] STC 1251, although the Court of Appeal considered that it was able to sidestep the issues by applying a conforming interpretation. For understandable reasons, given the history of the litigation, it is considered that these issues have not been satisfactorily considered to date.