Judicial review and the correct channels to appeal a tax bill (Glencore v HMRC)

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Public Law analysis: Litigation concerning the diverted profits of multinational Glencore threw a spotlight on the use of judicial review, and the correct channels by which taxpayers can appeal a tax bill. Ben Amunwa, barrister with The 36 Group of 36 Bedford Row, reflects on the case and explains key features of the Court of Appeal's decision, which provided both practitioners and taxpayers with welcome clarity.

Original news

R (on the application of Glencore Energy UK Ltd) v Revenue and Customs Commissioners [2017] EWCA Civ 1716

The Court of Appeal, Civil Division, dismissed Glencore UK's (GENUK) application for judicial review on the grounds that a suitable alternative remedy was available in the form of the review under the Finance Act 2015 (FA 2015) in conjunction with the right of appeal to the First Tier Tribunal. The court also held that GENUK's grounds for seeking judicial review were not made out on their merits.

What was the background to the case?

As part of UK government attempts to increase accountability of corporations who have used offshore arrangements to avoid paying tax, from 1 April 2015, HMRC was handed new powers in FA 2015 to prevent corporations based in the UK from hiding their profits offshore.

Since then, tax practitioners have waited patiently for the first reported cases on the operation of this new scheme. In the second half of 2017 three reported cases arrived, like London buses, in quick succession. Each arose from a single legal challenge brought by the mining multinational, Glencore, to a corporate tax bill of over £21m issued by HMRC under its powers in FA 2015.

First came a High Court judgment clarifying its procedural powers to grant permission to appeal against refusals of judicial review applications (*Glencore Energy UK Ltd v HMRC* [2017] EWHC 1587 (Admin)). Then came a more substantial High Court judgment dismissing GENUK's judicial review application (*Glencore Energy UK Ltd v Revenue and Customs* [2017] EWHC 1476 (Admin)).

That decision was latterly confirmed as correct by the Court of Appeal *(R (on the application of Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716).

What issues arose for the court's consideration?

HMRC decided that GENUK was liable to pay diverted profit tax (DPT) on profits arising from oil trading which had been allegedly channelled via its Swiss parent company, Glencore International AG, under a risk and services agreement (RSA) between the two companies.

The DPT bill was reviewed under a statutory scheme with a right of appeal. However, prior to the conclusion of the review, GENUK applied for judicial review of HMRC's decision to issue a charging notice under FA 2015, s 95.

The High Court refused permission for judicial review on the basis that GENUK had an adequate alternative remedy in the combined form of the statutory review and appeal procedures. The High Court also concluded that the errors GENUK complained of were not material (ie the outcome would not have been substantially different if the alleged errors had not occurred).

GENUK appealed to the Court of Appeal, which granted permission to appeal and permission for judicial review, but ultimately dismissed GENUK's claim for many of the same reasons as the High Court while adding a few of its own.

What did the court decide and why?

GENUK's application was dismissed for several reasons.

There was an adequate alternative remedy in the form of both the statutory review and appeal procedure capable of dealing with GENUK's complaints (see: *R (on the application of Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716, at para [52]). Judicial review was inappropriate in the circumstances, being a remedy of last resort.

Previous authorities (in particular *In re Preston* [1985] 1 AC 835) have established that in the context of taxation, where Parliament's aim was to ensure that the correct amount of tax was properly collected when it is due, and where a statutory appeal procedure was established to resolve disputes, judicial review will only rarely be an appropriate form of challenge.

Applying *Preston*, in tax cases where there is an adequate alternative remedy, the High Court should only intervene when invited to do so in judicial review proceedings where there had been a serious error amounting to abuse of power in order to protect the rule of law. Examples include where there was evidence of bribery or where a clear promise not to issue a tax charge had been broken.

GENUK argued that the pre-appeal statutory review procedure would unfairly keep the taxpayer out of its money if it transpired that the taxpayer did not owe the tax that had been paid. The court rejected this argument and concluded that the statutory review did not affect the suitability of the appeal process.

The statutory review was akin to mediation. Parliament's intention was to get taxpayers to engage with HMRC early on, provide more information and try to narrow the issues on any subsequent appeal, which may otherwise be complex. All this made sense and would be undermined by the High Court intervening in anything other than exceptional cases.

In any event, none of GENUK's grounds for judicial review were made out. The court rejected GENUK's criticisms of the language used by HMRC's decision-maker in the charging notice, and rejected the submission that insufficient reasons had been provided for the decision to impose the charge.

What guidance does this decision provide on the court's approach towards the suitable alternative remedy principle?

The court gives clear and highly readable guidance on the alternative remedy principle, uncluttered by the many authorities in this area (see: *R (on the application of Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716 at paras [55]–[56]). These paragraphs are deliberately broad statements of principle which may be taken to apply to all public law proceedings (whether or not they are tax-related).

In summary, judicial review is a remedy of last resort whose purpose is to ensure respect for the rule of law where there is no other procedure to ensure that principle is respected. Even where there are alternative remedies, the court may exceptionally intervene before waiting for those alternative remedies to become available. That will be more appropriate where the alternative remedies provided by Parliament are not capable of addressing the unlawfulness complained of.

Are there any unresolved issues or special considerations arising from this decision specific to tax appeals?

In the (hopefully) rare case of serious abuse of power by HMRC, a taxpayer has the option to exercise any statutory right of appeal and/or to bring a claim for judicial review rather than wait for the appeal to run its course.

In practice, where both forms of remedy are pursued in such circumstances, it is not entirely clear how the problems of duplication, inconsistency and disruption identified by the court (at para [56]) can be avoided. It may be that once a judicial review claim is brought, the Tax Tribunal can be invited to exercise its general case management powers to stay any appeal pending the outcome of proceedings in the High Court.

Alternatively, it is not uncommon for the High Court to stay judicial review proceedings in order for appeal procedures. Practitioners should be alive to the fact that the Administrative Court tends to be under considerable pressure in terms of its caseload and may be receptive to defendant applications to stay or even dismiss claims where another court or tribunal can address the substance of the claimant's complaint.

Practitioners should be prepared to respond to either of these scenarios.

What are the implications and takeaway points for practitioners handling judicial review claims?

GENUK's challenge illustrates the fundamental importance of using the appropriate remedy or remedies to address the particular types of unlawfulness complained of. It also demonstrates that where a defendant raises the availability of alternative remedies as grounds for disputing the court's jurisdiction, the court should closely examine the scope, intent and adequacy of the remedy before deciding on jurisdiction.

Tax practitioners will welcome in particular the granular discussion of the DPT regime and the detailed account of HMRC's dealings with GENUK (see *R (on the application of Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716 at paras [8]–[21] and [22]–[50]).

Lastly, the Court of Appeal considered an interesting point about whether a letter sent by a team of public officials could be said to represent the views of the particular officer with statutory authority to take the decision (see *R (on the application of Glencore Energy UK Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716 at paras [47]–[48]). The court decided that the officer could rely on her team's view of the case, even though she had not seen the letter sent by her team. On the facts, her evidence suggested that she would have endorsed the views of her team and relied on their views.

Interviewed by Julian Sayarer.

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