Neutral Citation Number: [2020] EWHC 2207 (Admin)

Case No: CO/101/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Cardiff Civil and Family Justice and Centre
2 Park Street, Cardiff CF10 1ET

Date: 12/08/2020

Before:

HIS HONOUR JUDGE JARMAN QC

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Between:

THE QUEEN (on the application of)	**Claimants**
(1) JOHN WALTER BOULTING **(2) PSC TRAINING AND DEVELOPMENT GROUP LIMITED** **- and -** **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS**	**Defendants**

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Mr Philip Ridgway (instructed by **Burges Salmon**) for the **claimants**
Ms Sadiya Choudhury (instructed by **General Counsel and Solicitor to HMRC**) for the **defendant**

Hearing dates: 5-6 August 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and released to Bailii. The date and time for hand-down is deemed to be 10.30 am 12 August 2020

HH JUDGE JARMAN QC:

1. This is the rolled up hearing of the claimants' application for permission to bring a judicial review claim of HMRC's decision dated 9 October 2019 to treat its statutory clearance (the clearance) given on 22 October 2014 as void. The claimants also seek to challenge HMRC's consequent decision to assess the first claimant (Mr Boulting) to income tax (IT) in respect of his sale of shares in the second claimant (the company) to the company for the sum of £4,800,000, instead of capital gains tax (CGT) as indicated in the clearance.

2. The basis on which HMRC now says that the clearance is void is that it was made without full or accurate disclosure of facts or circumstances, namely that the shares in question were each worth £66,900 and not £600,0000 which was the valuation which the claimants relied upon in applying for the clearance. Accordingly, as the price paid for the shares was considerably more than their market value it cannot be for the benefit of the company's trade but rather for the benefit of Mr Boulting. Thus, the appropriate tax on the purchase price received by Mr Boulting is IT and not CGT.

3. The claimants' response to this is that in applying for clearance the company was not required to provide a valuation of the shares but only to give the price paid and could not then have known that HMRC would later take a different view of valuation, which in any event was irrelevant to the clearance procedure. The company could not disclose what it did not then know.

4. Before setting out the background in more detail, it is necessary to refer to the statutory scheme. Prior to the UK joining the EEC, it was not permissible in this jurisdiction for a company to buy its own shares, unlike in other member states. This hindered shareholders who wished to sell shares in a family run company to do so in such a way as to ensure that ownership of the company was kept in the family. Accordingly, the Companies Act 1980 permitted such a sale in certain circumstances. The Finance Act 1982 introduced fiscal advantages to shareholders selling their shares to the company for the benefit of the company's business, for example by allowing the smooth transition of the management of the company upon the retirement of a substantial shareholder. The fiscal advantage was that the tax paid on the price of the shares would, if certain conditions were met, be at the lower CGT rate rather than the higher IT rate. In order to assist with planning, a clearance mechanism was established whereby HMRC confirms in advance whether the conditions are met.

5. The current statutory regime is set out in the Corporation Tax Act 2010 (the 2010 Act). Section 1033 deals with the purchase by an unquoted trading company of its own shares as follows:

> "(1) A payment made by a company on the … purchase of its own shares is not a distribution for the purposes of the Corporation Tax Acts if—
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> (a) the company is an unquoted trading company, or the unquoted holding company of a trading group, and
>
> (b) either Condition A or Condition B is met.

> (2) Condition A is that—
>
> (a) the … purchase is made wholly or mainly for the purpose of benefiting a trade carried on by the company or any of its 75% subsidiaries,
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> (b) the … purchase does not form part of a scheme or arrangement the main purpose or one of the main purposes of which is— (i) to enable the owner of the shares to participate in the profits of the company without receiving a dividend, or (ii) the avoidance of tax, and
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> (c) the requirements set out in sections 1034 to 1043 (so far as applicable) are met."

6. Section 1044 deals with advance clearance of payments by HMRC in this way:

> "(1) A company may make an application under this section to the Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") before making a payment on the … purchase of its own shares.
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> (2) If, before the payment is made, the Commissioners notify the company that they are satisfied that section 1033 will apply to it, the payment is treated as one to which section 1033 applies.
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> (3) If, before the payment is made, the Commissioners notify the company that they are satisfied that section 1033 will not apply to it, the payment is treated as one to which section 1033 does not apply."

7. The details of the advance clearance mechanism is set out in the following supplementary section, section 1045, thus:

> "(1) An application under section 1044—
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> (a) must be in writing, and
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> (b) must contain particulars of the relevant transactions.
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> (2) The Commissioners may by notice require the applicant to provide further particulars for the purpose of enabling them to make their decision.
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> (3) The power under subsection (2) must be exercised within 30 days of the receipt of—
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> (a) the application, or
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> (b) any further particulars previously required under subsection (2).

> (4) If a notice under subsection (2) is not complied with within 30 days, or any longer period that the Commissioners may allow, the Commissioners need not proceed further on the application.
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> (5) The Commissioners must notify their decision to the applicant—
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> (a) within 30 days of receiving the application, or
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> (b) if they give notice under subsection (2), within 30 days of the notice being complied with.
>
> (6) If particulars provided under this section do not fully and accurately disclose all facts and circumstances material for the decision of the Commissioners, any resulting notification by the Commissioners is void."

8. The issue of whether in this case the particulars provided by the company for clearance fully and accurately disclosed all facts and circumstances material for the decision of HMRC in giving the clearance is at the heart of the dispute between the parties.

9. The facts may be summarised for present purposes as follows. In 1993 Mr Boulting co-founded a company to deliver apprenticeships and career development programmes in the South West of England. Business thrived. This company became a wholly owned subsidiary of the company, of which Mr Boulting was the majority shareholder. In 2013, when Mr Boulting had passed retirement age, the board of the company discussed a new management strategy. It was decided that he would retire as a director to allow his son Mark to take this strategy forward.

10. Advice was sought from the company's accountants, after which it was proposed that Mr Boulting would give 38% of his shareholding to his son and sell 8% to the company. This proposal was discussed at a board meeting in September 2014 and it was decided that the purchase was necessary for the long term sustainability of the company. A valuation of the company's shares was undertaken by Mark Boulting who has an MBA, and advice taken from the accountants as to methodology.

11. On 9 October 2014, the accountants applied to HMRC for clearance and for confirmation that the proposed purchase would be subject to CGT only. The guidance given by HMRC as to the necessary information for such an application was at that time set out in a document called SP2/82. The application contained all of the required information, including that the purchase was to be made wholly or mainly for the purpose of benefiting the trade carried on by the company and was not part of a scheme to enable Mr Boulting to avoid tax or to participate in the profits of the company without receiving a dividend.

12. Such applications are dealt with by HMRC's clearance team. Members of that team do not consider the valuation of the shares. They do not have the expertise to do so and market valuation as such is not part of the conditions for granting clearance. Such valuations are dealt with by HMRC's shares and asset valuation department. On 22

October 2014, HMRC gave clearance in which it was stated that section 1033 of the 2010 Act would apply to the proposed purchase in the circumstances described in the clearance application. The company's accountants notified HMRC in February 2015 that the purchase had been completed in accordance with the clearance.

13. Accordingly, in Mr Boulting's self-assessment tax return for the year ended 5 April 2015, the tax payable on the price which he received for the shares was calculated on the basis that it was CGT. In October 2016 HMRC launched an enquiry into that assessment, which culminated with HMRC issuing a closure notice on 9 October 2019 stating that Mr Boulting owed £1,008,621. This was largely because HMRC decided to treat the clearance as void on the basis that the company had used a value for the shares it purchased which was "materially greater than market value" and that the company had not disclosed this as a fact and circumstance material for the decision to grant clearance.

14. Mr Ridgway, in seeking permission to proceed by way of judicial review to challenge those decisions on behalf of the claimants, submits that there are five arguable grounds. There is some overlap between them. Ms Choudhury, for HMRC, submits none of them is arguable. The issue of the correctness and relevance of the value of the shares looms large. However, the parties properly did not seek to argue before me as to what the correct valuation is, and no expert evidence was adduced in these proceedings.

15. The first ground is that the reasons given for treating the clearance as void are not supported by the evidence and are unlawful as being contrary to the company's compliance with the provisions of the 2010 Act. Accordingly, Mr Boulting is being treated differently from other taxpayers, which is unfair. In response HMRC say that the company did not comply with those provisions because it did not disclose that the valuation used overstated the value by over nine times when compared to the market value, and that this was relevant to the issue as to whether the purchase was wholly or mainly for the purpose of benefiting the company's trade. Unfairness is not a free standing public law ground of challenge, although it may be relevant to such grounds as legitimate expectation.

16. The second ground is one of public policy in that the proper administration of the tax system requires that HMRC does not treat as void a clearance which it has given without sufficient reasons and there are none here. HMRC responds that it is in the public interest that tax is collected in accordance with statute and that includes correcting an incorrect decision.

17. Third, the claimants had a legitimate expectation because of the clearance that tax would be assessed on the basis of CGT and proceeded with the sale and purchase of shares accordingly. It is an abuse of power now to renege on the clearance without adequate justification. HMRC respond that clearance is given subject to the caveat in section 1045(6) of the 2010 Act and the expectation is that the claimants will be taxed in accordance with the law. HMRC's CGT manual makes clear that whilst taxpayers can request a valuation check after a transaction has been carried out, pre-transaction checks will not be made.

18. Fourth, whilst accepting that the threshold for an irrationality ground is high, Mr Ridgway submits that the reason given by HMRC for substituting the market value of

the shares is that the transaction was between connected parties, but that is against its own guidance and so there is no logic to the decision. HMRC respond that it was not irrational to seek to tax Mr Boulting on the basis of the correct facts and under the law.

19. The final ground is that Mr Boulting should pay the correct amount of tax which is as stated in the clearance, and it is arbitrary for HMRC now to impose a different tax. HMRC respond that any unfairness to him is outweighed by the clear public interest in not limiting its powers to inquire into the affairs of taxpayers.

20. However, Ms Choudhury submits that there is a more fundamental reason why permission should be refused even if one or more of the public law grounds are arguable. She also points out that the claim has not been brought promptly in that the three month long stop for such claims was about to expire when it was filed. However, she made clear that her main reason is that Mr Boulting has a suitable alternative remedy and that is to appeal the closure notice to the First-tier Tribunal (Tax Chamber) (FTT).

21. In fact Mr Boulting has lodged an appeal in the FTT seeking to appeal the closure notice on the basis that the assessment by HMRC of the tax to be paid on the price which he received for his shares should be subject to the CGT regime, rather than the IT regime. There is an as yet unresolved issue in the appeal as to whether Mr Boulting needs an extension of time. If he does, then this question will be determined on principles similar to those applicable to relief from sanctions under CPR 3.9 under *Denton & Ors v T H White Ltd & Ors* [2014] EWCA Civ 906.

22. HMRC do not dispute that even if such an extension is granted public law arguments cannot be pursued in such an appeal. However, the crucial issue is whether such an appeal provides a suitable alternative remedy. It is also well established that judicial review is a remedy of last resort and that if a claimant has such a remedy then permission to proceed with judicial review will ordinarily be refused. This is particularly so where the remedy is an appeal to a specialist tribunal, such as a tax tribunal.

23. The question of permission in the field of taxation was considered by Green J, as he then was, in *R (oao Glencore Energy) v HMRC* [2017] STC 1824, who at paragraph 7 said this:

> "…grounds of judicial review… carefully crafted in public law garb but when the outer garments are peeled back the true substance is revealed. And that true substance is the meat and drink of the statutory review and appeal procedure. The public law grounds conceal the real dispute between the parties and a determination of those public law issues would almost certainly leave the true issues unresolved. Moreover, on the facts of the case, and as confirmed orally during the hearing, HMRC and the taxpayer have now engaged in a re-consideration of the disputed issues arising and HMRC accepts that if GENUK presents evidence that satisfies it then HMRC will amend or revoke the Charging Notice. I therefore refuse permission because there are alternative remedies available to the Claimant

> which are in substance adequate and appropriate… In arriving at these conclusions I have considered the merits of the proposed Grounds. I consider them all to be weak. I have not however formally decided this case upon the basis that the Grounds are unarguable. Finally, I have considered the position under section 31(3C) Senior Courts Act 1981. Applying that test I have concluded that this is a yet further basis for refusing permission. In short, the Claimant has a perfectly proper case to advance in the statutory review and appeal process and that is where this dispute should be resolved."

24. The taxpayer appealed to the Court of Appeal ([2017] EWCA Civ 1716). Sales LJ gave the lead judgment upholding the approach in the lower court. In it he gives clear guidance as to the principles involved in deciding whether permission for judicial review should be given in tax cases and it is worth citing that part of the judgment at length.

25. He deals firstly with the issues of jurisdiction and the principle that judicial review is a remedy of last resort:

> "54… In this case the High Court (and hence this court) has full jurisdiction to review the lawfulness of action by the Designated Officer and by HMRC. The question is whether the court should exercise its discretion to refuse to proceed to judicial review (as the judge did at the permission stage) or to grant relief under judicial review at a substantive hearing according to the established principle governing the exercise of its discretion where there is a suitable alternative remedy.
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> 55. In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor."

26. He then deals with the rationale of the principle that judicial review is a remedy of last resort:

> "56. Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required."

27. Finally, for present purposes, he applies those principles in the tax context:

> "57. In my judgment the principle is applicable in the present tax context. The basic object of the tax regime is to ensure that tax is properly collected when it is due and the taxpayer is not otherwise obliged to pay sums to the state. The regime for appeals on the merits in tax cases is directed to securing that basic objective and is more effective than judicial review to do so: it ensures that a taxpayer is only ultimately liable to pay tax if the law says so, not because HMRC consider that it should. To allow judicial review to intrude alongside the appeal regime risks disrupting the smooth collection of tax and the efficient functioning of the appeal procedures in a way which is not warranted by the need to protect the fundamental interests of the taxpayer. Those interests are ordinarily sufficiently and appropriately protected by the appeal regime. Since the basic objective of the tax regime is the proper collection of tax which is due, which is directly served by application of the law to the facts on an appeal once the tax collection process has been initiated, the lawfulness of the approach adopted by HMRC when taking the decision to initiate the process is not of central concern. Moreover, by legislating for a full right of appeal on fact and law, Parliament contemplated that there will be cases where there might have been some error of law by HMRC at the initiation stage but also contemplates that the appropriate way to deal with that sort of problem will be by way of appeal.
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> 58. For reasons of this kind it has long been established at the highest level that "Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial

> review to be used to attack an appealable decision": *In re Preston* [1985] 1 AC 835, 852D per Lord Scarman; see also p. 852F ("I accept that the court cannot *in the absence of special circumstances* decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair" [emphasis in original]); and p. 862B-F per Lord Templeman, with whom the other members of the appellate committee agreed ("Judicial review process should not be allowed to supplant the normal statutory appeal procedure"; unless the circumstances are exceptional and involve an abuse of power of a serious character, as explained at pp. 864F-H and 866G-867C). In that case, the allegation was that the Inland Revenue Commissioners had made a promise not to collect tax in certain circumstances (i.e. had created what would today be called a legitimate expectation not to collect an amount of tax), and although the allegation was not made out the House of Lords was prepared to accept that such a claim could be made by way of judicial review. In fact, the tax appeal process would have been incapable of dealing with such a claim of unlawfulness on the part of the commissioners, which did not go to the merits of whether the criteria for imposition of tax were or were not met (a subject fit for examination on appeal) but rather to enforcement of fundamental rule of law standards against the commissioners if they had in fact made a promise not to initiate the tax collection process in the first place."

28. Ms Choudhury submits that those observations are particularly apposite in the present case where the FTT will be able to deal with evidence as to the proper valuation of the shares. She also submits that the uncertainty as to whether an extension of time is needed or will be granted by the FTT for the appeal to proceed should not be considered in deciding whether there is a suitable alternative remedy. If an extension is not granted that will be because the appeal was not lodged in time and it is not just to grant such an extension.

29. So far as the company is concerned, although it has been made a party to these proceedings because it was the company who applied for and obtained the clearance, there is no fiscal effect on the company arising out of the assessment of the tax payable by Mr Boulting on the price he received for the shares.

30. Mr Ridgway submits that there is no alternative remedy in the present case. Where HMRC is acting unfairly by refusing to apply a concession or ruling the correct course is to seek judicial review (see *Refson v HMRC* [2009] STC 64). The FTT has no jurisdiction to hear cases by way of judicial review. The fact that the claimants are challenging the substantive merits of a decision by way of an appeal is not a good ground for delaying commencing judicial review proceedings, where HMRC acted unfairly in making an assessment (*R (oao International Masters) v HMRC* [2006] STC 1450). The fact that courts have entertained applications (for example in *Preston*) shows that there is no alternative remedy where there is a ground of legitimate expectation. The benefit of clearance is that the taxpayer avoids the time

and expense of an appeal. If permission is not granted, there is no other means of challenging the voiding of the clearance. That decision is inherently a matter of public law and the will of Parliament is if anything better served having regard to the mandatory nature of section 1045 of the 2010 Act if irrational, unfair and/or unlawful decisions to treat clearances as void are amenable to judicial review. In making these points, Mr Ridgway also relies upon many of the arguments he makes in support of the grounds as summarised above.

31. In response, Ms Choudhury points out that in *International Masters* the court refused permission on the basis of delay but also on the basis that the judicial review claim would not put them in a better position than if there were to succeed on the appeal. She submits that if Mr Boulting satisfies the FTT that his tax assessment in relation to the purchase price of the shares should be on the basis of CGT rather than IT, as indicated in the clearance, then he will succeed in achieving the same remedy as in these proceedings.

32. Having regard to the particular facts of this case, I accept Ms Choudhury's submission that the issue of valuation of the shares, given the very wide disparity between the parties on that issue, may potentially have a bearing on whether the purchase of the shares was wholly or mainly for the purpose of benefiting a trade carried on by the company. I also accept that the parties, or HMRC at least, may well wish to call expert evidence on that issue. That is a matter which is appropriately dealt with by way of appeal rather than by judicial review. I also accept that that will give Mr Boulting the remedy he seeks if he succeeds, namely, to be taxed in accordance with the clearance. That is the "true substance," to use the phrase of Green J in *Glencore Energy,* of what he seeks. I accept that there is no further remedy sought by the company.

33. Accordingly, assuming for the moment that the grounds are arguable, I nevertheless refuse permission on the basis that there is a suitable, if not a more suitable, alternative remedy, namely an appeal to the FTT.

34. I am grateful to each counsel for his and her helpful and thorough submissions. They helpfully indicated that any disagreement on consequential matters can be dealt with on the basis of written submissions which should be filed within 14 days of hand down.