[2020] UKUT 213 (TCC)

Appeal reference: UTJR/2019/001

INCOME TAX – judicial review – s809L Income Tax Act 2007 – remittance basis – application for permission to bring judicial review refused

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE QUEEN on the application of

(1) SANJEEV MEHAN
(2) RAJ SEHGAL

Applicants

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: MR JUSTICE BIRSS

Hearing date: 8 June 2020, by Skype

Michael Firth (instructed by Brian White Ltd) for the Applicants

Christopher Stone (instructed by The General Counsel and Solicitor to Her Majesty's Revenue and Customs) for the Respondents

Mr Justice Birss:

1. This is the Applicants' application for permission to apply for judicial review in respect of an alleged decision taken by HMRC to apply a novel interpretation of the remittance basis taxation rules to the Applicants.

Background

2. On 25 February 2010, the Applicants entered into a written agreement ("the SPA") under which they sold their respective shareholdings of 31.5% and 41.5% in Visage Group Limited ("Visage") to Centennial (Luxembourg) S.a.r.l ("Centennial"), a member of the Hong Kong listed Li & Fung group of companies ("Li & Fung"). At the date of this sale, Internacionale Retail Limited ("IR") owed a debt of approximately £6 million to Visage ("the IR Debt"). IR was wholly owned by SKS1 Limited ("SKS"), a Jersey company. By October 2010, the Applicants had also become beneficially entitled to 38% each of the shares of SKS.

3. The SPA included a Clause 8.1(d)(i) which provided that the Applicants, among others, would, in summary, indemnify Centennial against any failure by IR to pay the IR Debt. After the SPA, it became clear that IR would not be able to pay the IR Debt. Clause 8.1(d)(i) was then amended by a written agreement on 3 August 2010 to include the failure of any other company, who had agreed to pay equivalent amounts in replacement of the IR Debt, to pay such amounts.

4. On 23 December 2010, a new written agreement was entered into which provided that a payment from SKS to Miles Fashion GmbH ("Miles"), a German member of Li & Fung, of €6,738,000 in respect of a sale of clothing goods to SKS would reduce the IR Debt, that the Applicants, among others, were released from any liability under Clause 8.1(d)(i) in respect of such debts and that Centennial would procure that Visage would not pursue IR in respect of the IR Debt.

5. In December 2010, SKS transferred €6,378,000 to Miles. Such funds were contributed to SKS by the Applicants, among others. The clothing goods, being jackets, were delivered to SKS in Jersey in January 2011 and thereafter gifted to a charity in Africa. After this, Visage issued a credit notice to IR in respect of the IR debt ("the Credit Note").

6. HMRC began statutory enquiries under section 9A of the Taxes Management Act 1970 into the Applicants' tax positions for the financial years 2008/9, 2009/10 and 2010/11.

7. There was a letter dated 15 January 2015 in which Mr Adrian Thornley, an Inspector of Taxes for HMRC, asserted that, by virtue of the transactions, there had been a remittance within section 809L of the Income Tax Act 2007.

8. The purpose of s809L is to define what "remitted to the United Kingdom" means, and this is done by reference to various conditions A to D. Sub-sections (1) to (3) of s809L are as follows:

> 1) An individual's income is, or chargeable gains are, "remitted to the United Kingdom" if—

(a) conditions A and B are met,

(b) condition C is met, or

(c) condition D is met.

(2) Condition A is that—

(a) money or other property is brought to, or received or used in, the United Kingdom by or for the benefit of a relevant person, or

(b) a service is provided in the United Kingdom to or for the benefit of a relevant person.

(3) Condition B is that—

(a) the property, service or consideration for the service is (wholly or in part) the income or chargeable gains,

(b) the property, service or consideration—

(i)derives (wholly or in part, and directly or indirectly) from the income or chargeable gains, and

(ii)in the case of property or consideration, is property of or consideration given by a relevant person,

(c) the income or chargeable gains are used outside the United Kingdom (directly or indirectly) in respect of a relevant debt, or

(d) anything deriving (wholly or in part, and directly or indirectly) from the income or chargeable gains is used as mentioned in paragraph (c).

[*There is no need to set out the remainder of s809L*]

9. In the 2015 letter Mr Thornley had asserted that the Credit Note constituted 'property' under section 809L. The Applicants responded with an opinion from counsel stating, inter alia, that the Credit Note did not constitute 'property' under s809L.

10. Correspondence between the parties continued and included, in particular, letters dated 9 February 2018 and 11 January 2019.

11. The letter dated 9 February 2018 was again from Mr Thornley. In that letter, he asserted that the transaction in December 2010 was 'uncommercial and contrived' and that, by virtue of the transactions, there had been a remittance within the meaning of s809L, in particular under Conditions A and B of that section. Mr Thornley's analysis was that the contractual rights received by the Applicants, IR and SKS under the December 2010 agreement constituted 'property' under s809L and / or that Centennial's commitments under the December 2010 agreement constituted 'a service' under s809L. Mr Thornley also reserved the HMRC's position in respect of Condition D of s809L.

12. The letter dated 11 January 2019 was from Ms Sabeela Malik, a member of the Personal Tax Litigation Team for HMRC. In that letter, Ms Malik confirmed HMRC's position following a review. Ms Malik supported the analysis and the conclusions of Mr Thornley's letter of 9 February 2018 and added that Condition D of s809L was also satisfied in that the property of Miles had been used in the UK and enjoyed by IR and the Applicants.

13. In respect of the analysis adopted by HMRC, there is some difference between the parties as to what it is. The Applicants assert that it involves an interpretation that:

    i) "there was property brought to, received or used in the UK because the [Applicants] had contractual rights under the 23 December 2010 agreement which were governed by English law and subject to English jurisdiction;

    ii) the grant of a contractual right is the provision of a service;

    iii) the service referred to in (ii) is provided in the UK because the contractual right is governed by English law and subject to English jurisdiction and/or it relates to a contractual right governed by English law and subject to English jurisdiction.".

14. HMRC rely on the analysis as set out in full in the letters of 9 February 2018 and 11 January 2019 but do also emphasise that "*The rights obtained by the* [Applicants] *represent the economic conclusion of the arrangements entered into by them.*" and also that (ii) and (iii) are incorrect in that it is Centennial's commitments that constitute the service rather than the "*grant of a contractual right*".

15. By a claim form dated 25 February 2019 and issued in the Upper Tribunal (Tax and Chancery Chamber), the Applicants sought permission to apply for relief under section 15(1) of the Tribunal, Courts and Enforcement Act 2007 ("the 2007 Act") and an order that the case was retained in the Upper Tribunal despite s18 of the 2007 Act. The Applicants relied upon two grounds: irrationality / abuse of process and legitimate expectation. In terms of substantive remedies, the Applicants sought declarations that HMRC's reliance on the reasoning and interpretation set out in paragraphs 4.2.1 and 4.2.3 of the letter of 11 January 2019 was unlawful and an order prohibiting such reliance. Paragraphs 4.2.1 and 4.2.3 of the letter of 11 January 2019 were the paragraphs dealing with the analysis that the contractual rights received were 'property' or the release or the procurement of the release was a 'service' within the meaning of s809L. In support of their application, the Applicants filed four witnesses statements, being of themselves, Mr Brian White and Mr Matthew Hodgson.

16. I will refer to the reasoning adopted by HMRC, which is what the Applicants complain about, as the "HMRC Interpretation", although it may be more apt to call it reasoning.

17. HMRC resisted the application and the matter came before me, sitting in the Upper Tribunal on 24 June 2019. I was bound to transfer the application to the Administrative Court under section 18(3) of the 2007 Act and accordingly did so by order of 24 June 2019. However, as I am authorised to sit in the Administrative Court, I was then able to deal with the Applicants' request that the application be dealt with by the Upper Tribunal in any event. At the time I did consider whether to refuse to do this, in order to discourage the approach which had been taken, since it all started with the Applicants

issuing in the Upper Tribunal proceedings which the tribunal had no jurisdiction to handle, as the Applicants must have known. The arrangement was obviously an attempt to secure its venue of choice for this dispute. However I decided it was right to transfer the matter back to the Upper Tribunal, and did so.

18. Sitting in the Upper Tribunal, I then dealt with the substantive application for permission on paper. That was refused for two reasons, firstly that a statutory appeal to the First-tier Tribunal provided a suitable alternative remedy and secondly that the Applicants' substantive grounds for review were not arguable. Another reason for refusal put forward by HMRC was that the application was premature in that there was no decision as yet to review. However, on that latter point I held it was at least arguable that HMRC's statement in the letters dated 9 February 2018 and 11 January 2019 amounted to a decision amenable to judicial review. By a third order dated 24 June 2019, I refused the Applicants' application and ordered them to pay HMRC's costs.

19. The Applicants were entitled under rule 30(4) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to apply for my decision to be reconsidered at a hearing. They did so by grounds of renewal dated 8 July 2019.

20. Unfortunately, it has taken some time for the matter to come back, the hearing being almost a year after the grounds of renewal. In the meantime, HMRC have issued letters to the Applicants informing that they intend to issue closure notices and penalty determinations in respect of the financial year 2010/11. HMRC have yet to do so in light of the Covid-19 pandemic.

Issues

21. HMRC did not seek to re-open arguments on whether there was any decision amenable to judicial review and so I do not reconsider my previous determination in this regard. Therefore, there are three questions for the Court to consider.

    i) First, do the Applicants have a suitable alternative remedy by way of a statutory appeal to the First-tier Tribunal? The Applicants argue that there is no alternative remedy because their substantive grounds cannot be dealt with by the First-tier Tribunal. HMRC submit that the Applicants' grounds are in substance matters that the First-tier Tribunal can deal with and that the First-tier Tribunal is the proper forum for the same.

    ii) Second, is there an arguable case that HMRC's application of the HMRC Interpretation to the Applicants was irrational and / or an abuse of power? The Applicants argue that HMRC are irrationally applying the HMRC Interpretation to only them and not to others in their circumstances. HMRC submit that the HMRC Interpretation would have been or will be applied to all persons in the same circumstances as the Applicants.

    iii) Third, is there an arguable case that HMRC should be prevented from applying the HMRC Interpretation to the Applicants due to a legitimate expectation? The Applicants argue that HMRC's practice of not applying the HMRC Interpretation has given rise to an implicit representation that it would not be applied to the Applicants. HMRC submit that there is insufficient evidence for

any representation and that, even if there were a representation, HMRC should not be prevented from relying on the HMRC Interpretation.

22. I will deal with these three questions in reverse order. Before doing so, I note that it was common ground that the Applicants need only establish an arguable case for the purposes of being granted permission to proceed with judicial review. It was also common ground that the above questions are to be approached on the assumption that the Applicants would lose on any appeal to the First-tier Tribunal, in other words on the assumption there has indeed been a remittance within the meaning of s809L, and that the Applicants would therefore owe the relevant tax.

(a) Legitimate Expectation

23. In respect of the general approach I refer to ***R (Vacation Rentals (UK) Limited v HMRC*** [2018] UKUT 383 (TCC), which adopted the principles summarised by Leggatt J in ***R (GSTS Pathology LLP & Ors) v Revenue and Customs Commissioners*** [2013] EWHC 1801 at [72]:

> "The principle that legitimate expectation should be protected is now well established as a ground for judicial review. For this principle to apply, the general requirements are: (1) the claimant has an expectation of being treated in a particular way favourable to the claimant by the defendant public authority; (2) the authority has caused the claimant to have the expectation by words or conduct; (3) the claimant's expectation is legitimate; (4) it would be an unjust exercise of power for the authority to frustrate the claimant's expectation. Although it has sometimes been said to be a requirement also that the claimant has relied to its detriment on what the public authority has said, the law now seems to be clear that such detrimental reliance is not essential but is relevant to the question of whether it would be an unjust exercise of power for the authority to frustrate the claimant's expectation."

24. The Applicants submit that they had a legitimate expectation that HMRC would not apply the HMRC Interpretation to them, based on HMRC's "*consistent practice and belief*" to the contrary. In the circumstances, the Applicants seek to imply a representation from HMRC's conduct.

25. It is established law that the conduct of public authorities is capable of giving rise to a legitimate expectation (***R v IRC ex p. Unilever plc*** [1996] STC 681, commented on with approval by the Supreme Court in ***R (Gallaher Group Ltd) v The Competition and Markets Authority*** [2018] UKSC 25). However, it is more difficult to establish a legitimate expectation via a course of conduct than words. In order to do so, the Applicants:

> "…need evidence that the practice was so unambiguous, so widespread, so well-established and so well-recognised as to carry within it a commitment to a group of taxpayers including themselves of treatment in accordance with it." (***R (Davies and another) v HMRC*** [2011] UKSC 47 at [49]).

26. In support of their position, the Applicants assert that (to the best of their knowledge and belief):

i) "HMRC have never published any document stating or referring to the [HMRC Interpretation] or indicating that this is how HMRC will apply the remittance rules.

ii) HMRC have never provided any guidance to HMRC Officers or Inspectors making such persons aware of the [HMRC Interpretation] or stating that it should be applied.

iii) HMRC have published extensive guidance on the circumstances in which a remittance arises... That guidance makes no mention of the [HMRC Interpretation]...

iv) HMRC have never relied on the [HMRC Interpretation] against any other taxpayers.

v) HMRC have never, during an enquiry or investigation, asked questions or sought information intended to identify whether the [HMRC Interpretation] might apply to any other taxpayers.

vi) No tax adviser the Claimants can find is aware of HMRC relying on the [HMRC Interpretation] apart from in this case.

vii) No text book refers to the [HMRC Interpretation] or it being HMRC's practice.

viii) HMRC have no intention of publishing the [HMRC Interpretation] and/or applying it generally to all cases falling within its scope."

27. In support of this, the Applicants cite the witness evidence of Mr Brian White and Mr Matthew Hodgson who rely upon 35 years and 20 years of experience in the area respectively. The Applicants say that they have given HMRC several opportunities to refute these allegations but the response has been inadequate.

28. These facts, the Applicants say, are sufficient evidence for the tribunal to conclude that:

i) "HMRC's unvarying practice has been not to apply the [HMRC Interpretation] to taxpayers.

ii) this has not been an oversight but a deliberate decision not to claim that a remittance arises due to the [HMRC Interpretation].

iii) at some point in late 2017/early 2018, Mr Thornley arrived at the [HMRC Interpretation] solely in order to demand tax from the [Applicants], his earlier analysis having been undermined.

iv) HMRC have no intention of publishing the [HMRC Interpretation] or applying it generally to all cases falling within its scope."

29. HMRC characterise the Applicants' case as relying only upon an absence of published material and an absence of knowledge on their own part. A critical point say HMRC is that s809L is a new provision which has not so far been the subject of any decision. HMRC referred to publications, including the explanatory notes to the legislation and their own guidance, to demonstrate the breadth of s809L and the open-ended list of

examples in which a taxable remittance may occur. HMRC also highlight that, in the field of tax, successful cases based on legitimate expectation are rare due to the strong public interest in imposing taxation in accordance with the law:

> "…experience shows that the cases where such a claim [of legitimate expectation] has succeeded, at any rate in the field of taxation, are relatively few and far between. This is in my view hardly surprising. There is a strong public interest in the imposition of taxation in accordance with the law, and so that no individual taxpayer, or group of taxpayers, is unfairly advantaged at the expense of other taxpayers… there are likely to be few cases where a taxpayer can plausibly claim that a representation made in general material…is so clear and unqualified that the taxpayer is entitled to rely on it and to be taxed otherwise than in accordance with the law." (per Henderson LJ, at ***Samarkand Film Partnership No 3 v HMRC*** [2017] EWCA Civ 77 at [115]).

30. Since my initial decision, the Applicants have also found, and now rely upon as part of the factual circumstances giving rise to the representation or practice, correspondence in 2012 between the Chartered Institute of Taxation and a representative of HMRC. In that correspondence, CIOT asks whether there would be a remittance within the meaning of s809L in circumstances where, pursuant to a matrimonial settlement, a non-domicile ex-husband pays a capital sum from foreign income to the non-UK bank account of his ex-wife. In response, a Lead Technical Advisor of HMRC states there would be no remittance. The Applicants submit that this correspondence is inconsistent with the HMRC Interpretation because the described circumstances also involve the release of liabilities under English law and subject to English jurisdiction in return for payment of a sum. HMRC distinguish the cases by saying that the Applicants' case involves a benefit enjoyed by a relevant person in the UK, which the correspondence's case does not.

31. An issue also arose as to the time period during which HMRC's conduct may be taken into account. HMRC assert that the relevant period of practice to consider is between 6 April 2008 and 23 December 2010. The first date is when s809L came into force. HMRC submit that given the purpose of s809L (i.e. to address previously existing loopholes, flaws and anomalies), any evidence of HMRC's practice prior to 6 April 2008, including as it relates to the experience of Mr White and Mr Hodgson, is not relevant. HMRC limit the period to 23 December 2010 because that is when the new written agreement was entered into, making the point that whether the Applicants knew of or relied upon the representation or practice at the date of their transaction is an important factor in whether it would be unfair for HMRC to frustrate any expectation. The Applicants submit that the conduct during the period from 2008 to 2010 is sufficient for their purposes, but that in any event there is no reason to limit the relevant period. The Applicants submit that HMRC's conduct after 2010 can shed light on the prior practice and that the limitation to that period depends upon detrimental reliance being a requirement which it is not.

32. Another step of the analysis on legitimate expectation is to consider whether "*it would be an unjust exercise of power for the authority to frustrate the claimant's expectation*"

Vacation Rentals (supra). I did not deal with this step expressly in my initial decision but having considered submissions on the point from both parties, I do so now.

33. A preliminary issue is which party bears the burden of proof in this regard. Since the parties' initial submissions, the Court of Appeal has dealt with this question in ***R (Aozora GMAC Investment Limited) v HMRC*** [2019] EWCA Civ 1643 and determined that the Applicants would bear the burden of proof (at [46]).

34. HMRC submit that the law relating to legitimate expectation means that they should be prevented from applying the HMRC Interpretation on the grounds of a legitimate expectation only where to frustrate the expectation would "*be so unfair as to amount to an abuse of power*" (***R (Hely-Hutchinson v HMRC*** [2017] EWCA Civ 1075). HMRC submit that there is no evidence that the Applicants either knew of or detrimentally relied upon any representation at the time of the December 2010 transaction. HMRC again rely on ***Aozora*** at [39] and [44-45] in asserting that knowledge and reliance are important factors in this regard.

35. The Applicants submit that detrimental reliance is not a requirement and that the many factors relied upon in support of the implicit representation amount to a sufficiently strong case.

36. I have set out the arguments on legitimate expectation in detail but I believe the point is a clear one. The point is not arguable and has no reasonable prospect of success. S809L is a new provision and conduct prior to its coming into force which was not directed to the meaning and effect of that particular provision is not relevant. The Applicants did not rely on any statement by HMRC when they entered into the relevant transaction. It is strongly arguable that the relevant period ends in December 2010 but I will assume for this purpose it does not. Even on that basis HMRC have never made a public statement about s809L which could fairly be interpreted as an assurance that, in the circumstances of this case, they would not interpret remittance in the manner they have done as part of the HMRC Interpretation. I do not believe the conduct relied on amounts to the making of any such representation. Furthermore and separately, even if the conduct did amount to such a representation, in my judgment this situation does not come close to one in which there was an arguable justification to override the public interest in the collection of taxes lawfully due. I reject this ground.

(b) Irrationality / Abuse of Process

37. The Applicants' main ground of review is that HMRC's decision to apply the HMRC Interpretation in their case was irrational and / or an abuse of power. The Applicants assert that HMRC's decision to do this is irrational because:

    i) "it is not HMRC's interpretation of the relevant legislation; and/or

    ii) it is not an interpretation that HMRC have applied to any other taxpayers; and/or

    iii) it is not an interpretation that HMRC have applied consistently to other taxpayers to whom the interpretation would apply; and/or

    iv) it is not an interpretation that HMRC intend to apply generally to all cases falling within its scope in the future."

38. In respect of the general approach to the question of irrationality in these circumstances, the Applicants cited ***Gallaher*** in which the Supreme Court held that equal treatment is not a distinct principle in English law. Instead, the relevance of equal treatment as articulated by Lord Sumption at [50] is as follows:

> "Consistency of treatment is, as Lord Hoffmann observed in *Matedeen v Pointu* [1999] 1 AC 98, at para 9 "a general axiom of rational behaviour". The common law principle of equality is usually no more than a particular application of the ordinary requirement of rationality imposed on public authorities.".

39. The Applicants assert the first proposition above on the basis of five factors. First the scope of the HMRC Interpretation is so wide as to encompass cases which cannot logically fall within the legislation. Second there is no reference to the HMRC Interpretation or anything like it in HMRC's publications which should be expected if it were a genuine interpretation. Third there is no evidence of the HMRC Interpretation ever being applied, which would be expected given its wide scope. Fourth HMRC have not, to the Applicants' knowledge, made enquiries into the governing law and / or jurisdiction clauses of contracts which would be expected if the HMRC Interpretation were being applied. Finally HMRC have not provided any evidence to refute this allegation despite being asked repeatedly to do so.

40. HMRC's answer to the second and third propositions above is that they are not aware of any materially identical cases that have been treated differently. The Applicants submit that this is inadequate because there is no rational distinction between the Applicants' circumstances and other cases in which the HMRC Interpretation has not generally been applied, or at least HMRC have not explained what the alleged rational distinction is.

41. In support of the fourth proposition above, the Applicants submit that the HMRC Interpretation represents such a change from the previously understood law that if HMRC had such intention, they would make that clear to taxpayers. Instead, the Applicants submit that Mr Thornley is deliberately singling out the Applicants due to a loss of objectivity, such loss being further demonstrated by Mr Thornley's statement that he would be seeking penalties in respect of the Applicants' transactions.

42. The Applicants also referred me to HMRC's duty of candour in proceedings such as these. HMRC must "ensure that all relevant information and facts are put before the Court" and "disclose any information or material facts which either support or undermine their case." (Administrative Court: Judicial Review Guide 2019). The Applicants submit that HMRC have avoided providing any explanation as to when the HMRC Interpretation would apply and what was material about the Applicants' circumstances which distinguished them from others. The Applicants say that I should draw an adverse inference from HMRC's failure to abide by their duty of candour, namely that there is no rational basis for the distinction between the Applicants and other cases in which the Applicants say the HMRC Interpretation should apply.

43. HMRC submit that the allegations made by the Applicants are inconsistent with the evidence. HMRC say that the fact that Mr Thornley has been supported in the parties' correspondence in letters from his Operational Leader, Mr David Bailey, and from the solicitor, Ms Malik, demonstrates that the HMRC Interpretation is HMRC's genuine interpretation of the legislation. This, HMRC say, also refutes any allegation that Mr

Thornley has lost his objectivity. HMRC assert that, although HMRC are not aware of any taxpayers in materially similar circumstances to the Applicants, the HMRC Interpretation is applied when considering other taxpayers and that it will be applied in the future to any taxpayers in the same factual circumstances as the Applicants. HMRC say that the fact that the Applicants are the only taxpayers in their particular circumstances thus far does not mean that there will not be others in the future. HMRC highlight that the legislation is recent and that guidance upon it has an open-ended list of examples and emphasises the breadth of its application. Finally, HMRC submit that it is not the proper purpose of a judicial review claim to require HMRC to redraft their guidance or delineate the precise boundaries of the legislation.

44. During the hearing, HMRC also stated that the circumstances of the Applicants were unusual in that they involved allegedly uncommercial and uncontrived transactions and the rights obtained being the economic conclusion of the transactions. HMRC highlighted that these points had been set out in their letters of 9 February 2018 and 11 January 2019 respectively. The Applicants objected, on the ground that this point ought to have been made at an earlier stage. The Applicants submitted that, although it had been a suspicion on their part that the HMRC Interpretation was being applied to suspicions of tax avoidance (a suspicion that continued up to and was articulated in their initial statement), it had never been confirmed. The Applicants submitted that suspicions of tax avoidance gave rise to an irrational distinction and that, if the matter were to be pursued, they would amend their grounds of review to include a ground that it was irrational to say that the Applicants' transactions had been "*uncommercial and contrived*".

45. It is worth recalling that the purpose of this ground for judicial review is to give the Applicants a remedy against HMRC for concluding the tax was due despite the relevant tribunals or higher courts holding that the HMRC Interpretation was right in law and so the tax was indeed due. The argument has to be that despite that correctness in law, HMRC was irrational in public law terms in applying that interpretation in this case. In my judgment that argument has no real prospect of success. The Applicants assert that they are not challenging the rationality of the law, but rather whether the reasoning is being irrationally applied to them and not to others. I do not agree with that distinction on the facts of this case. The alleged irrationality relied on can only be an irrationality in the law itself. Even if it were true that the law did draw an irrational distinction between the present case in which the HMRC Interpretation applied and a different case in which it did not, then that does not mean HMRC would have acted irrationally on public law grounds in following that legal conclusion. Putting it another way, this argument about the presence or absence of rational distinctions in the application of the HMRC Interpretation – is an argument to be deployed in the FTT (and on appeal from that) in support of the Applicants' case that the HMRC Interpretation is wrong in law. But if it fails, then public law does not give the Applicants another remedy.

46. Nor am I persuaded that there is any traction to be gained by the Applicants in their arguments about HMRC's intentions. This is not a case at all like ***Gallaher*** in which an assurance was given to one party and not to others. The point is an issue of law. If HMRC are right in law then the taxes are due, if not then not. If the result of the consideration of this point is the law as applied in other cases needs to change too, then no doubt HMRC will need to do so, but that cannot give a remedy to these Applicants.

47. A different issue is the procedural criticism of HMRC in that the idea that it was material to the HMRC Interpretation that the transactions were uncommercial and contrived was not raised earlier. I seriously doubt that this came as any real surprise to the Applicants when it was raised at the hearing, but at least it is a point which is capable of falling within the ambit of judicial review. Its flaw is that it does not lead anywhere. That is because ultimately the legal issue can still be debated in the FTT.

48. I reject this ground.

(c) Suitable Alternative Remedy

49. Since I have found that the grounds are not arguable, it is not strictly necessary to deal with this point. I will do so briefly.

50. Judicial review is a remedy of last resort and therefore the court's discretion to grant permission for judicial review should not be exercised where there is a suitable alternative remedy (per Sales LJ in ***R (Glencore Energy) v HMRC*** [2017] EWCA 1716 at [51] to [53]).

51. In considering whether there is a suitable alternative remedy, the court have regard inter alia 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…" (Sales LJ, ***Glencore*** at [55].)

52. The starting point is therefore that the court will be slow to interfere with the statutory procedure by exercising its judicial review function. It should only be exercised in exceptional cases (***Glencore***, applying ***re Preston*** [1985] 1 AC 835).

53. HMRC submit that this matter falls within the cases referred to by Green J in ***Glencore*** at first instance (***R (Glencore Energy)*** [2017] STC 1829), where:

> "….grounds of judicial review are 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."

54. HMRC accept that matters relating to legitimate expectation and "*comparative unfairness*" could not be relied upon in the First-tier Tribunal but assert that these matters are not sufficiently arguable to proceed in any event.

55. The Applicants submit that their case on irrationality falls within HMRC's reference to "*comparative unfairness*" and therefore there is no dispute that the matters cannot be dealt with in the First-tier Tribunal. The Applicants assert that they are not challenging

the rationality of the law, but rather whether the HMRC Interpretation is being irrationally applied to them and not to others. The Applicants submit that, in ***Glencore***, all the matters related to substantive challenges that could be raised in the First-tier Tribunal or procedural unfairness that did not affect liability and that it therefore does not apply to the Applicants' circumstances. The result of having no suitable alternative remedy, the Applicants say, is either that theirs is an exceptional case that justifies judicial review or that the exceptionality test does not apply.

56. When I dealt with this application on paper, I rejected this ground. Having heard the submissions, I can see that if the Applicants had made out an arguable ground based on legitimate expectation (which they have not) then that might have justified proceeding by judicial review and thereby giving them a remedy not available via the FTT on the hypothesis that the Applicants lost on the law before the FTT. However the point does not arise.

57. I cannot see how the irrationality ground relied on by the Applicants could ever justify a remedy not available in the FTT. In truth the irrationality ground is the legal argument dressed up in a different way. I would refuse that part of this application on this ground too.

Conclusion

58. The application is dismissed.

MR JUSTICE BIRSS

UPPER TRIBUNAL JUDGE

RELEASED: 10 JULY 2020