CHANGING PERSPECTIVES: THE PUBLIC RELATIONS BATTLE FOR TAX ADVISERS

By Samuel Brodsky

Public opinion affects the direction of travel of our system of taxation: the tax policy of our current and future governments, the attitude of HMRC to individual taxpayers in correspondence and negotiation, and (whisper it quietly) even how judges view tax cases. It is troubling therefore that, in the current climate, "tax" is a dirty word and "tax adviser" suggests to many someone who aids and abets those who cheat the system. HMRC has had considerable success in the public relations battle in recent years, but a new government is an opportunity for the profession to fight back. How might they do this? One of the first steps must be to talk about those cases where victory for the taxpayer really is the right result, and I start with some cases in which I have been involved.

Principal private residence relief:
***HMRC v Higgins* [2019] EWCA Civ 1860**

This case was about principal private residence relief, and whether a taxpayer needed to live in a property from the date of exchange of contracts in order to qualify for full relief, or whether it was sufficient to occupy from the date of completion. Mr Higgins exchanged contracts on an off-plan flat in 2006, agreeing to purchase from a developer at a time when the flat was still to be constructed. The flat was physically completed in December 2009, and the purchase was legally completed in January 2010. He lived in the flat for two years, as his principal residence, and then sold it at a gain. Mr Higgins claimed full relief on the sale, on the basis the flat had been

his main residence for his entire *"period of ownership"*, as required by s.223 of the Taxation of Chargeable Gains Act 1992. HMRC however took the view that Mr Higgins' *"period of ownership"* commenced on the date of exchange (rather than completion). It was common ground that Mr Higgins did not live in the property from the date of exchange: it is rare for a purchaser to be entitled to move in before completion, and in this case the flat had not even been constructed at that point in time.

As a matter of law, HMRC's position was weak and unanimously rejected by the Court of Appeal. A purchaser obtains only limited land rights on exchange of contracts, and is not properly described as the *"owner"*. And, in the case of an off-plan purchase, it is hard to see how someone can *"own"* a property before it has even been built. HMRC's approach was also bizarre as a matter of policy. It would have led to most ordinary members of the public having a CGT liability on the sale of their homes as it is rare for a purchaser to be entitled to occupy before completion. As the Court recognised, that would have meant that the legislature had failed to grant the relief in the paradigm case. This approach also risked significantly undermining the property market. The delay between exchange and completion is inevitably larger on an off-plan purchase, and so a decision in HMRC's favour would have been a significant disincentive to those considering an off-plan purchase. That may have put at risk the ambitious housing plans of the government and developers. It could also have trapped current home-owners in their properties, unwilling or unable to pay the high CGT bill that even a lateral move would trigger. That would cause further stagnation in the market.

Higgins was a case where a taxpayer victory was important not only for the individual concerned, but also for the government and the wider body of taxpayers.

Claim for NICs without limitation of time

In general, the Limitation Act 1980 (LA 1980) does not apply to claims by HMRC for the recovery of any tax or duty, as such claims are expressly excluded by s.37(2)(a). However NICs are not a tax but a "contribution". Accordingly LA 1980 does apply, and any claim must (subject to some exceptions) be brought within the six year time limit in s.9. If a company has failed to pay their NICs, HMRC can in some circumstances issue a personal liability notice (PLN), which imposes personal liability on company directors. This power is contained in the Social Security Administration Act 1992, s.121C, but it is not subject to any express time limits. There is however an inherent time limit: a PLN can only be issued if there is an existing *"liability"* on the company, and the best view is that a time-barred liability is not a *"liability"* for the purposes of s.121C. Accordingly the six-year limit also applies to a PLN.

HMRC however have taken the point that – if the company entered liquidation during the six-year window – this "stops the clock" for the purposes of issuing a PLN against a director. That interpretation is not supported by the statute. It is also worrying as a matter of policy. Section 121C already represents a significant erosion into the principle of separate corporate personality, and inevitably will most often be utilised where the relevant company is insolvent (as otherwise it would be able to pay the NICs itself). There is thus a real risk of injustice if directors are held personally liable more than six years after the tax debt fell due on the company. Where there is no allegation of fraud or deliberate conduct, certainty for the taxpayer is an important principle. Certainty is especially important in the context of PLNs, because the amount of liability is based on the company's unpaid debts, and accordingly might be far in excess of any remuneration or other income which the director actually received.

Conclusion

Communicating cases of injustice to the wider public is a difficult task, but one which has the potential to dramatically shift public perception of the tax code and, by extension, the direction of legislative reform in the new decade.