SQUIRE SANDERS

IN THE LION'S DEN

PETER VAINES picks his way through the case of *Daniel v HMRC.*

The recent Court of Appeal decision in *Daniel v HMRC* [2012] EWCA Civ 1741 concerned a case management issue. It is no surprise that articles rarely appear in *Taxation* on this subject, but this particular case may have a wider interest than usual.

Mr Daniel was claiming to be non-resident. He had left the UK to take up full-time employment abroad and, during his period of non-residence, he realised a capital gain. Mr Daniel claimed that he was non-resident on strict legal principles but, even if HMRC disagreed, he certainly satisfied the terms of HMRC's leaflet *IR20 – Residents and non-residents: Liability to tax in the United Kingdom* (which still applies when considering residence status until 5 April 2009) and the department were bound to treat him as non-resident on that basis. This is all rather familiar.

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Where First?

Mr Daniel could not take both arguments to the First-tier Tribunal because it has no authority to deal with IR20; that is a judicial review matter which must be heard by the Upper Tribunal or the Administrative Court. The question was whether he should appeal to the tribunal first, or whether he should first make his application for judicial review to the Administrative Court.

What did it matter? If he appealed to the tribunal and won, then (apart from a possible appeal by HMRC) the matter would be over and he would be non-resident. If he lost, he would then make his application for judicial review to the Administrative Court. Alternatively, if he started in the Administrative Court and lost on the grounds that IR20 did not apply, he would go back to the tribunal to argue the matter on the strict law. If he won and the Administrative Court decided that IR20 applied, the strict legal position would not matter. Either way there is the possibility of hearings in both courts. So who cares which happens first?

Actually, Mr Daniel cared rather a lot because a full-blown hearing before the tribunal would take a colossal amount of time and expense, whereas an application for judicial review in the Administrative Court would take only a couple of days. More importantly, he would have been aware of HMRC's (hitherto unsuccessful) argument that, even if he had a legitimate expectation to be treated as non-resident under IR20, if he lost his appeal before the First-tier Tribunal, his legitimate expectation would become illegitimate and he would have no entitlement to apply for judicial review. It is no wonder that Mr Daniel wanted to avoid the risk of finding himself in this "catch 22" position.

KEY POINTS

- Familiar facts, but procedural complications.
- Interpretation of IR20 rules was a judicial review matter.
- Judicial review was the less costly option.
- HMRC had argued for the priority of judicial review in the previous case.
- Court of Appeal reaches a different conclusion from the Supreme Court.

The Review Application Route

Mr Daniel therefore applied to the court to have the judicial review application heard first, but the court decided that the substantive appeal in the First-tier Tribunal should take priority.

One might wonder why this is worth mentioning. It is because we have been here before. The cases of *R (oao Davies & James) v HMRC [2011] STC 2249 and R (oao Gaines-Cooper) v HMRC* [2011] STC 2249 in 2011 both ended up in the Supreme Court and this point was argued at length, but the conclusion there was different.

In *Davies & James*, the Court of Appeal decided that the application for judicial review should be determined before the substantive appeal was heard. In the Supreme Court, Lord Wilson said that this view was correct. He said that it was unfortunate that Mr Gaines-Cooper's case had not followed the same course. Furthermore, HMRC argued that Mr Gaines-Cooper could have adopted the same stance as *Davies & James* and insisted on the judicial review application first. Now we have the Court of Appeal in *Daniel* saying that the matters should be heard the other way round.

The Decision

In *Daniel*, the court regarded the factual position as crucial. Until the facts were known it could not be said whether IR20 could apply because the benefit of IR20 cannot be claimed unless it can be shown that the taxpayer falls within its terms. To bring himself within the ambit of IR20, Mr Daniel needed a finding that he had left the UK to work full-time abroad under a contract of employment and that the employment continued for at least a whole tax year. It was said that such a finding could only be made in the First-tier Tribunal and not in the Upper Tribunal exercising its judicial review jurisdiction.

This is equally confusing because, in many ways, the issues in *Davies & James* were identical – the key question being whether the taxpayer had left the UK to take up full-time employment

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The judgment in *Daniel* studiously avoided any consideration of the substantive issue, confining itself exclusively to the case management matter. When the substantive issue comes to be heard, another important point may arise. HMRC raised a discovery assessment on the grounds that the taxpayer had been negligent. They said that the time limit for making a discovery assessment was extended by reason of the negligent conduct of the taxpayer who should have known that his residence status was in doubt when completing his tax return. This seems to be perilously close to arguing that a taxpayer is negligent if he does not agree with the views expressed by HMRC.

I imagine that all these issues will be followed with great interest by practitioners.

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