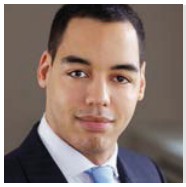
Analysis
Concurrent proceedings in tax residence cases

SPEED READ **It is becoming increasingly common for taxpayers to bring concurrent proceeding – a statutory appeal and a claim for judicial review – in determining their residence status for tax purposes. This is not surprising given the reliance placed by taxpayers on IR20. This issue was considered in *Daniel*, where the Court of Appeal was reluctant to lay down any hard and fast rules. The order of proceedings is an issue of case management and the appropriate course must be determined on a case-by-case basis. The case also considered the meaning of paras 2.2–2.5 of *IR20* and highlighted the difficulty a taxpayer is likely to face when seeking to demonstrate that he or she is not resident under that guidance.**



Ryan Hawthorne is a barrister at Devereux. He specialises in all areas of taxation, commercial and employment law, and was previously a lecturer in the law of personal taxation at King's College, London. Email: hawthorne@devchambers.co.uk; tel: 020 7353 7534.

In *Daniel v HMRC* [2012] EWCA Civ 1741 (*Daniel*), the Court of Appeal considered the order in which concurrent proceedings – a statutory appeal in the First-tier Tribunal (FTT) and a judicial review hearing in the Upper Tribunal (UT) – should be heard. This is a situation that occurs frequently given the reliance by taxpayers on *IR20* (now *HMRC6*) when seeking to demonstrate that they are not resident in the UK for tax purposes. Whilst UT Judge Bishopp and the Court of Appeal in *Daniel* were reluctant to lay down any hard and fast rules, it is possible to identify principles that are likely to inform a tribunal's decision as to the order of proceedings in future cases. The case also raises issues as to the meaning of paras 2.2–2.5 of *IR20* and the difficulty a taxpayer is likely to face when seeking to demonstrate that he or she is not resident under that guidance.

The facts

In March 2000 the taxpayer sold shares in Morgan Stanley Dean Witter, by an associate company of which he had been previously employed, thereby realising a very substantial gain. He accepted that he was resident and ordinarily resident in the UK in both the 1998/99 and 2000/01 years of assessment. His dispute with HMRC concerned the year 1999/2000 in which the disposal took place. The taxpayer's case was that he left the UK on 5 March 1999 in order to take up full-time employment abroad and therefore ceased to be resident in the UK by virtue of paras 2.2–2.5 of *IR20*. On 8 December 2009 HMRC determined that the taxpayer had been resident and ordinarily resident in the UK during the tax year 1999/2000. The taxpayer requested a review of that determination and on 3 February 2011 an inspector of taxes reviewed the decision and upheld the determination.

The taxpayer then issued two sets of proceedings challenging the decision: a statutory appeal which falls within the jurisdiction of the FTT and, separately, proceedings in the Administrative Court seeking permission to proceed with a claim for judicial review of the decision of 3 February 2011. He contended that he had a legitimate expectation that HMRC would apply paras 2.2–2.5 of *IR20* and in his case HMRC failed properly to adhere to and to apply the relevant guidance.

A combined case management hearing in respect of both the statutory appeal and the application for permission to proceed with the claim for judicial review was heard by UT judge Bishopp sitting as both a judge of the UT and as a judge of the FTT. Judge Bishopp held that as there was a significant dispute about the facts, which the UT exercising its judicial review jurisdiction would be unwilling to resolve itself, the statutory appeal should be heard first. The Court of Appeal agreed.

The principles

The Court of Appeal was reluctant to lay down any hard and fast rules. The order of proceedings is an issue of case management and the appropriate course must be determined on a case-by-case basis. There will inevitably be some cases in which there is no dispute about any relevant facts, and others in which the facts are hotly disputed, and yet more in between. Both judge Bishopp and the Court of Appeal considered that the principal considerations for the FTT are:

- whether the proceedings can finally dispose of the dispute; and
- whether there is a substantial dispute about the facts.

The interplay between these considerations can be set out as follows:

If the judicial review hearing cannot properly dispose of the dispute then the statutory appeal is likely to proceed first. For example, in *Daniel*, the Court of Appeal found that an order quashing the decision would not resolve the issue of whether the taxpayer has a further tax liability in respect of the year 1999/2000. On the other hand, if the taxpayer wins his statutory appeal that would likely be conclusive of his status and of his liability to pay the tax in question. If he loses the appeal, he can if he wishes proceed with the judicial review. Were he then to win his judicial review claim, a fresh determination would be made in the light of the findings of fact made by the FTT but applying paras 2.2-2.5 of *IR20*.

If the judicial review hearing can properly dispose of the dispute between the taxpayer and HMRC, but there is a significant dispute about the relevant facts, they will have to be determined after hearing live evidence. Where a detailed enquiry into the facts cannot be avoided it is for the FTT to undertake that enquiry. This was the course taken by Kenneth Parker QC sitting as a deputy high

court judge in *R (oao Hankinson) v HMRC* [2009] STC 2158. In giving his decision he observed that in judicial review proceedings pursuant to *IR20*, para 2.2, it is essential that the fact of full-time employment abroad is established by the applicant, either by agreement or as a finding of fact by the tribunal hearing the case. In *Hankinson*, the claim for judicial review was withdrawn after the facts had been found by the FTT. On the other hand, if the alternative course is adopted, the UT would either be embarrassed by a factual dispute or having taken greater stock of its scale than is possible at a case management hearing, feel obliged to revisit the order of proceeding and direct after all that the tax appeal should be heard first. This would result in substantial wasted costs.

If the judicial review hearing can properly dispose of the dispute between the taxpayer and HMRC, and there is no significant dispute about the relevant facts, the judicial review hearing should proceed first. This would be the most economical and effective course. A judicial review hearing in these circumstances would be shorter than the statutory appeal as it could be determined based on the agreed facts. The only question to be determined would be whether, on those facts (which would be assumed to be correct for that purpose) the Commissioners had failed to apply *IR20* correctly. An outcome favourable to the taxpayer would compel HMRC to think again, and therefore make a fresh decision. An example of this is the case of *R (oao Davies and Gaines-Cooper) v HMRC* [2011] 1 WLR 2625. Had Mr Gaines-Cooper's contention in his claim for judicial review prevailed, to the effect that he had only to show that he had kept his day count in the UK below 91 days, the ten day hearing of his appeal before the Special Commissioners (which would now be heard by the FTT) would have been unnecessary.

The FTT will not stray too far into the merits of the underlying dispute at the case management hearing, therefore in the absence of agreement with HMRC, in the ordinary course of events the statutory appeal will precede the judicial review hearing (see *R (oao Lower Mill Estate Ltd and Conservation Builders v HMRC* [2008] BTC 5743).

IR20

The real difficulty lies not in imposing well-established public law obligations on HMRC, but in the interpretation of the assurances HMRC has given and their application to the facts relating to a particular taxpayer. That there is difficulty is not surprising bearing in mind the application of *IR20* may lead to a wide range of value judgements to be taken by HMRC. The meaning of para 2.2 was considered in *Hankinson* and *R (oao Davies and Gaines-Cooper) v HMRC* [2010] EWCA Civ 83, and following principles emerged:

- It is not enough that the taxpayer has left the UK; he must have left to work full-time. Absence of itself is not sufficient; it must be absence whilst engaged on full-time employment for at least a whole tax year.
- The absence need be neither permanent nor indefinite.
- A taxpayer who leaves the UK to take up full-time employment abroad needs not to demonstrate a substantial loosening of social or family ties (as he would for the purposes of paras 2.7-2.7 of *IR20*).
- Properly construed, para 2.2 does not entitle a person to non-resident status unless he leaves to work full-time either before or by the start of a tax year.
- The taxpayer must leave for and remain in full-time employment throughout the relevant tax year.
- Full-time employment throughout any subsequent tax years does not affect the date when a taxpayer first attained non-resident status; that date is determined by reference to the date the taxpayer left to work full-time abroad.

An issue that has not yet been determined by a court is the extent to which remaining duties to be performed within the UK affect any conclusion that the work is full-time abroad. Paragraph 2.5 of *IR20* demonstrates that the issue may not be straightforward. However, this is not an issue that arises in *Daniel*.

In *Daniel*, much of the taxpayer's criticism of the decision of 3 February 2011 is directed at the treatment by HMRC of long periods (106 nights in the tax year 1999/2000) during which he was, he says, working in an office at his holiday home in St Tropez as part of his full-time employment based in Brussels. In the author's view, on a proper construction of para 2.2, there is no requirement for the full-time employment abroad to be in one country, i.e. the taxpayer was not limited to Brussels provided his time outside of Brussels (and likely the UK) is pursuant to his full-time employment abroad.

However, HMRC contends that: (i) the earliest date at which the taxpayer may have left the UK for full-time work abroad was 20 April 1999, which would be too late for the tax year 1999/2000, and (ii) the employment taken up in Brussels was not full-time. The UT may be in a position to determine that in reaching those conclusions HMRC has or has not properly applied *IR20*, but if it reaches the conclusion that *IR20* has not been properly applied, it will not be in a position to substitute the findings of fact which will enable the taxpayer to bring himself within *IR20*.

As a result, judge Bishopp and the Court of Appeal stayed the judicial review proceedings pending the outcome of the statutory appeal. This will enable the FTT to make the relevant findings of fact that will inform the judicial review – assuming the taxpayer is unsuccessful in the statutory appeal – and in particular, when the taxpayer left the UK, whether he was employed abroad full-time and whether any such employment last the whole tax year. Such findings can only be made in the FTT and not in the UT exercising its judicial review jurisdiction. ■