respect it is perhaps revealing that, unlike Jackson J., the Court of Appeal made no reference to the importance of ascertaining the wishes and feelings of the child. Albeit for the most compelling reasons, the approach of the Court of Appeal risks putting the interests and principles of others before the welfare of the children. There may be legitimate reasons for so doing, but it is hard to reconcile such an approach with the "best interests" principle.

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LEGITIMATE EXPECTATIONS AND HMRC ADVICE

FOR the tax system to function efficiently, it is necessary for the tax authority to provide advice to taxpayers. What is the consequence, however, where the advice is predicated on an error of law, and HM Revenue & Customs then later seeks to correct this error? That is the question that came before the Court of Appeal in *HMRC v Hely-Hutchinson* [2017] EWCA Civ 1075, [2017] S.T.C. 2048. The judgment underlines the difficulties that taxpayers face when seeking to rely upon HMRC assurances and when seeking to invoke the doctrine of legitimate expectations generally.

In 2003, the Inland Revenue issued guidance in respect of the calculation of capital gains tax on sales of share options. In 2009, HMRC acknowledged that the guidance contained an error of law and produced revised guidance. As regards closed cases in which the 2003 guidance was relied upon (namely those cases where taxpayers' enquiries were closed), HMRC applied the terms of the 2003 guidance. What about open cases, in other words, instances where there was an open enquiry in 2009? This question was pertinent to the case of Ralph Hely-Hutchinson, who relied upon the 2003 guidance but whose case was still open in 2009. HMRC refused to treat him in accordance with the 2003 guidance, instead applying the less favourable 2009 guidance. Whipple J. in the High Court ([2015] EWHC 3261 (Admin), [2016] S.T.C. 962) found that this breached the taxpayer's legitimate expectation that he would obtain the treatment specified in the 2003 guidance. The Court of Appeal disagreed and found in favour of HMRC, critically noting that the taxpayer did not *rely* upon the HMRC advice. The specific facts of the case may be viewed then as limiting the scope of the judgment.

The Court of Appeal considered the general principles that apply in cases of legitimate expectation and in particular where the expectation arises from HMRC assurances. As a public body invested with the duty to collect tax

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HMRC may provide guidance to assist the collection of tax (at [37], [39]). However, the duty to collect tax must be balanced with the duty of fairness owed to taxpayers. The duty to collect tax is itself imbued with the considerations that not all taxpayers must be charged with tax which is strictly owed due to interests of good management (at [40], [44], [46]) and that HMRC must retain the ability to correct past mistakes, even if this results in inconsistent treatment (at [46], [48]). When balancing the duty of fairness against the duty to collect tax, the taxpayer needs to demonstrate conspicuous unfairness in order for a claim to succeed (at [41]–[43]). Thus, the taxpayer needed to demonstrate in this case that there was unfairness amounting to an abuse of power by reason of HMRC resiling from its previously published position (at [45]).

Against the background of the general principles to be applied, the Court considered there to be three main issues in the case. The first was whether HMRC's action was comparatively unfair, to which the Court responded that HMRC are entitled to change policy where it has uncovered a prior mistake. This is a "good reason" to depart from previous policy (at [62]). Further, the Court found that in terms of consistency, HMRC were required to compare taxpayers at the time of assessment, not at the time that the guidance was produced. In other words, the treatment of the taxpayer in the case should be compared with the treatment offered to other taxpayers whose cases were "open". In this way, there was no inconsistency or hence comparative unfairness. The taxpayer was treated similarly to other taxpayers in materially similar circumstances (at [64]).

The second issue was whether the HMRC's decision was conspicuously unfair even if it was not comparatively unfair. The argument, however, that it was conspicuously unfair was rejected: if there had been no comparative unfairness, there could have been no conspicuous unfairness either (at [73]). Similarly short shrift was given to the claimant's arguments concerning discrimination under Article 14 of the ECHR and the right to enjoyment of private property under Article 1 Protocol 1, the Court holding that no such rights were in play (at [75]).

The third issue was whether HMRC's decision was unlawful having regard to the considerations taken into account when making the decision. The Court determined that there was no unlawful decision. The taxpayer was simply returned to the same position he was in when he sold his shares (at [90]), which occurred before and independently of the 2003 guidance. He had been warned since 2003 that HMRC did not accept his claims (at [90]). As his enquiry was open, not closed, the fact that different treatment was applied was immaterial (at [90]–[91]). Further, the relevant HMRC officer had considered the detriment to the taxpayer when arriving at the decision. But it had been caused by general, extraneous financial difficulty, not reliance upon the 2003 guidance (at [92]).

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Several matters arising from the case stand out for comment. First, the result appears to have been reached through an orthodox application of the relevant public law principles. The decision to withdraw the previous guidance was one that fell squarely within HMRC's discretion to which courts will generally give significant leeway. The taxpayer accordingly was in the unenviable position of having to overcome the "conspicuous unfairness" threshold. Public authorities regularly produce guidance for citizens. But a distinction should be drawn between guidance that sets out rules that the relevant public body itself has autonomy to produce, such as the DPP's prosecutorial policy, and guidance that sets out a public authority's approach to implementing legislation, as arose in the present case. In the former case, the public body has the authority to set the rules; in the latter, it is Parliament that has set the underlying rules. When seeking to enforce legitimate expectations in the latter accordingly, the citizen is particularly disadvantaged as he or she must argue that for some reason the public authority should not enforce the rules as laid down by Parliament. A taxpayer's prima facie legitimate expectation is to be taxed in accordance with the law.

Secondly, the case raises a broader question about the limitations of the legitimate expectations doctrine in respect of HMRC advice. The doctrine protects taxpayers who seek to rely upon HMRC assurances. However, even in this case (where the taxpayer clearly fell within the terms of relatively long-standing guidance), HMRC was entitled to resile from the previously published assurance. Taxpayers will now legitimately ask: what is the utility of HMRC advice, if at some unspecified time in the future HMRC may be permitted to reverse its position?

Thirdly and following from the last point, the Court provided little guidance on when HMRC will be entitled to depart from a previously communicated position in the absence of detrimental reliance. The Court's view was that HMRC was entitled to reverse its position in order to correct a mistake. But how grave must the mistake have been? What about the case where it is highly unclear whether HMRC has previously made a mistake? Further, what counts as a mistake – does internal legal advice pointing out a possible mistake suffice? What if a tribunal or other judge finds against an HMRC interpretation? Perhaps the lack of reasoning is explained by the fact that HMRC's error was particularly obvious and hence it went without having to be said that in such an obvious case HMRC could reverse its position. But that explanation is difficult to square with the Court's statement earlier in the judgment that it was "not concerned with the correctness of HMRC's view" (at [3])

Finally, HMRC stressed in the appeal that the taxpayer did not rely upon the 2003 guidance per se. The 2003 guidance post-dated the taxpayer's actions and the taxpayer retrospectively amended his tax claims. It therefore seems a contortion of the English language to say that the taxpayer

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"expected" anything at the time that he undertook the taxable transaction. The taxpayer's lack of expectation at that time might be viewed as limiting the scope of the dicta in the case to its specific facts. Indeed, this lack reveals a tension in the doctrine of legitimate expectations (see for instance R. Williams, "The Multiple Doctrines of Legitimate Expectations" (2016) 132 L.Q.R. 639). This case is distinct from those legitimate expectation cases where a citizen received an assurance in advance from a public body or official, and arranged her or his affairs in accordance with that assurance. Instead the present case concerned consistency, which the doctrine also seeks to protect. The idea is that it would be unfair for a public body to fail to act consistently towards citizens. The question in "consistency" cases is whether the public body had good reasons for applying different treatment. When viewed in this light, the result in the case is perhaps obvious, as HMRC was simply required to demonstrate that it had good reasons for applying dissimilar treatment.

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