



Taxing Matters

Navigating the complexities of the tax world

RPC

Season 4

Episode 3 – The Court of Appeal's decision in *A Taxpayer v HMRC* with Rebecca Sheldon, Old Square Tax Chambers

Alexis:

Hello, and welcome to Taxing Matters, your one stop audio shop for all things tax brought to you by RPC. My name is Alexis Armitage and I'm a Senior Associate in RPC's Tax Disputes team. I will be your guide as we explore the sometimes hostile and ever-changing landscape that is the world of tax law and tax disputes. Taxing Matters brings you a roadmap to guide you and your business through this labyrinth. In case any of you miss any crucial information or just want some extra bedtime reading, there is a full transcript of this and indeed every episode of Taxing Matters on our website at www.rpclegal.com/taxingmatters.

I am delighted to be joined today by Barrister Rebecca Sheldon, at Old Square Tax Chambers. Rebecca has developed a busy practice in all areas of tax law, specifically complex advisory work and litigation. She's appeared in numerous high-profile cases for both taxpayers and HMRC, and has significant experience in bringing cases before the First-tier Tribunal (FTT), the Upper Tribunal (UT) and the Court of Appeal. Rebecca specifically focuses on issues around residence and trust taxation, IHT, STLT and VAT, but has also regularly advised on other areas such as employee taxation and the dividing line between capital and income. Today, Rebecca and I are going to be discussing the Court of Appeal's decision earlier this year in the case of *A Taxpayer v HMRC* in which Rebecca was instructed for the taxpayer. Welcome, Rebecca, and thank you so much for joining me today.

Rebecca:

You're very welcome.

Alexis:

And so just to kick things off then, for any listeners who haven't yet read the judgment, can you give us a quick outline of what this case was all about?

Rebecca:

Yes, so to start with on the tax issue, so here on the 4th of April 2015 the taxpayer moved from the UK to Ireland and in that same tax year the taxpayer's husband transferred shares to her which she then received an £8m pound dividend on so you can sort of see why the revenue were interested.

It was common ground that the taxpayer had been in the UK for 50 nights in the relevant tax year, which was a mere five more than was allowed under the Statutory Residence Test (SRT). So, what we then had to do was consider the exceptional circumstances test, and this is under paragraph 22(4). And what this does is it allows for extra days in the UK for an individual to be here without them then becoming UK resident and therefore taxable in the UK, assuming that that test is met.

Now the test has several parts to it, and these were all in play in this case and what it requires is as follows. So a) P, the person, would not be present in the UK at the end of that day, but for exceptional circumstances which are beyond P's control and that prevent P from leaving the UK. And then finally under b), that the person intends to leave the UK as soon as those circumstances permit. So, there's quite a lot in that. In terms of the facts of this case, which are rather sad, unfortunately, the taxpayer had a twin sister who she has a really close emotional bond with. And unfortunately, for the twin sister, there isn't a lot of wider support available to her. So her elder brother had committed suicide. Another sister sadly was estranged and then there was another brother who did in fact live about 20 miles away from the twin sister, but he was emotionally unable to support her for various reasons going on in his own life. So, when the twin's marriage broke down in 2011, so a few years before this relevant year, she moved closer to our taxpayer's marital home, again which we would say evidences the closeness of this bond, she wanted to be near her sister. The twin had two children in the relevant year, aged 11 and 13 at that time. And she had been suffering from alcoholism and depression. And this had sort of been a factor for previous years, but it had become really bad in the 2015 tax year. And the two children were, you know, again, very sadly being neglected. So, there was evidence, for example, given that they were crawling with nits.

Eventually, the twin is committed initially to an NHS hospital and then to a residential mental health hospital where she was kept in April 2016. So, after our periods, which were in the winter of 2015 and in February 2016. But in

essence, our taxpayer's position was that she had come back to the UK because she had to because her twin had become suicidal and she was the only person who could support her twin through that. So that was the reason why she was originally claiming exceptional circumstances.

Alexis:	And so what made this particular exceptional circumstances claim under the SRT stand out, do you think?
Rebecca:	Well, it was the first ever case to get a hearing on the SRT. That's the first thing. I mean, it's the only case that we have that tells us how this test is to be interpreted. And in particular, it's the only case we've ever had on exceptional circumstances in general in this area. And so that's important for a number of reasons. Firstly, post COVID-19, the amount of people who are claiming this test has gone up. Secondly, there have been many changes to the law in this area. So, domicile has been fundamentally changed and now the reliance on the SRT is significantly more important. And so how that's interpreted is even more important. And then finally, this has always been an area that HMRC inquire into a lot, but that has very much increased since COVID and it is now something that they do almost as a matter of course, I think. So that's why I would say that this case is particularly a standout case that is important to know about.
Alexis:	And after everything you've just said, obviously there's quite a personal background to this case, obviously it involved family and moral obligations and not just tax rules. And how do you think those human factors shaped the Tribunal's thinking in particular?
Rebecca:	I personally feel that they were crucial. I've just gone through the test and obviously there are lots of different parts to it, but a lot of this case turns on the meaning of exceptional and what exceptional is supposed to have meant in the Statute of Residence Test. Now here we had the potential fate of the twin sister who was very, very unwell and needed the support of her twin and twin sisters have a particularly strong bond, I can say that as a twin sister. But also, we had the fact that her minor children were not being cared for properly. And it doesn't really, in my view, get more exceptional or sympathetic than that. And whilst the law is what the law is, and certainly a Tribunal is only ever going to apply the law, having a set of facts that can be readily empathised with is, in my view, inherently more persuasive to a Tribunal. And so, yes, I think it was a very important factor that here we had a very sad set of circumstances which had arisen.
Alexis:	Yes, indeed. And the taxpayer won, lost and then won again. Can you walk us through that roller coaster and what each stage turned on?
Rebecca:	So, in the FTT, that's the part where all the evidence is heard, where you sort of bring people on to give their evidence and you can sort of show a tribunal all of that. We won, but not exactly on the ground that we had argued. So part of the difficulty here is that our taxpayer, which is why I'm saying taxpayer, was anonymous. And this was for very good reasons. It's actually very, very hard to get a privacy order. The good reasons here were to protect her sister and of course protect these minor children who were being talked about. So, we did in fact have very good reasons, but this meant that the sister really didn't know about the hearing at all. She had no knowledge because it was to protect her from those negative consequences. That she might have felt very guilty, and given that she was in a fragile place, it was felt that it was best not to tell her. As a result of that, we really could only have evidence from the taxpayer and her husband. Now, of course, our taxpayer is the person who's been assessed. So that evidence is inherently going to be challenged on the basis of, you know, not lying, but on the basis of bias and her husband, who again, is going to be subject to the same challenges. So, in the absence of being able to call the twin or obtain her medical records, which of course we would have needed her permission for, and then we would have to tell her about, this created some evidential challenges because as taxpayers, most of the time, they have the burden of proof to get things to the balance of probabilities. In that context, the FTT found that there wasn't quite enough to show that the twin sister was threatening to commit suicide in our relevant periods. So, in the two days in December or so, and in the three days in February. However, and what they held was a combination of the need for the taxpayer to care for her twin sister and particularly for her minor children at a time of crisis caused by the twin sister's alcoholism does constitute exceptional circumstances for the purposes of paragraph 22(4) so in effect in the FTT whilst they weren't quite convinced that we'd got over the evidential hurdle of showing that there was a genuine suicide threat the position that the twin sister was in, along with her children being neglected, meant that we did just about get over that burden. Now, in the UT, where they didn't hear any of the evidence, it was a very, very different position. So, in essence, the decision was made that firstly, the word 'prevent' was to be interpreted objectively and as making an act impossible. And it was also held that moral obligations like caring for a family member were not in themselves exceptional. So, to take this a step further, this would mean that as an example, if you are at the deathbed of a dying parent who let's say

you were very, close to the UT held that that person would not be prevented from leaving the UK because nothing was physically preventing it. And moral reasons were not enough. So, short of incapacitation or a prison cell, this test wasn't going to be met on how the Upper Tribunal analysed it. It was also sort of found that the FTT could not find both that the alcoholism and depression were not exceptional, but that combining that with caring for minor children was. I have to say, I still struggle with that reasoning, but that is what they found.

Alexis: I have to agree, so do I.

Rebecca: To me just fundamentally doesn't make sense but there we go. That's what they found so that was the law for about 18 months or so until we could get on to the Court of Appeal. So, we appealed up to the Court of Appeal and thankfully, we won on all grounds, so good for taxpayers, I would say. What they held in essence was that the word 'prevent' should be interpreted as stronger than 'hinder' but crucially, not 'impossible'. We got rid of this idea that you had to be incapacitated or, you know, in a prison cell in order for you to be, you know, prevented from leaving. And they also made a distinction about when somebody is compelled to stay or where it's simply more attractive. So, one of the examples that we had was about a football fan. Now, I don't know if you know this about me, but I am a big and ever disappointed Everton fan and they haven't won anything since the FA Cup in 1995, which I was barely conscious for. So pretending optimistically that they would ever be in a position to, if I was outside of the UK and came back to the UK to watch them, it was sort of determined that this would be an example of where it was simply more attractive to come back, rather than the test being met for being prevented from leaving. So, this is the sort of balance we're trying to draw here. Now importantly as well, the Court of Appeal held that moral obligations or obligations of conscience both can and should be considered when applying the exceptional circumstance test. So, the test then thankfully from the UT decision has really moved from a purely objective test to looking at the individual person's reasons, their morality, their sense of conscience. And then looking at whether as a society, something meets that exceptional bar in a more objective sense. So, would society as a whole consider this to be an exceptional circumstance?

Alexis: And so how much does this case change the landscape for others following in the taxpayer's footsteps seeking to rely on exceptional circumstances?

Rebecca: Well, as I've said, I mean, it's the first binding decision, of course, being in the Court of Appeal is now binding on the courts below that we have on the law in this area. So, in my view, what it does is it gives some much-needed flexibility to the SRT, which can be extremely rigid in how it applies because of course, it's a statutory test. It's not case law. You don't look at the facts. You just apply the statute as it looks. And what this case does is it gives us some really good guidance on what 'prevent' means and what 'exceptional' means in this context. Before, we did have other cases that looked at this, but in different contexts. So, in *R and Kelly*, and that was one of the cases that we looked at in *A Taxpayer*, that looked at the meaning of 'prevent' and 'exceptional', but this was in a criminal law context. And so we had nothing before that was directly on point, and now we do.

Alexis: And so for advisors helping clients manage UK residents and time spent here, what's the key lesson from this decision?

Rebecca: The key lesson for advisors, I think, is to put it very bluntly, do not rely on this test unless you absolutely have to. So, in the end, we did win. And I think that was right on the facts that we had on how the law actually is, we did win, but we won in the end after many, many, many years of arguing about it.

And the word 'exceptional' is inherently through just the ordinary meaning of the word itself, a really high bar to get over. So, one of the things I often mention when I, when I talk about this area is that I've had a client before who, who had a sprained ankle ask me if that counted and he'd tried to get some medical advice and the medical advice had said that there was nothing stopping him from travelling. And so my answer was very politely no, it doesn't count. Please hobble to a train to France immediately because you are not going to be able to get it. So don't rely on this test unless you absolutely have to because it is a really high bar.

Alexis: Absolutely. And does this case change how taxpayers should evidence or explain their circumstances to HMRC, especially when family or moral duties are involved?

Rebecca: Well, yes and no. The taxpayer in this case was criticised by HMRC for not having kept a day-to-day diary of events. So I think the expectation was that, you know, after dealing with her very ill sister and cleaning the house and cleaning the children and feeding them and looking after all of them, that she ought to have sat down and written down why she was still there and what it was she was doing and crucially her decision when she did leave why that was taken. But if you are truly in an exceptional circumstance, in my view, I think it's asking quite a lot for taxpayers to sit there and start writing a diary and have the presence of mind to do something like that. I mean, of course, it really does depend on the facts of each case, but also and sort of on that note, if you do keep a diary, you've also got to be prepared that HMRC are going to say that it's contrived in order to meet this test. So, you really can't win in terms of the lessons that

we learned evidentially from this case. And of course, this case is also relatively unique in that it was private. And so, there were limits to what we could get in terms of evidence. However, there are of course some general common-sense things to do. So...keeping receipts, getting bank statements, retaining text messages which evidence what was happening in the taxpayer's mind at the time, and anything which is going to be able to show the closeness of the relationship if that is an issue that's in point, so if someone has stayed there for someone else. I mean I personally think that the test could extend to things like dying pets, at least in theory. But you would have to have some pretty decent evidence of why you specifically were compelled to stay in that circumstance. So, I suppose that would be my advice. Keep what you have. Obviously, focus on the situation at hand. And when you do get to dealing with HMRC, it's always best to try and take advice and to be as honest and as open as possible. Because if you can get this resolved before it goes to a tribunal, that's obviously the best situation for you.

Alexis: And do you think HMRC will adjust its approach to these kind of cases now?

Rebecca: From what I have seen so far, HMRC's approach is very much still looking to narrow the meaning of the exceptional circumstances test and the circumstances it can apply to. I very much doubt that this is the last time we will be having a case on this issue.

Alexis: Yes, I suspect you're right. And finally, what's one piece of advice for anyone facing a similar exceptional circumstances situation in the future?

Rebecca: I think if you are one of the people who can come to the UK for X amount of time without being tax resident, my main advice to you would be leave a few days so that if something unexpected happens, you then don't have to make a claim that this test applies. Obviously, hindsight is a wonderful thing. And sometimes there is no choice. And sometimes things come up and you know, you didn't have notice and this is just the way that life is. And that's why we have the test so that if you do find yourself in this sort of situation, you can get advice, I would say, ideally from me or of course from RPC. But often taxpayers seem to want to use their days right up to the maximum allowed and they plan this in advance before the tax year starts. If possible, try to give yourself that breathing space in case you do need to come back to the UK and then stay for days that you weren't expecting because it might save you a lot of hassle and time and cost and all the rest of it in the long run.

Alexis: Well, thank you so much, Rebecca. That's all we've got time for today. But I think on any view, that is a fantastic win for the taxpayer. So well done to you and the team. Thank you to everyone joining today. See you next time.

Rebecca: Thank you.

Alexis

As ever, a big thank you goes to RPC's in-house team for the production, music and sound editing of this episode.

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