

Legality and desirability of getting it wrong

Dr Stephen Daly
King's College London
Stephen.daly@kcl.ac.uk

Overview of talk

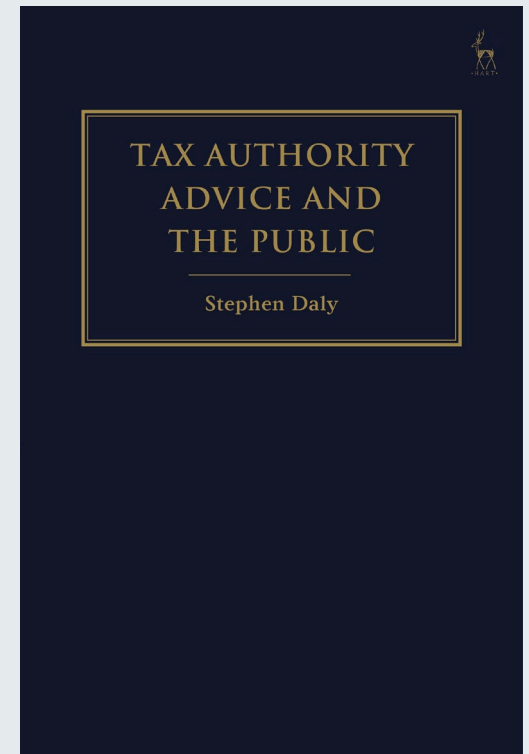
Background: At the heart of every dispute lie human beings. And it is human to err. When it comes to tax disputes accordingly, many revolve around human mistakes.

Thesis: HMRC should become more comfortable with forgiving taxpayers for tax authority errors.

Breakdown:

Part 1: Lawfulness

Part 2: Desirability



1: Lawfulness

- Definition of mistake: A public authority makes a mistake where it singles out for favourable treatment a person/group or grants an unwarranted benefit
- An unlawful (“*ultra vires*”) mistake arises where a public authority makes a mistake which it had no lawful authority to make. E.g. a forward-looking tax agreement in the UK (*Al-Fayed* [2004] S.T.C. 1703)
- Two categories of lawful mistake, bad bargain (power to determine e.g. tax settlement) and compliance (power to manage compliance e.g. incorrect advice) mistakes.
- These categories are subject to the ordinary limits of public law – legality, rationality and procedural propriety. Thus a bad bargain mistake will be unlawful if it is vitiated by an irrelevant consideration (e.g. *UK Uncut* [2013] EWHC 1283). A compliance mistake will be unlawful if it is knowingly perpetuated without good reason (*Wilkinson* [2005] UKHL 30).
- Lawfulness of compliance mistakes as a matter of statutory interpretation: 1) duty to “try” not to “succeed” on account of distinction between primary and secondary responsibility; 2) undesirable consequences; 3) unfairness

1: Lawfulness

- Caselaw accepts that HMRC has the power to collect less tax than due and thus to make compliance mistakes.
- HMRC is under a duty to manage and collect taxes due (CRCA 2005, s. 5)
- In the case of *Gaines-Cooper* ([2011] UKSC 47) the Supreme Court found that where an incorrect interpretation of the law underlies the exercise of the power, this is not sufficient reason alone for the court to find that the public authority has acted unlawfully.
- Bingham LJ in *MFK Underwriting* ([1990] 1 W.L.R. 1545) also rejected as too narrow the notion that any mistake on the part of the tax authority resulting in less tax collected than due would be in conflict with the statutory duty to collect and manage taxes.

2: Desirability

- **As mistakes are lawful, the next question is whether mistakes should be permitted to perpetuate when realised**
- If the mistake is caught before any taxpayer has been affected, then it should be corrected as soon as possible
- If the mistake is caught and a taxpayer has relied upon it, the mistake should go uncorrected (unless there is good reason) for that taxpayer
- Why? The Rule of Law and Human Dignity dictate that individuals ought to be able to plan their lives knowing the consequences of their actions.
- BUT the current law does not require HMRC to perpetuate the mistake (e.g. *Hely-Hutchinson* [2017] EWCA Civ 1075)



TAX AUTHORITY ADVICE AND THE PUBLIC

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Conclusion

- It is lawful to make mistakes
- Most HMRC mistakes are compliance mistakes
- Taxpayers litigate (unsuccessfully) compliance mistakes where they have relied upon them (often invoking the doctrine of legitimate expectations)
- HMRC should become more comfortable with forgiving taxpayers for tax authority errors.

Thank you all for listening!

Dr Stephen Daly
stephen.daly@kcl.ac.uk
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