Last chance HMRC

Management of taxes



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Keith Gordon considers the repercussions of the High Court’s decision in *NCM 2000* Ltd

Key Points

What is the issue?

A key principle for applications for judicial review is that they must be started ‘promptly’

What does it mean to me?

The discretion to extend the ordinary three months’ judicial review time limit will be sympathetically approached by the court if the applicant has not been sleeping on their rights but has been trying to canvass them by other legitimate means

What can I take away?

Whenever judicial review is being considered, or even when it might be considered relevant at a future date, obtain specialist advice early on

For most tax advisers, the mere mention of judicial review sends shivers down the spine. There is a fear of increased costs and complexity and, for non-lawyers, the need to find a solicitor. Some of these concerns are justified, but not all of them. The key thing is that judicial review is different from other litigation that tax advisers are used to – that which is conducted in the First-tier Tribunal.

Being different means that the processes are different; the time limits are different; the expectations of the court are different. It is also worth emphasising that a key principle, set down in the Civil Procedure Rules, is that applications for judicial review must start ‘promptly’, the definition of which can vary from case to case. However, my advice is to seek legal advice immediately. This is not an area where one should seek legal advice only if one is in any doubt; this is an area where one should seek legal advice if one does not know.

Another principle of judicial review is that it is a remedy of last resort. Of course, no litigation should be pursued unless other ways of resolving the dispute have been exhausted. However, with judicial review, this principle is even more pronounced. If there remains an alternative remedy, the courts will not want to be troubled with an application for judicial review. This point has practical significance for tax practitioners because appealable decisions, such as assessments, now come with the right of internal review. In those relatively rare cases where a taxpayer wishes to challenge the decision by way of judicial review (axiomatically, this will be limited to those cases where the ground of challenge is outside the tribunal’s jurisdiction), the final decision will be the outcome of the internal review process, not the original

decision. Therefore, time limits and the need to act promptly will run from the date of the internal reviewer's conclusions.

The logic of this rule is clear. Judicial review has evolved as a citizen's way to challenge a decision of the executive when there is no other remedy available. Thus, while an alternative remedy still remains, a judicial review will generally be premature.

This principle was one of the issues that arose in the recent application for judicial review by NCM 2000 Ltd *(R (on the application of NCM 2000 Ltd) v HMRC* [2015] EWHC 1342 (Admin)). The other principle was the question as to whether the application for judicial review was in fact made late.

Facts of the case

NCM 2000 Ltd (NCM) organises exhibitions and trade fairs for the computer trade. It charges an admission fee to the public and a charge for individuals and businesses that wish to hire a stall. It is the stall hire that was at the centre of the dispute with HMRC.

When the business was set up in 1992, the local VAT office advised NCM that the tax should be charged on the stall hire. NCM then became aware that some of its competitors were not charging VAT and contacted the office again, in 1993. The response was the same with the added threat of assessments to recover any VAT not charged in the interim. For completeness, it should be noted that HMRC deny NCM's accounts of the advice given, although they do accept that the same point was made by one of their officers during a routine VAT inspection in 1995. However, they also deny NCM's further claims that enquiries were made during inspections in 1997, 2002 and 2005.

After a change of accountants in 2009, NCM formed the view that it should not be charging VAT on stall hire and ceased to account for the output tax from 1 November 2008. In 2009, HMRC also decided that the hiring of exhibition stalls was not subject to VAT – it being a supply of a right over land.

In the meantime, NCM calculated that it had suffered losses of more than £2 million in relation to VAT it had wrongly accounted for to HMRC and claimed this amount back. HMRC accepted the claim for the period between 1992 and 1996 and between 2006 and 2008 (these being the periods for which a repayment claim could be made

under the time limits in the statute). However, HMRC refused to consider the claim for the period in between, amounting to nearly £1.8 million.

NCM's claim was based on HMRC's extra-statutory discretion to refund VAT wrongly paid due to official error. In the correspondence between the parties, HMRC refused to accept the existence of the conditions for such a refund. This correspondence culminated in a letter from HMRC dated 18 April 2013, which NCM treated as the decision for the purposes of seeking a judicial review. The application was made in July that year.

Judicial review differs from other litigation in that the applicant must obtain permission from the court before proceedings can start. In this case, HMRC, as they almost invariably do, argued that the court should refuse permission. Their objections were twofold:

1. HMRC considered that the impugned decision had in fact been made in May 2012 (not April 2013). Therefore, the application was at least 11 months late, given that the rules of court (as well as insisting that applications be made promptly) provide for a backstop time limit of three months.
2. HMRC argued that NCM had an alternative remedy. Therefore, it was premature to bring an application to the court until that option had been exhausted.

Either of HMRC's objections, if upheld, would have been enough to knock out NCM's application.

The court's decisions

On reviewing the correspondence, the judge, Mrs Justice Swift, considered that the decision to refuse to reimburse NCM had indeed been made in May 2012 and, therefore, the judicial review application was made late. The judge considered that there was no reason to extend the time limits, the ongoing correspondence being described as no more than 'a continuing hope … that [HMRC] would change its mind'.

Mrs Justice Swift also upheld HMRC's second objection. HMRC had argued that the taxpayer had an alternative remedy, being the right to refer the case to the adjudicator. Since this option had not yet been pursued, the judge held that it was premature to start the judicial review application.

For both reasons, therefore, the judge refused to give NCM permission to pursue its judicial review.

Commentary

In some ways this is resonant of a case I reviewed in an earlier article, ‘Too late or not too late’, where the fact that a formal decision had been made (in that case an appealable one) was not immediately clear. In both cases, tax advisers can find themselves embroiled in correspondence with HMRC over months or years but which ends up in stalemate. That impasse can be broken only if the taxpayer starts litigation in the tribunal or in the courts. At that stage, legal advice is sought for the first time, only for the taxpayer to find out that the time limit for launching the litigation is long past.

HMRC’s second argument, however, raises a practical problem, especially as it was indeed upheld by the court. There are undoubtedly several judicial review challenges against HMRC that address issues that the adjudicator cannot consider, such as arguments that HMRC have acted beyond their legal powers – *ultra vires* challenges. But most judicial reviews on tax centre on questions of fairness, of which legitimate expectation challenges are probably the largest subset. Those challenges, according to the judge, should now all start with a complaint to the adjudicator, with judicial review following only after the adjudicator fails to uphold the complaint. The adjudicator’s resources are already stretched and, as a result, cases do take a long time to resolve, although the adjudicator’s latest report shows a reduction in the backlog. The judge’s decision in this case does, nevertheless, suggest that cases should be referred to the adjudicator before judicial review starts and, if this leads to an increased backlog, so be it.

More worrying is the fact that the judgment, at least at face value, gives mixed messages. On the one hand, NCM’s judicial review application was dismissed because it had been made too late – the ongoing attempts to resolve the dispute had disguised the fact that a reviewable and ‘final’ decision had already been set down. On the other, the application was premature because the company had not exhausted the alternative remedies available. Furthermore, it is almost impossible to comply with the obligation to launch judicial review proceedings within the three-month time limit (never mind the overriding need to act promptly) if the taxpayer must first raise the complaint with the adjudicator.

To the cynical reader, it might seem that taxpayers are damned if they do and damned if they don't – whatever they do will be held to be wrong. Of course, the courts would quickly suggest otherwise. Indeed, historically the courts have taken the view that their role is to stand up to government excesses.

Furthermore, I believe that the two strands of the decision are reconcilable and consistent with earlier case law. In short, NCM was told that, at the present stage in proceedings, the 'reviewable' decision was made in May 2012 and, therefore, the claim made in July 2013 was unforgivably late.

Such a delay would have been excusable had NCM taken steps in the interim to pursue the complaints procedure, ultimately referring the matter to the adjudicator. The Court of Appeal held in *R (oao Burkett) v Hammersmith and Fulham LBC* [2001] Env LR 39 that 'when a potential applicant for judicial review expeditiously seeks a reasonable way of resolving the issue without litigation, that the court will lean against penalising him for the passage of time and will where appropriate enlarge time if the alternative expedient fails'. The key is as the High Court held in *R v University College London ex parte Ursula Riniker* [1995] ELR 213: 'The discretion to enlarge time beyond the ordinary three months is one which will be sympathetically approached by the court where the applicant in the meantime has not been sleeping on her rights but has been attempting to canvass them by other legitimate means.'

In other words, although all public lawyers urge potential judicial review claimants to start their claims promptly but within three months, the rule is not immutable. Indeed, as shown in the present hearing, a taxpayer can be punished for going to the court before the adjudicator has had a chance to consider the case, even if that means breaching three-month time limit. Nevertheless, I would repeat my earlier advice: whenever judicial review is being considered, or even when it might be considered relevant at a future date, obtain specialist advice early. Otherwise, the last chance for doing so might already be long gone.

Further information

Read Keith's article 'Too late or not too late' from the August 2010 issue of *Tax Adviser*.