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# The four-year hitch

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Keith Gordon discusses a case in which a taxpayer sought repayment of tax by putting in a return more than four years after the year to which it related

## What is the issue?

HMRC will generally refuse to process a return four years after it was due, even if a substantial repayment would otherwise be due

## What does it mean for me?

The court held that the word ‘assessment’, when used in TMA 1970 s 34(1), was not meant to be interpreted that widely and only to those by HMRC

## What can I take away?

The decision on s 34(1) could be a welcome boost to taxpayers. Taxpayers who have had ‘late’ tax returns rejected by HMRC on the basis of the four-year rule (or the previous six-year rule which applied before 2010) should now revisit them

For the past five years, there has been a basic time limit in tax of four years. For example, the general limit for claims is four years after the tax year to which the claim relates (s 43). Four years also represents the general time limit for HMRC assessments (s 34), although later assessments (often referred to within HMRC as ‘extended time limit assessments’) may be made in some circumstances (s 36). The statutory references given refer to the Taxes

Management Act 1970 (TMA) and cover income tax and capital gains tax; similar time limits for other taxes exist elsewhere.

Many readers, however, will have come across the situation in which a taxpayer wishes to put in a tax return outside the four-year limit. In many such cases, this was needed to cancel out a tax-geared penalty that had been imposed because the return was late and HMRC would accept the return to that extent. Nevertheless, HMRC will generally refuse to process the return beyond that, even if a substantial repayment would otherwise be due. Although most taxpayers would give up at this stage, there is a case in which the taxpayer decided not to take no for an answer, namely *R (oao Higgs) v HMRC* [2015] UKUT 92 (TCC).

## The facts of the case

The taxpayer, Mr Higgs, had made payments on account of his 2006/07 liability amounting to more than £46,000. However, his true liability for the year was less than £19,000.

Therefore, Mr Higgs would have been entitled to a repayment of the £27,000 balance, but for one hitch: he did not submit his 2007 tax return until after 5 April 2011. The reasons for the delay were not altogether clear. However, HMRC, citing section 34(1) of the TMA, refused to process the return.

Section 34(1) reads:

'Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than four years after the end of the year of assessment to which it relates.'

The return was submitted in November 2011, but not processed by HMRC on the basis of their reading of s 34(1). A formal refusal to process the return was made on 7 March 2013 and it was this 'decision' that formed the basis of the judicial review proceedings, which started in the High Court.

Permission was given to Mr Higgs to proceed and the case was transferred to the Upper Tribunal and heard by Mr Justice Barling.

There were two limbs to Mr Higgs's challenge. First, he argued that the provision in s 34 applies only to assessments by HMRC and not 'self-assessments' by taxpayers. In the alternative, he argued that a refusal by HMRC to exercise their discretion to extend the time limit would result in an infringement of his human rights.

## The tribunal's decision

**Does s 34(1) apply to self-assessments?**

It was accepted by both parties that a self-assessment can be an assessment. However, it was argued on behalf of Mr Higgs that the word 'assessment', when used in s 34(1), was not meant to be interpreted that widely. In particular, 'assessment' in s 34(2) (which refers to objections to the making of an assessment) was agreed to apply only to those by HMRC.

Further, Mr Higgs noted that the origins of s 34 pre-dated self-assessment and that the High Court had previously held that it had no application to self-assessments (*Morris v HMR*C [2007] EWHC 1181 (Ch)).

Finally, it was noted that s 28C, which deals with determinations (in the absence of a tax return having been submitted) and self-assessments which can supersede a determination, clearly envisages the possibility of a tax return being submitted more than four years after the end of the relevant tax year. Although HMRC contended that this was simply an exception as contemplated by the opening words of s 34(1), Mr Higgs argued otherwise. First, he contended that the style of wording was different and therefore s 28C could not be seen as a specific case of statute permitting a longer time limit; second, s 28C preceded (rather than followed) s 34 and, as made clear in s 34(1), the more general relaxation to s 34 was limited to provisions that followed it.

Although the judge accepted HMRC's submissions that there was a public interest in achieving finality in tax cases, this could not override the clear wording of the legislation. For all these reasons, the judge upheld the taxpayer's claim.

**The exercise of HMRC's discretion**

This aspect of the case was considered more briefly on the basis that the judge's conclusion on the previous point made the human rights angle academic.

HMRC made several submissions explaining why their refusal to process Mr Higgs's late tax return was not a breach of his human rights, notwithstanding the substantial overpayment due to him (which was a major factor underlying Mr Higgs's arguments to the contrary). HMRC noted that states that have signed up to the European Convention of Human Rights 'enjoy a wide margin of appreciation and the court will respect the legislature's assessment in such matters unless it is devoid of reasonable foundation' (*National & Provincial Building Society v UK* (1997) 25 EHRR 127 at [80]).

Mr Justice Barling recognised the force of HMRC's arguments. However, HMRC had a factual obstacle to overcome: this was that there was no evidence that HMRC had considered the matter, beyond their forensic analysis of s 34. As a result, were it not for the finding in Mr Higgs's favour on the first point, Mr Justice Barling would have allowed the judicial review claim, but only to the extent of remitting the case back to HMRC for them to make a fresh decision on the exercise of their discretion.

# Commentary

For taxpayers, the decision on s 34(1) could be a welcome boost. I suspect that there are thousands of cases where taxpayers have had 'late' returns rejected by HMRC on the basis of the four-year rule (or the previous six-year rule which applied before 2010). Although Mr Higgs's case concerned a taxpayer who had made payments on account, I cannot see why the same conclusion could not apply to taxpayers whose late returns seek the repayment of surplus tax deducted at source.

Reminiscent to the consequences of the Fleming decision (*Fleming (t/a Bodycraft) and Condé Nast Publications Limited v HMRC* [2008] UKHL 2) in the VAT context, the *Higgs* case suggests that these repayments can now be claimed, going back to the advent of self-assessment in 1996/97, by submitting a return (or simply by referring HMRC to an earlier submission and asking HMRC now to process the return). I would expect HMRC to continue to refuse to process them – but the Higgs decision will make this stance harder to justify. Further, I suspect that HMRC would seek to challenge the Upper Tribunal's decision in the Court of Appeal. That would certainly give HMRC a reason, although not necessarily a justification, to defer making a decision in other cases.

Taxpayers might therefore consider waiting to see whether HMRC do appeal and, if so, what the Court of Appeal decides. However, that could be a dangerous strategy. In particular, HMRC might decide in the meantime to announce a change in the legislation to give statutory effect to their interpretation of s 34(1). For this reason, I would advise any old returns to be lodged before any change in the law is announced so as to maximise the chances of the return being processed.

The judge's decision on the discretion point seems fair. However, it also serves as a timely warning that judicial review claims can often be successful in the short-term but not in the long-term. In particular, judicial review is a way for a court to regulate decision-making bodies, with the review focusing more on the decision-making process than the actual decision. Therefore, where it is concluded (as here) that HMRC have failed to exercise their discretion properly when reaching a decision, the court will usually return it to the decision-maker and tell it to do the job properly. It is only when there is only one ‘right’ decision (as also happened here) that the court will in effect make the decision itself.

Finally, although not part of the story set out above, readers should be aware that judicial review proceedings are different from mainstream tax litigation. In particular, they are labour-intensive and require considerable work within weeks of the challenge. Therefore, a taxpayer considering judicial review proceedings is strongly advised to seek legal advice at the earliest opportunity. Otherwise, it can be too late.

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