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TAXATION AND JUDICIAL REVIEW[1]

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INTRODUCTION

When is judicial review relevant to tax matters?

1. For most tax matters there are appeal procedures set out in law that enable disputes between the taxpayer and HMRC to be settled. But in some cases there is no right of appeal to the tribunal against HMRC actions.

2. This is mainly where the decision made is in relation to a discretionary matter, for example a decision on whether a late claim should be accepted, or the application of Extra-Statutory Concessions.

3. Where there is no statutory right of appeal a taxpayer may turn to judicial review to take the dispute forward.

4. A taxpayer may seek judicial review if they believe that an HMRC officer is not carrying out, or is delaying in carrying out their duties, has assumed powers to which they were not entitled or did not properly exercise their discretion, for example by refusing to apply an Extra-Statutory Concession.

5. Judicial review may also look at HMRC decisions where the dispute is not about whether the decision is technically correct but where a taxpayer claims that they were misdirected and in consequence suffered disadvantage, for example that a return is wrong because they relied on incorrect advice received from HMRC.

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6. Judicial review may also be considered in cases where the taxpayer believes that an HMRC officer has not listened properly to their representations or has acted in a way that appears to be unfair.

7. A taxpayer may also seek judicial review against the First-tier Tribunal where there is no appeal on a point of law against the tribunal decision, for example where the tribunal has refused a late appeal or refused to review their previous decision.

8. The FT reported on 22 January 2014 that the number of taxpayers seeking to challenge HMRC through judicial review jumped by nearly a third in 2012 (from 39 to 51, a figure that had remained broadly constant for several years), as aggrieved individuals and businesses tried to overturn what they claimed were illegal or unreasonable decisions on tax and benefits.

9. For more useful information on judicial review see The Judge Over Your Shoulder.

PROCEDURE

10. Judicial review of tax cases may be referred to and carried out by the Upper Tribunal. Decisions of the Upper Tribunal have the same effect as if the review had been carried out by the High Court (England and Wales), the Court of Session (Scotland) or the Court of Appeal (Northern Ireland).

<u>All cases</u>

11. In all cases except those involving judicial review of the First-tier Tribunal's own procedures, an initial application must be made to the relevant High Court or the Court of Session, who will consider whether it is appropriate to refer the case for a decision by the Upper Tribunal.

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12. If a party wishes a judicial review of the First-tier Tribunal's procedures they should apply directly to the Upper Tribunal.

Pre-action letters

13. The leave of the court must be obtained before a claim for judicial review can be made (except in Scotland). In England and Wales, before any application for permission to begin proceedings is made, the person who is thinking of taking action against a public body should normally send a 'pre-action letter' to that body.

14. The purpose of the pre-action letter is to identify the issues in dispute and to establish whether litigation can be avoided.

15. The public body must reply to the pre-action letter (usually within 14 days).

Permission to appeal

16. The taxpayer must then apply to the High Court for permission to bring judicial review proceedings. The High Court will decide the application for permission and may transfer the judicial review to the Upper Tribunal or it may decide the case itself.

17. The taxpayer must apply to the High Court for permission to bring judicial review proceedings by sending a written application to the Court within 3 months of the date of the decision the application relates to.

18. The application can be made later if it is made within 1 month of the date when the First-tier Tribunal sent their reasons for the decision or notification that the application for the decision to be set aside was unsuccessful.

19. The application must state:

    19.1. the taxpayer's name and address;

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19.2. the name and address of their representative (if any) and any other interested parties;

19.3. an address where documents can be sent to them;

19.4. details of the decision being challenged, including the date, reference and identity of the decision maker;

19.5. a statement that the application is to bring judicial review proceedings;

19.6. the outcome they are seeking;

19.7. the facts and grounds of their case.

20. The taxpayer must also send a copy of any written record of the decision, and copies of any other documents which the High Court/Upper Tribunal or any other party need to understand the application.

21. The taxpayer may apply for an extension to the time limit, but must give reasons why they did not apply within the time limit.

22. The High Court/Upper Tribunal will send a copy of the application and any documents to all interested parties.

23. Any party who receives a copy of the application and wants to take part in the proceedings must write to the High Court/Upper Tribunal to acknowledge that the application has been served within 21 days of the date the High Court/Upper Tribunal sent the copy to them.

24. The acknowledgement must state whether they intend to oppose the application for permission and, their grounds for support or opposition; the name and address of anyone not named in the application that they think is an interested party.

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25. If they do not send an acknowledgement they may not take part in the application for permission. But they can take part in any subsequent proceedings if permission is given.

26. The High Court will write to all interested parties to tell them whether it gives permission to bring judicial review proceedings. If the High Court refuses permission it will also give reasons for refusing and details of any limitations or conditions imposed.

27. If the High Court has refused an application without a hearing, or allows an application with conditions, the party applying for permission can write and apply for the decision to be reconsidered at a hearing. They must apply for the decision to be reconsidered within 14 days of the date the High Court/Upper Tribunal sent them its decision.

28. Where permission has been granted, the person who wishes to bring a case for judicial review must provide detailed grounds in support of their case to the High Court in writing within 35 days after the High Court/Upper Tribunal granted permission.

29. The party who applied for permission can only rely on the grounds given in their application unless the High Court/Upper Tribunal gives them permission to include other grounds.

30. Both the party applying for permission and the party opposing it may provide evidence and make representations at any hearing. Other parties can also provide evidence or make representations but must apply to the High Court/Upper Tribunal for permission to do so.

31. Each party to the proceedings, and any other person the High Court / Court of Session / Upper Tribunal permits, may produce evidence (except at the application for permission hearing); make representations at any hearing they are entitled to

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attend, and make written representations relating to a decision to be made without a hearing.

32. The hearing and decision will follow the same procedure as other hearings by the High Court / Court of Session / Upper Tribunal. The Court / Upper Tribunal can award costs in judicial review proceedings.

GROUNDS FOR JUDICIAL REVIEW

33. Lord Diplock outlined three grounds upon which the courts will quash a decision in *C.S.U. v Minster for Civil Service* [1985] 1 AC 374 at p. 410 as follows:

    33.1. *illegality*: which occurs if the decision-maker fails to '*understand correctly the law that regulates his decision-making power*'. For example, because he has misconstrued a statutory provision or failed to take account of a consideration which he is expressly or implicitly required to take into account or takes account of considerations which are irrelevant;

    33.2. *procedural impropriety*: which occurs if the decision fails to comply with an express procedural requirement or a procedural requirement which is implied by the rules of natural justice. It may, for example, be a breach of natural justice for HMRC to seek to exercise discretionary powers without first giving the taxpayer an opportunity to make representations;

    33.3. *irrationality*: the decision is so unreasonable that no reasonable body could reach it.

34. In the tax context in particular the courts have expressed a willingness to quash decisions where there has been '*unfairness amounting to an abuse of power*'. It is important to appreciate that the courts will not interfere in a decision merely because it is harsh and therefore appears unfair. It is only in those cases where the

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decision is entirely unreasonable or HMRC have acted in such a way that the decision can be regarded as an unfair abuse of power that the courts will interfere.

35. In *R v IR Commrs ex parte Unilever* [1996] STC 681, Unilever successfully argued that HMRC's past conduct in allowing loss relief claims made it unfair for them to refuse relief on the basis that there had been a failure to make a proper claim within the statutory time limit.

36. In the Unilever case no express representation was made to the taxpayer but HMRC's past conduct was held to make its refusal of the claim unfair and unlawful.

37. However, most applications have related to HMRC's failure to act in accordance with representations made to taxpayers. These representations might be generally published statements of practice or made to specific taxpayers.

38. In *R v IR Commrs ex parte Matrix Securities Ltd* [1994] STC 481 and *R v IR Commrs ex parte MFK Underwriting Agencies Ltd* [1989] STC 873 it was accepted that it could be an unfair abuse of power for HMRC to depart from guidance or informal clearances given to individual taxpayers if they are expressed in terms which the taxpayer could reasonably expect to rely upon and are not subject to any relevant caveats including where the taxpayer receives a ruling that does not reflect the correct application of the law.

39. The two primary conditions set out in MFK, which must be satisfied, are:

    39.1. the taxpayer has put all his cards face upwards on the table (which includes providing full details of the specific transaction for which he seeks HMRC's ruling); and

    39.2. the ruling relied upon must be clear, unambiguous and devoid of relevant qualification.

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40. These are not easy conditions to satisfy.

41. Since what is unfair invariably depends upon the facts of any particular case, the precise factual background to any case will have an impact on the court's approach. It will generally not be unfair of HMRC to revoke an informal clearance if the taxpayer has not yet relied upon it (see *R v IR Commrs v Camacq Corp and Cambrian & General Securities plc* [1989] STC 785). Even if the taxpayer has relied on the statement, any unfairness may be avoided by the payment of compensation, see *Matrix Securities Ltd* per Lord Griffiths.

42. HMRC will, in general, be bound by formal statements given to taxpayers which objectively are intended to be relied upon, provided the taxpayer clearly falls within the terms of the statement (see *R v C & E Commrs ex parte Kay* [1996] STC 1500).

43. Judicial review proceedings in the tax field are normally commenced by taxpayers challenging decisions by HMRC relating to their own affairs. However, if they can show sufficient interest for doing so, other interested people may also be entitled to mount a challenge.

44. In *R v Att-General ex parte ICI* 60 TC 1, ICI successfully challenged the basis upon which petroleum revenue tax was assessed on ethane produced by oil companies, its competitors. While acknowledging that one taxpayer has in general no interest in the affairs of other taxpayers, the court held that ICI was entitled to seek relief since its competitive position was at stake. While the court considered that the basis of valuing ethane to be invalid and declared accordingly, Lord Oliver at p. 66 noted that in determining what tax to collect '*the Revenue will, no doubt, be able to exercise those discretions normally exercisable in the carrying out of their duty of managing the nation's taxes*'.

45. The Court of Appeal refined the test as it applies to public guidance in *R (Gaines-Cooper and Davies & James) v HMRC* [2010] STC 860. Whilst HMRC accepted

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that a legitimate expectation could arise based on their public guidance, the Court of Appeal confirmed that expectations could be limited by further requirements which did not expressly appear within the guidance, but had arisen as a principle established by case law.

46. This decision was upheld on appeal to the Supreme Court which, despite observing that parts of the guidance were very poorly drafted, similarly found in favour of HMRC in *R (Gaines-Cooper and Davies & James) v HMRC* [2011] STC 2249.

RECENT JUDICIAL REVIEW CASES

Ingenious

47. In the case of *R (Ingenious Media Holdings) v Her Majesty's Revenue and Customs* [2014] STC 673 (Admin) Sales J rejected an application for judicial review by Ingenious Media Holdings plc and Patrick McKenna, who complained that a senior official in HMRC had identified them in "off the record" briefings.

48. Ingenious Media is an investment and advisory group which promotes film investment partnerships which allow participators to take advantage of certain tax reliefs and exemptions. HMRC has long been fighting to close down these "film schemes", with some success (see the Eclipse 35 appeal).

49. In 2012, the Times began investigating tax avoidance, which led two of its journalists to invite David Hartnett, then the Permanent Secretary for Tax at HMRC, to a meeting.

50. It was agreed that the meeting would be "off the record", which David Hartnett understood would mean that nothing said during that meeting would be published. During the briefing, which lasted 75 minutes, the journalists suggested that Mr Hartnett had reached unduly lenient settlements with some taxpayers; Mr Hartnett denied this vigorously and gave as an example the way HMRC had dealt with certain individuals involved in film schemes. When one of the journalists

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suggested that one of these individuals was Mr McKenna, Mr Hartnett confirmed that was correct.

51. The Times published articles on 21 June 2012 which quoted from the briefing, in contravention of the "off the record" agreement.

52. Sales J started his analysis with section 18 of the Revenue and Customs Act 2005, which provides that HMRC may not disclose any information held by HMRC except if that disclosure is "*made for the purposes of a function*" of HMRC. He then referred to s 51 of the 2005 Act which refers to those functions and held:

> *I consider that Mr Hartnett could properly and rationally take the view in the circumstances of the briefing that it would assist HMRC in the exercise of their tax collection functions to seek to foster a spirit of co-operation with the journalists, and that to do that it would be desirable to discuss the matters in which they were interested and about which they were already well informed with measured frankness. Mr Hartnett could properly and rationally take the view that the limited disclosures which he made in relation to the Claimants were directly relevant to the discussion with the journalists and were appropriate to be made to foster such a spirit of co-operation.*
>
> *In general, it is legitimate for HMRC to seek to maintain good and co-operative relations with the press. The efficient and effective collection of tax which is due is a matter of obvious public interest and concern. Coverage in the press about such matters is vital as a way of informing public debate about them, which is strongly in the public interest in a well-functioning democracy. HMRC have limited resources to devote to the many aspects of their tax collection work, and it is legitimate and appropriate for them to seek to maintain relations with the press and through them with the public to inform public debate about the tax regime and the use of HMRC's resources. It is also relevant to the exercise of HMRC's functions to provide proper and accurate information to correct mis-apprehensions or captious criticism regarding the exercise of their functions (such as any misplaced suggestion that they had engaged in unduly lenient "cosy deals" with certain taxpayers), in order to maintain public confidence in the tax system. If such confidence were undermined, the efficient collection of taxes could be jeopardised, as disaffected taxpayers might withhold co-operation from the tax authorities. These considerations provided good objective grounds for Mr Hartnett's decision to participate in the briefing and to seek to foster the spirit of co-operation with the journalists to which I have referred.*

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> *Mr Hartnett's wish to encourage the journalists to share information with HMRC about tax avoidance, which could be of direct assistance to HMRC in relation to their tax collection functions by helping to inform them about where to focus their attention and investigations, was a further legitimate basis for that decision. He could rationally and lawfully take the view that the journalists would be unlikely to assist HMRC in this way unless HMRC for their part demonstrated a degree of measured frankness about the topics under discussion in return.*
>
> *In addition, I consider that Mr Hartnett could lawfully and rationally take the view he did regarding co-operation and sharing information with the journalists at the briefing so as to encourage them to understand and convey to the public the negative attitude which HMRC had to participation by taxpayers in film investment schemes.*

53. All Ingenious' claims were dismissed. The Judge gave permission to appeal to the Court of Appeal.

Cameron

54. In *Cameron & Others v HMRC* [2012] EWHC 1174 (Admin), the taxpayers, who were taxed under the code applying to seafarers, relied on a number of assurances from HMRC, mostly in writing. The dispute concerned determining when a ship left the UK. The taxpayers' accountant wrote to ask if HMRC agreed that this was to be determined by the location of the vessel at midnight. HMRC agreed that this was correct.

55. This did not, however, reflect the position under the taxing acts. HMRC subsequently went back on these assurances and sought to apply the letter of the taxing code. Wynn Williams J held (in the High Court) that HMRC, by its assurances, had created a legitimate expectation of the taxpayers, and consequently HMRC were bound by their agreement as to when a ship left the UK and could not collect the tax.

56. Brings us neatly to the question of whether legitimate expectation claims such as Unilever and Cameron have to be heard by way of judicial review in the

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administrative courts (with its attendant time limits) or whether the First-tier Tribunal has jurisdiction.

Noor

57. In *HMRC v Oxfam* [2010] STC 686, Sales J had suggested that the First-tier Tribunal had jurisdiction to determine cases on the basis of public law arguments in a VAT case. The authorities since then have struggled both with the question of what Oxfam had decided and how that should be applied.

58. The issue in Oxfam was whether, following a case law development in the VAT treatment of donations received by a charity, HMRC was still bound by the input tax recovery method previously agreed with Oxfam. Oxfam based its case both on contract (that it had a binding agreement in place) and legitimate expectation, and lost both arguments.

59. Oxfam started judicial review proceedings in the Administrative Court, which was then stayed pending the outcome of the substantive tax case which went through the usual tribunal procedure. On appeal of the substantive case to the High Court, having decided that Oxfam's claim in contract failed, Sales J considered the legitimate expectation point, stating that the words '*an appeal shall lie … with respect to…. the amount of any input tax which may be credited to a person*' were wide enough to empower the VAT Tribunal to consider the amount of input tax to be credited on the basis of any argument, including the legitimate expectation argument.

60. In reaching his conclusion, Sales J drew support from the example of other tribunals (with statutorily defined jurisdiction) where public law points had been determined. Sales J also saw that for a lower tribunal to determine a public law point was in the interests of justice, as it provided a streamlined approach from the taxpayer's perspective, and also ensured that public law aspects were determined by a tribunal which specialised in the legislation under consideration.

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61. In addition, Sales J recognised that a taxpayer will generally also be pursuing a substantive claim in respect of his tax treatment, as well as a public law claim, and that as the procedure for those two claims differs (the substantive claim is pursued through the tax tribunal system, a judicial review is commenced in the High Court) this results in additional expense and complexity, together with the strategic problem of which claim to pursue first.

62. As Sales realised that this was against the tide of previous authority he stated that it would be prudent to commence judicial review proceedings in the Administrative Court.

63. However, it is unclear whether Sales J's comments on the public law jurisdiction of the VAT Tribunal were part of his decision in the case, or whether the comments were non-binding judicial comment (*obiter*). The intervening cases have gone both ways on this point, and it is indicative of the difficulty of the point that Warren J (the President of the Upper Tribunal) and Judge Bishopp (President of the FtT) considered in *HMRC v Hok* [2013] STC 225 (decided late 2012) that Sales J's comments were *obiter*, but in *Noor* (*HMRC v Abdul Noor* [2013] UKUT STC 998 (TCC) the same tribunal effectively overruled them.

64. The facts in *Noor* were that Mr Noor had incurred input VAT on a supply of legal services which he received in respect of a dispute relating to a commercial property he was developing. He visited his local HMRC office, and there telephoned the National Advice Service (NAS), enquiring whether he needed to register for VAT. He was incorrectly advised that he could reclaim the VAT on the solicitors' invoices under the option to tax within three years, rather than, as was the undisputed correct position, that he needed to register for VAT within six months of the time of supply. The First-tier Tribunal found as facts that Mr Noor had placed all of his cards 'face upwards on the table' and had been given incorrect advice. This seems clearly within the criteria set out in *MFK* above.

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65. The First-tier Tribunal (Judge Brooks and Mr Corke had found for Mr Noor) but the Upper Tribunal, in considering Sales J's decision in *Oxfam* concluded that Sales J had erred in concluding that he was not bound by the earlier House of Lords authority of *C&E Commrs v J H Corbitt (Numismatists) Ltd* [1980] STC 231, which would have been sufficient to dispose of the appeal.

66. However, the Upper Tribunal in *Noor* also considered the statutory provision which was the source of the First-tier Tribunal's jurisdiction. They held that the proper construction of that provision could only lead to one result: that the VAT Tribunal, a creature of statute, had jurisdiction to determine the amount of input tax to be recovered on the basis of the legislation alone.

67. The words '*with respect to … the amount of any input tax*' were not, in their view, broad enough to empower the VAT Tribunal to allow input tax recovery on the basis of a public law argument, because the only public law remedy which the taxpayer could obtain would be an order for repayment of an amount equal to the input tax, not repayment of the input tax itself.

68. Although the Upper Tribunal in *Noor* were sympathetic to the public benefit points which Sales J cited as supporting his position, they were not in agreement. As the VAT Tribunal's jurisdiction derives from statute, they found that one would expect clear statutory language if it were given a judicial review jurisdiction, and procedural rules. This was, they held, an important point, as judicial review procedural rules — the timing of commencement of a claim, the need to obtain leave — are provided for to protect public bodies from vexatious claims.

69. It is emphasised in *Noor* that there are circumstances in which it is proper for the First-tier Tribunal to take account of public law arguments, but this is only the case where it is clear that the First-tier Tribunal is deciding issues within its jurisdiction.

70. They held that there is a distinction between a situation where it is claimed that HMRC is acting in breach of its powers and where HMRC is exercising a

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discretion which it is empowered to do by statute. The example given in the judgment is the discretion which HMRC has to allow input tax recovery without an invoice. There, all that tribunal is really deciding is whether HMRC's discretion had been exercised reasonably (usually in accordance with its own guidance) and within the terms of the legislation. The tribunal is not exercising a supervisory jurisdiction to determine whether HMRC has abused its power.

71. The Upper Tribunal considered that, in balancing the respective rights of HMRC and the taxpayer, HMRC had not acted so unfairly that their incorrect advice constituted an abuse of power. *R (Corkteck Ltd) v HMRC* [2009] STC 1681 (another judgment of Sales J) was cited with approval. *Corkteck* also involved advice given by the NAS, deciding that the NAS was only a source of general advice, rather than a source of binding rulings on the proper tax treatment of specific transactions.

72. Therefore, as a matter of procedure and jurisdiction the decision in *Noor* makes it clear that the First-tier Tribunal does not have any judicial review function, and its scope to consider questions about whether HMRC has exercised its discretion fairly is confined to those circumstances where HMRC is given a discretion in the legislation. The real supervisory jurisdiction rests with the Administrative Court or Upper Tribunal only.

73. In *William Bourne v HMRC* [2010] UKFTT 294, it was noted that, for the ordinary taxpayer, without the benefit of representation, the requirement to commence judicial review proceedings in the Administrative Court (as well as pursue the substantive case in the tax tribunal) is '*tantamount, in practice, to denying that appellant the ability to pursue that claim*', as the unrepresented taxpayer is unlikely to go to the expense of funding two sets of proceedings, and, if not advised, may well be forgiven for thinking that all his complaints against HMRC would be dealt with in the appeals process which the HMRC literature sets out.

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74. The practical effect of *Noor* therefore is that the well advised taxpayer should file judicial review claims at the Administrative Court, in parallel to any appeal where any issue subject to judical review and, in particular, a question of a legitimate expectation may arise.

75. Note also that the Upper Tribunal decision in *Noor* was recently followed in *Templar Business Center v HMRC* (TC03271 — 29 January 2014).

GSTS Pathology

76. This is an interesting interim relief case on the scope of judicial review proceedings. It was noted above that in *Unilever* the Court of Appeal held that legitimate expectation may arise based on HMRC's past conduct, however, this can only be established in the most exceptional of circumstances, the correct test to be applied being one of the fairness of HMRC's conduct.

77. The question still remains: what happens when HMRC changes its mind?

78. On 22 April 2013, Mr Justice Leggatt gave an oral judgment on an application for interim relief made by the claimants in *R (on the application of GSTS Pathology LLP & Others) v HMRC* [2013] EWHC 1823 (Admin) [2013] STC 2017, accepting that a taxpayer's legitimate expectation of a particular tax treatment may extend into the future (albeit for a defined period), and was not limited to a prohibition on collecting tax for the past.

79. In GSTS the dispute concerned whether pathology services supplied by a public-private joint venture to customers largely made up of NHS trusts should be treated as standard-rated or as exempt within the health and welfare exemption at VATA 1994 Schedule 9 Group 7, read alongside section 31 of VATA 1994. To the extent that the NHS customers incur VAT on the pathology services, that VAT is simply reclaimed under the contracted out services provisions, authorised by VATA 1994 sections 41(3).

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80. In 2008, the claimants applied for a written ruling from HMRC regarding the correct VAT treatment of the proposed supply of pathology services. HMRC provided a ruling explaining that the proposed services would be standard rated. In reliance on that ruling, the claimants set up the joint venture. The supplier's VAT profile was built into the pricing model, based on HMRC's ruling, and was key to the commercial position of the new undertaking. Two further written rulings were then obtained from HMRC, in advance of a new party joining the joint venture in 2010. HMRC's further rulings again confirmed that the supply of services was standard-rated.

81. In January 2013, HMRC effectively withdrew the ruling provided in advance of the formation of the joint venture, offering GSTS just three months to make necessary alterations to its business model. HMRC had not made any assessments or sought to collect tax in respect of previous periods. GSTS appealed against the withdrawal of the liability ruling.

82. It also issued a judicial review claim, applying for an interim injunction to delay the implementation of the sudden change in VAT treatment by HMRC pending the outcome of the substantive tax appeal made to the FTT.

83. The facts of GSTS appear clearly to be within the conditions set out in *MFK* above.

84. The Administrative Court rejected HMRC's case that three months was reasonable. Mr Justice Leggatt granted the injunction and permission on the judicial review claim, which was then stayed pending the outcome of the appeal proceeding in the First Tier Tribunal.

85. This Judgment forces HMRC to suspend the implementation of its decision prospectively and prevents HMRC claiming it has no power to limit the effects of the implementation of a decision applying a change in tax treatment to the

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taxpayer's detriment (based on arguments that it has a duty to administer and collect taxes).

86. The real issue was the fact that HMRC appeared to have changed its mind about the VAT treatment of the services provided by the first claimant, by issuing a decision letter withdrawing its previous rulings. This change was in the clear absence of any actual change in the law, whether in terms of new legislation, any developments in case law in the CJEU or in the UK courts, or any material change in the facts since the original written ruling had been provided in 2008.

87. This was further supported by HMRC's published guidance on the medical care exemption (Notice 701/31 Health Institutions) in existence in 2007 prior to the request for a ruling, which was republished in materially identical terms in 2011 and remained current at the date of judgment.

88. The interim relief awarded prevents the implementation of HMRC's decision until three months after the First-tier Tribunal hands down its decision in the main tax appeal. The court also indicated that, should the taxpayer lose in the First-tier Tribunal, it may be entitled to further time to make any necessary alterations to its business model, leaving the door open for a future hearing on the issue of what would be a reasonable period.

89. The court therefore accepted that a taxpayer's legitimate expectation of a particular tax treatment could extend to the future and was not limited to prohibiting HMRC's collection of tax for the past.

90. This is the first time that a court has granted interim relief in the form of an order restraining HMRC from collecting tax in the future, which it considers to be due, whilst an appeal remains pending in the First-tier Tribunal regarding the correct tax treatment.

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Conclusions

91. Interim relief to prevent the immediate implementation of a proposed change in tax treatment may be available to a taxpayer making an application for judicial review.

92. A judicial review claim needs to be issued in the High Court, separate from any tax appeal to the First-tier Tribunal, and therefore different procedures and time limits will apply.

93. If taxpayers believe they may have a claim for judicial review in respect of a ruling from HMRC on which they have relied, timing is critical. Proceedings must be begun 'promptly' and, in any event, within three months of the relevant adverse decision.

94. The fascinating question will be the scope of an application for judicial review in respect of follower notices and accelerated payment notices – where there are no rights of appeal and especially where it may be argued that the retrospective nature of the measure opens a judicial review challenge on human rights grounds because the payment notice fundamentally changes the procedural basis on which a pre-existing legal dispute is conducted.

95. The First-tier and Upper Tier Tribunal are bracing themselves.

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