Clark and discovery assessments

A recent tribunal decision might make it increasingly difficult for taxpayers to close down discovery assessments.

The law relating to discovery assessments seems to provide an inexhaustible supply of 'interesting' aspects – and an equally endless supply of tribunal cases. There have been some recent decisions about whether inattention on the part of HMRC can cause a discovery to 'lose its newness' and become stale, preventing HMRC from raising an assessment even before the end of the limitation period. But even more interesting, is the case of *G Clark v HMRC* [2017] UKFTT 392 (reported in *Tax Journal*, 26 May 2017).

What happened here is that HMRC issued a discovery assessment on Mr Clark because it took the view that there was a liability to tax which had not been assessed. However, in due course, it concluded that there were actually no grounds for the loss of tax it thought existed.

However, HMRC found another area where it thought there was a loss of tax and said that the earlier discovery assessment was sufficient to cover this as well.

Er, no – said Mr Clark. The awareness of the hypothetical HMRC officer of a possible loss of tax can only refer to that loss of tax.

The tribunal explained that for the purposes of determining whether a discovery assessment has been validly made, it is necessary to identify the loss of tax that has been asserted by the officer; and then to test whether the further conditions in TMA 1970 s 29 have been met by reference to that loss of tax. That sounds pretty much what Mr Clark was arguing.

However, the tribunal went on to say that it is entitled to apply the law to the facts as it finds them and to form its own view. It does not have to confine itself to the reasons advanced by HMRC, nor indeed is it constrained by the arguments of either party, before or at any stage in the proceedings. In this case, there was a discovery and there was an assessment, and the tribunal saw no reason why they should not be linked up.

That is all very well, but surely this means that HMRC can issue a discovery assessment and, if it is found to be wrong or unfounded, it can thrash around indefinitely to find something (anything) to which the assessment might apply.

That must be a recipe for abuse. It enables HMRC to keep the time limit for an assessment open indefinitely, simply by raising a discovery assessment which is groundless in the hope that something will turn up eventually.

The tribunal did suggest that there was a limitation on the scope of the discovery assessment. It said that it cannot extend to a loss of tax for which no valid assessment was capable of being made by reason of a specific prohibition under s 29 – for example, if HMRC was already aware of the relevant facts. Unfortunately, a review of earlier cases on the subject indicates that such limitation is largely illusory.

> Surely this means that if a discovery assessment is found to be wrong or unfounded, HMRC can thrash around indefinitely to find something to which the assessment might apply

Accordingly, it is likely to become seriously difficult to close down a discovery assessment in future because, while it is alive, it can cover anything.

I wonder what the will of Parliament might have been on this point. ■

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The High Court ruling in *Glencore Energy*

A commercial judicial review concerning the diverted profits tax clarifies the High Court's power to grant permission to appeal.

Does the High Court have the power to grant permission to appeal against its own decisions to refuse permission for judicial review after a hearing?

No, says the case of *Glencore Energy UK Ltd v HMRC* [2017] EWHC 1587 (Admin), in which the High Court clarified the operation of civil procedure rules (CPR).

The case arose from an application for judicial review made by Glencore Energy (the multinational mining giant and taxpayer), against a decision by HMRC to impose a charge for diverted profits tax under FA 2015.

Glencore's application was dismissed on the basis that there were alternative remedies available to it in the form of statutory review and appeal procedures, (judicial review being a remedy of the last resort) and because the errors complained of made no substantial difference to the outcome.

The dispute focused on whether the CPR provides the High Court with the power to determine an application for permission to appeal against the refusal of permission for judicial review.

CPR 52.3(2) provides for a general rule on applications for permission to appeal which allows the lower court or the appeal court to grant permission.

CPR 52.8 contains a specific rule for judicial review proceedings which states that there is no right for the High Court to grant permission to appeal following refusal of permission and that the disappointed party must seek permission to appeal from the Court of Appeal.

That must be done within a very short deadline of seven days. The relationship between these two rules had not been considered previously until now.

The judge concluded (at paras 10–12):

'CPR 52.3(2) is a general rule whereas CPR 52.8 is a special rule applicable to judicial review. There would be no point in CPR 52.8 having been drafted had it been intended that the general rule should govern cases where permission to apply for judicial review had been refused after a hearing.

'It is true that CPR 52.8 does not expressly state the negative, i.e. that the High Court, having refused permission, has no power to grant permission to appeal. But that it the silent premise upon which it is drafted.

'The logic behind these rules must be understood in the context of the regime governing judicial review in CPR 54. A litigant cannot bring proceedings for judicial review unless permission is granted and if no permission is granted there are no proceedings on foot: CPR 54.4. Where the High Court has refused permission on paper then the litigant can renew the application before the High Court but cannot appeal that refusal: CPR 54.12. Where the applicant has been refused permission after an oral hearing then there is a specific rule (CPR 52.8) enabling the disappointed litigant the chance to request the Court of Appeal to grant permission to bring proceedings. CPR 54.4, 54.12 and 52.8 thus provide a complete code which governs the bringing of proceedings for judicial review.'

While the decision took place in the context of commercial judicial review, its guidance is likely to affect any public law practitioners dealing with applications in the Administrative Court. ■

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