

# In The NIC Of Time?

## HMRC v Benchdollar Limited

**A**lbert Einstein once said that the only reason for time was to stop everything happening at once, but in recent years, tax cases on the application of time limits seem to have had something of a 'big bang'. This article explains that (despite a huge amount of comment in the professional press) the decision in the recent High Court case of *HMRC v Benchdollar Limited and Others* [2009] EWHC 1310 (Ch) will not be one of 'general relativity' outside the scope of national insurance contributions ('NICs') but does seem to be part of an emerging 'grand unified theory' of time limits. In *Benchdollar*, HMRC's claim for unpaid NICs was allowed in part even though HMRC's claim was brought more than six years after the payment of the NICs became due. A mutual mistake of law by HMRC and a taxpayer prevented the taxpayer from relying on the Limitation Act 1980 (LA 1980) against HMRC's out of time claim. An unusual feature of NICs, is that after a liability to NICs has been 'decided' by HMRC, and the decision has been appealed by the taxpayer, establishing the liability is a matter for resolution by the tax tribunal. However, if unpaid, the NIC has to be collected through County Court proceedings issued by HMRC for the recovery of a debt. *Benchdollar* is a case all about NIC collection procedures. Does it have wider application?

### BACKGROUND

HMRC's claim arose out of NIC planning transactions which involved paying employees by assigning to them an entitlement to the proceeds of certain 'trade debts' so that the employee had not been given cash, but instead a right under a contract. The trade debts were then settled in cash. The intention was for this arrangement to amount to 'payments in kind' and therefore be treated as excluded

*Joseph Howard, Barrister, and Rupert Shiers, Partner, at McGrigors LLP, look at the HMRC v Benchdollar Ltd case and its implications for tax, particularly National Insurance Contributions*

for the purposes of computing earnings-related NICs. HMRC disagreed with the taxpayer's analysis of the legislation and issued a decision that the NICs were payable. The taxpayer appealed against the decision, disputing the liability.

HMRC was aware that enforcing any decision in its favour would be subject to the limitation defence under s 9 of the LA 1980. Under s 9 of the LA 1980 'an action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued'. It was common ground between the parties that time began to run when each payment of NICs fell due, which was the 15<sup>th</sup> day after the end of the income tax month in which the earnings were paid. HMRC's usual procedure was to start proceedings for a protective County Court claim for payment of the disputed amount, which would be adjourned pending determination of the substantive appeal in accordance with s 117A(5) of the Social Security Administration Act 1992.

### THE 'ACKNOWLEDGEMENT OF DEBT'

Resolution of the substantive issues in the test case took longer than normal to complete. Although the planning was implemented in the years 1994/95 through to 1997/98, the dispute was not heard by the Special Commissioners until July 2006: *Spectrum Computer Supplies Ltd & Anor v Revenue and Customs* [2006] SPC00559. Due to the number of protective claims that it would have had to make, and in order to reduce its costs and administrative burden, HMRC initiated and entered into various

'home-made' agreements with taxpayers which it assumed (without taking legal advice) would be legally effective to refresh the start date of the limitation period to the date of those agreements.

The agreements contained either an acknowledgement by the taxpayer of HMRC's claim, or a part payment of £1 by the taxpayer on account of the claim. Both of these routes aimed to conform to the particular provisions of the LA 1980 and both were intended to buy HMRC another six years.

### HMRC'S DOUBTS

At some point HMRC began to doubt the legal effectiveness of the agreements, but nevertheless continued to enter into them. Finally, on 9 August 2001 HMRC received legal advice that the agreements were not effective, and by 11 September 2001, had considered that advice but resolved not to take any other steps to protect those claims from becoming time barred (by bringing protective County Court proceedings or entering into effective standstill agreements with the taxpayers).

In 2006 the *Spectrum* case was decided in favour of HMRC, which then began to issue proceedings against each taxpayer for the unpaid NICs in the Newcastle Upon Tyne County Court. Some taxpayers argued that the claims were time barred, it being over six years since the cause of action for payment of the NICs accrued. However HMRC, (since it now accepted that the agreements did not operate to restart the running of time from the date of the agreement) argued that either they had a contract with the taxpayer which provided that the taxpayer would not

raise the limitation defence (a standstill or 'tolling' agreement), or that the taxpayer was estopped from raising the limitation defence. The claims were transferred to the High Court due to the complexity of the issues of limitation and estoppel.

### THE HIGH COURT DECISION

Mr Justice Briggs dismissed HMRC's argument that the taxpayer contracted not to raise the limitation defence, on the basis that there was no evidence whatsoever of any intention on the parties to contract (see para 40 of the judgment). He then turned to the estoppel issues.

Broadly speaking, an estoppel is a legal doctrine which prevents a person relying on his or her strict rights when to do so would be unfair or 'unconscionable'. The judge immediately dismissed the possibility that the parties' dealings gave rise to an estoppel of the contractual type, formerly known as 'estoppel by deed'. He then went on to consider whether the facts of the parties' dealings gave rise to a non-contractual 'estoppel by convention'. After a thorough review of the applicable case law, the judge summarised (at para 52 of the judgment) the principles applicable to a non-contractual estoppel by convention.

The judge held (at paras 53-59) that, on the facts of the case all the requirements were present up to the end of the normal limitation period for the claims where payment of the NICs had become due more than six years before 11 September 2001, the point when HMRC had notice the agreements were ineffective and it had decided not to act further to protect its claims. Therefore, HMRC could enforce its claims for those periods. For claims for NICs where payment had become due less than six years before that date so that the normal limitation period was still open after HMRC realised its mistake, HMRC could not say that it was prejudiced by its reliance on a common understanding. HMRC was 'the author of its own misfortune' for failing to protect its claims by other means, and it was not unconscionable for the taxpayer to raise the limitation defence, notwithstanding the benefit it received. Consequently, the taxpayer was able to raise the limitation defence and HMRC could not claim payment of the debt arising from the unpaid NICs.

### TIME LIMITS

The dispute in the *Benchdollar* case was particular to the peculiar way in which unpaid NICs are claimed and recovered, and the limitation difficulties which arise in relation the lengthy time-span from the start of a tax dispute to its resolution if HMRC

were allowed to delay things, especially in correspondence. It was necessary for HMRC to make a protective claim for payment of the NICs so as to exercise its cause of action within the time limit imposed by the 1980 Act, notwithstanding that the tax had been 'decided' and the decision was under appeal. This is not a situation many taxpayers will see.

The big question though is how long, after the time-limit expires under the protection of the estoppel, does HMRC have to bring its claim? For example if a claim became time-barred on 10 September 2001, is HMRC's right to claim set in stone for ever, or must it act to bring that claim with reasonable promptness? For a claim for NICs in respect of which time began to run on (say) 2 June 1994 (in respect of a payment early on in the 1994/1995 tax year) the claim would have become time barred on 1 June 2000. However, HMRC would not have brought claims to enforce payment of the NICs in the County Court until the *Spectrum* appeal was determined. Consequently, there was (in respect of the earliest payments) a period of over six years between the end of the statutory limitation period and the bringing of the claim by HMRC, all of which fell within the protection of the estoppel. In other words HMRC's right to bring the claim was set in stone'.

This might be seen as simply consistent with the decision of the House of Lords in the joined cases of *Fleming and Conde Nast v HMRC* [2008] UKHL 2, where since taxpayers were blocked from making a claim during the normal window (by the words of the legislation) their right to claim was (broadly) set in stone, at least in the short term. However, the reason for not reading in an effective transitional period in *Fleming* was to do with the principle of legal certainty and the prohibition on judicial legislation, whereas an estoppel is a common law (or equitable) doctrine under the proper jurisdiction of the Courts. A direct read-across from *Fleming* as the basis of a general theory is not well founded.

The better view is surely that where HMRC's claim is protected by an estoppel and the time limit for bringing a claim has expired, it will be subject to a reasonable 'transitional period' in which it must bring its claim, in order for that estoppel to remain effective.

### PROCEDURE GOING FORWARD

What approach is HMRC likely to take going forward for NICs? It might be the case that HMRC has been so spooked by how close it came to an embarrassing loss of tax that, in future, it will take the draconian

steps of issuing protective County Court claims in every case. However, given the comments of the Judge (see para 8) in the case that it would have been an obvious solution for HMRC obtain the desired result by to entering into legally effective standstill agreements with taxpayers, it seems more likely that a cash-strapped HMRC will simply get an effective tolling agreement rolled out as soon as possible.

### FAILURE TO TAKE LEGAL ADVICE

The other issue of general interest which arises out of the *Benchdollar* decision was how HMRC actually benefitted from its own failure to take legal advice with regard to whether its anti-limitation agreements were effective. Notwithstanding that HMRC failed to use the established form of 'tolling' or 'standstill' agreement with taxpayers to contract out of the limitation defence, or to take legal advice as to the effectiveness of its 'home made scheme' and notwithstanding the fact that there was evidence of HMRC's doubts as to the efficacy of the scheme from the start, which did not shrink but grew over time, the High Court allowed HMRC to benefit from the principle of estoppel up until 'a reasonable time' after it had taken legal advice and decided to reject it. Where the inefficacy of the scheme was pointed out to HMRC by taxpayers advisers, HMRC quickly made a protective claim against that taxpayer rather than address the scheme as a whole! One cannot but question whether a tardy and incompetent taxpayer in a similar position would have been treated so generously by the Court!

### CONCLUSION

The technical decision in this case is clearly of limited application outside the scope of NICs. It is not a situation likely to arise again as even in the context of NICs, HMRC will surely use proper 'standstill' agreements to achieve the required results. Likewise, taxpayers should not be concerned that their Limitation Act protections have been eroded. But there is an evident undercurrent to the decision. In keeping with the mood of the times, the Courts will strive to protect HMRC's rights to recover taxes, almost in spite of its own, sometimes poor, efforts to do so itself.

Joseph Howard, Barrister for McGrigors LLP, can be contacted at Joseph.Howard@mcgrigors.com or on 020 7054 2715. Rupert Shiers, Partner at McGrigors LLP, can be contacted at Rupert.Shiers@mcgrigors.com or on 020 7054 2737.