

EVERY SECOND COUNTS: LIMITS ON HMRC’S POWER TO RECOVER NICs

by Michael Jones

Introduction

HMRC has at its disposal a considerable array of powers that can be used to collect the tax found to be due following assessment. Among them is the power, found in sections 66 and 68 of the Taxes Management Act 1970, to commence proceedings against the taxpayer in the County Court or the High Court for the recovery of the tax as a debt due to the Crown. Unlike ordinary litigants, however, HMRC is not subject to the usual time limits set down in the Limitation Act 1980. This is made clear by section 37(2)(a) of the Act, which states that, “this Act shall not apply to any proceedings by the Crown for the recovery of any tax or duty or interest on any tax or duty”. Accordingly, HMRC is able to recover arrears of tax using this power irrespective of the when the liability to pay arose.

But National Insurance is different. It is not a tax, we are told, but a “contribution”; and in line with that stance HMRC appears to accept that National Insurance is not “a tax or duty” within the meaning of section 37(2)(a). As a result, and since there is no specific provision governing their recovery, proceedings for the collection of National Insurance contributions (“NICs”) are subject to the time restrictions of the 1980 Act. In theory, at least, this can provide a taxpayer with a total defence to an otherwise unstoppable claim.

In practice, however, HMRC does not lightly give up its claims to arrears of NICs, and has been known to use several techniques to counter a limitation issue, ranging from a simple demand for payment to more sophisticated arguments based on provisions in the 1980 Act. Some of the more common techniques will be addressed in turn after a brief look at the basic rules.

General Principles – The Six Year Bar

Underlying the concept of limitation periods is the policy that a defendant ought not to have the threat of a stale claim hanging over him indefinitely. The Limitation Act 1980 therefore prescribes the period during which any claim must be brought. The clock starts running from the date on which the cause of action accrues, i.e., from the point at which all the facts establishing the essential elements of the claim exist. The clock is stopped when a claim is ‘brought’ in respect of that cause of action, and for the purposes of limitation this means the date on which the claim form is issued, rather than the date of its service on the defendant. Once the relevant period has run out, proceedings cannot be begun, giving the defendant a complete technical defence. The effect of expiration is said to be that the right of action itself is left intact; it just cannot be enforced. We shall see below why this distinction is important.

In the case of the collection of NICs the applicable provision of the 1980 Act is section 9(1), which deals with “actions to recover any sum recoverable by virtue of any enactment”. It provides that such an action shall not be brought after the expiration of six years from the date on which the cause of action accrued. Any claim for the recovery of

NICs must therefore be issued within six years from the statutory due date, otherwise the action is time-barred.

This is the standard position, but it is not the whole picture because, in certain circumstances, other sections of the 1980 Act can operate so as to extend the relevant period. For that reason these sections can be, and are, used by HMRC to counteract a limitation defence; and it is, therefore, important to have them in mind when faced with an attempt to collect NICs that are, *prima facie*, irrecoverable.

If You Don't Ask...

The first, and the bluntest, approach employed by HMRC is simply to ask for the arrears, presumably in the hope that the taxpayer will just pay up without realising that there may be a limitation issue. The collectors can do this because, as mentioned above, the right of action survives the expiry of the limitation period: making payment in these circumstances merely satisfies an unenforceable, but otherwise valid, debt. Accordingly, where it looks as though such a demand might relate to debts over six years old, it should be examined with caution to see whether part, or all, of the claim is out of time.

Concealment

Secondly, section 32(1)(b) of the 1980 Act postpones the commencement of the limitation period where the defendant, or his agent, has deliberately concealed from the claimant any fact relevant to the cause of action. If the collectors can demonstrate such conduct, the six year period will begin to run only from the date on which the concealment is discovered, or could, with reasonable diligence, have been discovered.

This exception exists for obvious reasons, and the central mischief at which it is aimed is clear, although it can become more difficult at the edges. It requires the claimant to show that some fact relevant to the cause of action has been concealed from him either by a positive act or by a withholding of relevant information, but, in either case, with the intention of concealing the fact in question. The need to show intention presents a claimant with a high hurdle, particularly where the alleged concealment involves an omission, and also means that mere ignorance on the part of the defendant ought not to be enough to bring the section into play.

The question of what amounts to “reasonable diligence” in this context adds a further layer of complexity. According to the case law, a claimant is not required to do everything possible to uncover the concealment, just those things that an ordinary prudent person in the position of the claimant would have done, having regard to the particular circumstances of the case at hand.

The relevant HMRC manual (DMBM527140) instructs collectors to investigate NICs arrears over six years old critically, to see if the circumstances of the particular case can support the advancement of the limitation period under the section. Among the factual aspects commonly examined for this purpose are (1) when the NICs liability arose, (2) whether returns detailing a NICs liability were made, (3) whether any returns made were submitted on time, and (4) when the Department could have first taken action

to pursue the debt. If grounds for postponement can be made out collectors are directed to pursue recovery of arrears in the usual way.

Acknowledgement

Taxpayers should also be aware of the acknowledgement provisions in the 1980 Act. Where an outstanding debt is admitted in writing and signed by the taxpayer, HMRC's right of action is deemed to have accrued on the date of the acknowledgement. The effect is to reset the limitation clock, allowing a further six years for collection. Before these provisions can operate, there has to be a sufficiently clear admission of the claimant's rights by the debtor, which will be a question of fact in each case. The acknowledgement need not be express: an implicit admission will do, and there is case law to support the view that a request for time to pay can be enough for these purposes. It is not unknown for HMRC to invite admissions of liability from a taxpayer; and again, if faced with any such invitation, taxpayers and their advisors should consider the position with care before any admission is made.

Part Payments

There are similar provisions that apply where a part payment is made towards the sums due. As with an acknowledgement, a part payment effectively 'restarts' the limitation period from the date of payment, and care should, therefore, be taken where payments on account are being considered. Each case must, of course, be looked at on its own particular facts, but where there are sums due in respect of both income tax and NICs, any payment made on account should be expressly allocated to the outstanding income tax liability, and not the National Insurance arrears, unless to do so would prejudice some other interest of the taxpayer. If this is not done, HMRC is free to appropriate the payment to whatever liability it chooses, although it is arguable that if HMRC does so, it will not amount to a payment for the purposes of these provisions. If neither party makes an allocation, the law will assume that unbarred claims are paid before time-barred ones. Where the taxpayer has outstanding National Insurance liabilities from different tax years, some of which arrears are time-barred and some of which are not, it is prudent, absent other considerations, to allocate any part payment to those claims that are still 'live' and enforceable. If this is not done then it is likely that HMRC will seek to appropriate the payment to the time-barred claims that cannot otherwise be collected and then pursue the recovery of the remainder.

In respect of both acknowledgement and part payment, a current period of limitation may be repeatedly extended by further acknowledgments or payments, but once a claim is barred by the 1980 Act it cannot be revived in this way.

Conclusions

In the space of this quick guide it has only been possible to highlight a few of the more fundamental aspects of this sometimes difficult area. The issues involved can be far from straightforward and will very often depend on the facts of the individual case at hand. When used correctly, however, a limitation point can provide a taxpayer with a

complete answer to a NICs claim brought out of time. It therefore pays to examine each case with care, taking specialist advice where necessary, to see whether a limitation argument is available as either a lever in negotiations with HMRC or as a total defence to an action for recovery.