

DELAY AND ALTERNATIVE REMEDIES IN JUDICIAL REVIEW CLAIMS AGAINST HMRC

By Michael Firth

As the saying goes, the early bird gets the worm, but the early worm gets eaten. And so it is with judicial review claims against HMRC. Commence the claim before you have exhausted your appeal rights to the FTT, and HMRC may argue that you have failed to exhaust all alternative remedies. Wait until you have a decision from the FTT, however, and you can expect HMRC to argue that you are hopelessly out of time to bring your claim for judicial review. Taxpayers therefore appear to face a choice between being the early worm (get eaten by alternative remedies) or the late bird (no worm due to delay). HMRC have even been known to argue both points in the same claim at the same time; that is, the taxpayer should be refused permission to proceed with judicial review both because he/she has not yet exhausted alternative remedies and is, in any event, late. The possibility of any tension between effectively arguing that the taxpayer is both too early and too late appears lost on HMRC.

The purpose of this article is to explain why HMRC are generally wrong on both accounts. First, as regards alternative remedies, because the FTT will typically refuse to consider public law issues on a statutory appeal. Second, as regards delay because it is usually difficult to identify any prejudice caused to HMRC by virtue of the delay, not least because the same decision will often be under challenge before the FTT, and, therefore, there is a good reason to extend time.

Alternative remedies

HMRC are always keen to observe that judicial review is

a remedy of last resort and that it should not be made available to persons with an alternative remedy. They are particularly keen, these days, to refer taxpayers and the Courts to the case of *R (Glencore Energy UK Ltd.) v HMRC Revenue and Customs* [2017] EWCA Civ 1716 and, in particular, paragraph 57:

“In my judgment the principle is applicable in the present tax context. The basic object of the tax regime is to ensure that tax is properly collected when it is due and the taxpayer is not otherwise obliged to pay sums to the state. The regime for appeals on the merits in tax cases is directed to securing that basic objective and is more effective than judicial review to do so: it ensures that a taxpayer is only ultimately liable to pay tax if the law says so, not because HMRC consider that it should. To allow judicial review to intrude alongside the appeal regime risks disrupting the smooth collection of tax and the efficient functioning of the appeal procedures in a way which is not warranted by the need to protect the fundamental interests of the taxpayer. Those interests are ordinarily sufficiently and appropriately protected by the appeal regime. Since the basic objective of the tax regime is the proper collection of tax which is due, which is directly served by application of the law to the facts on an appeal once the tax collection process has been initiated, the lawfulness of the approach adopted by HMRC when taking the decision to initiate the process is not of central concern. Moreover, by legislating for a full right of appeal on fact and law, Parliament contemplated that there will be cases where there might have been some error of law by HMRC at the initiation stage but also contemplates that the appropriate way to deal with that sort of problem will be by way of appeal.”

The principle they seek to derive from this passage is that where a taxpayer has the right to appeal to the FTT against

a HMRC decision, that is an alternative remedy and, therefore, judicial review should be refused.

It is sometimes tempting to High Court Judges with busy lists, containing more “deserving” cases than a taxpayer’s attempt to escape liability for tax that ‘Parliament has declared due’, to seize upon the intuitive proposition that a statutory appeal to the FTT is an alternative remedy and, therefore, the claim can be dismissed in short order. The fallacy in this reasoning is that the FTT appeal would only provide an alternative remedy if the FTT was able to hear and decide the same grounds as are raised in the judicial review. As matters stand, in most situations the FTT will refuse to hear arguments raising public law issues, on the basis that it does not consider that it has jurisdiction to do so (and HMRC will usually object to any attempt to raise such arguments in the FTT by seeking to have them struck out). Accordingly, for true public law challenges to a HMRC decision, the FTT appeal route does not provide an alternative remedy. *Glencore Energy UK Ltd* does not, in fact, say anything different. The reason why Glencore wished to pursue judicial review was not because the issues they raised could not be aired before the FTT (each of them could – see §§59 – 64), but because of the mandatory review period before the challenge could be taken to the FTT (§§65 and 69).

The Court of Appeal explicitly recognised that the alternative remedy principle would not apply to true public law challenges that could not be considered by the FTT:

“In [*re Preston* [1985] 1 AC 835], the allegation was that the Inland Revenue Commissioners had made a promise not to collect tax in certain circumstances (i.e. had created what would today be called a legitimate expectation not to collect an amount of tax), and although the allegation was not made out, the House of Lords was prepared to accept that such a claim could be made by way of judicial review. In fact, the tax appeal process

would have been incapable of dealing with such a claim of unlawfulness on the part of the Commissioners, which did not go to the merits of whether the criteria for imposition of tax were or were not met (a subject fit for examination on appeal), but rather to enforcement of fundamental rule of law standards against the Commissioners if they had in fact made a promise not to initiate the tax collection process in the first place.”

The same point was also made by Lewis J in *R (oao Manhattan Systems Limited) v. HMRC* [2018] EWHC 1682 (Admin):

“Where Parliament has created a statutory appellate system to hear appeals against decision, that system, rather than judicial review, is generally appropriate, and permission to apply for judicial review is generally refused, because of the availability of an alternative remedy which is adequate (see. e.g. *R (Glencore Energy UK Ltd.) v HMRC Revenue and Customs* [2017] EWCA Civ 1716). There are cases where the particular grounds of challenge available before a tribunal are narrower than those available in judicial review, in which case judicial review may be appropriate in relation to those other grounds (see, for example, *CC & C v HMRC* [2014] EWCA Civ 1653).”

Indeed, this is consistent with the fact that in *R (oao Davies and another) v. HMRC* [2011] UKSC 47 the Supreme Court specifically indicated that the judicial review claim should have gone before the FTT appeal. This was the course taken by the first appellants but not the second appellant:

“It is unfortunate that, for whatever reason, the course taken in the case of the first appellants was not taken in the case of the second appellant. Were either of his contentions in the present proceedings to prevail, it would follow that the Commissioners invested a large amount of time – as well as a conspicuous degree of care – in application to the issues of his residence and

ordinary residence of principles inapplicable to them. In their Decision they expressly noted that their function was to apply the law rather than the guidance in the booklet. But, whereas issues of fact between the Revenue and the first appellants in relation to their circumstances in 2001-02 remain unresolved, the now conclusive resolution by the commissioners of the issues of fact between the Revenue and the second appellant in relation to his circumstances from 1992-93 to 2003-04 at any rate throws the effect of these proceedings into sharp relief. For, although it remains an open question whether, upon application of the ordinary law, the first appellants were resident and ordinarily resident in the UK during the year relevant to them, we know that, upon application of the ordinary law, the second appellant was resident and ordinarily resident in the UK during the years relevant to him. As the appellants rightly stress, a legitimate expectation that the ordinary law will apply to them is a matter of no legal significance in that it adds nothing to the right of every citizen to due application to him of the ordinary law.” (§5)

It follows that, generally, the FTT appeal should not be regarded as an alternative remedy.

In terms of other possibilities, one that taxpayers should be aware of is that in cases not raising issues of law or policy, an application to the Adjudicator or Parliamentary Ombudsman may be considered to provide an alternative remedy (*R (oao NCM 2000 Ltd) v. HMRC* [2015] EWHC 1342, §§51 – 59).

Even where there is an alternative remedy, however, it must still be considered whether it is an effective and more suitable remedy:

“Whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than procedure

by way of judicial review; whether the matter depends on some particular or technical knowledge which is more readily available to the alternative appellate body; these are amongst the matters which a court should take into account when deciding whether to grant relief by way of judicial review when an alternative remedy is available.”

(*ex p. Waldron* [1986] QB 824 at 852, Glidewell LJ).

An example of where the FTT appeal route might not be equally as effective and suitable could be where there is a general challenge to the lawfulness of a statutory regime that is of wide importance:

“The Sections are on-going legislative provisions. The issue of the legality of the Sections and their consistency with Community law in the public interest must plainly be determined as a matter of urgency and these proceedings are the appropriate vehicle for this purpose. To refuse this application on that ground would be to promote rather than remove uncertainty and would scarcely accord with the duty of the court (if necessary by its own motion) to consider the compatibility of the Sections with Community law and promote legal certainty. I accordingly decline to accede to this objection on behalf of the Defendants.” (*R (oao Federation of Technological Industries) v. CCE* [2004] EWHC 254 (Admin), §3).

If there is real doubt as to the existence of an equally effective and suitable alternative remedy, the sensible course is for the Court to stay the judicial review rather than dismiss it.

Delay

The general rule is set out in CPR 54.5:

- “(1) The claim form must be filed –
 - (a) promptly; and
 - (b) in any event not later than 3 months after the grounds to make the claim first arose.”

This time limit may not be extended by agreement between the parties (CPR 54.5(2)).

Alternatively, but to the same effect (*R (oao Clark) v. HMRC* [2017] UKUT 379 (TCC), §54) is r.28 of the Upper Tribunal Rules 2008 (SI 2008/2698):

“(1) A person seeking permission to bring judicial review proceedings before the Upper Tribunal under section 16 of the [Tribunals, Courts and Enforcement Act 2007] must make a written application to the Upper Tribunal for such permission.

(2) Subject to paragraph (3), an application under paragraph (1) must be made promptly and, unless any other enactment specifies a shorter time limit, must be sent or delivered to the Upper Tribunal so that it is received no later than 3 months after the date of the decision, action or omission to which the application relates.”

Given that commencing a judicial review in the Upper Tribunal is a simpler process, with no fee, the latter is more likely to be relevant.

When grounds first arise

The question of when the “grounds to make the claim first arose” can sometimes lead to debate in claims against HMRC. Often the crux of the matter is that HMRC have decided that additional tax is due. This decision may crystallise in stages:

1. After prolonged correspondence, HMRC set out their view that further tax is due and state an intention to raise assessments.
2. HMRC raise the assessments.
3. HMRC carry out an internal review of the assessments (at the taxpayer’s request) and uphold the assessments.

Common sense suggests that the grounds should be considered to arise only after the conclusion of stage 3, which represents

HMRC final view on the matter which cannot be displaced by any further internal procedure.

HMRC have been known, however, to argue that the time limit runs from stage (2) and, sometimes even, stage (1). The arguments against such an approach are convincing. First, it is only after stage 3 that HMRC's position is effectively set in stone. Second, if the taxpayer were to seek judicial review after stage (1) he/she would not actually have the decision that crystallises the liability to tax. If the taxpayer were to seek judicial review after stage (2) he/she would have failed to await the outcome of the review process which could (theoretically) lead HMRC to uphold the public law complaint. Third, a common-sense approach is supported by the authorities:

“I do not think it fair to blame the appellant for not having tried to launch judicial review proceedings earlier. It is not obvious to me that the right approach to difficult problems such as this is to rush off to the administrative court. Most people try to resolve their difficulties over access to public services by negotiation and agreement with the authorities. Very few have the knowledge or the resources to approach the administrative court. If all the people who were trying to persuade public authorities to comply with their legal obligations did so, the court would soon be swamped. Better by far to try and achieve a negotiated solution. Indeed, while negotiations are going on, the court may well refuse leave on the ground that the application is premature.” (*A v. Essex County Council* [2010] UKSC 33, §117)

On any sensible view, commencing judicial review whilst HMRC's internal review is underway would be premature. Even if one did take stage 1 (or 2) as the time when grounds first arose, it is difficult to see why there would not be a good reason for extending time:

“In our judgment, on the facts of this case, where each of the decisions was a step along the path required by statute when a direction under section 38 is being contemplated by a PCC, and where the Chief Constable argues that a flawed approach by the PCC underlies all the decisions made, it is understandable that the Chief Constable should wait until the final decision before launching proceedings. Those circumstances provide a good reason to extend time. We anticipate that PCC would have alleged a challenge was premature if launched before the process was completed.” (*R (oao Crompton) v. Police and Crime Commissioner for South Yorkshire*) [2017] EWHC 1349 (Admin), §107, Garnham J).

Promptness

It will be noted that the time limits in the CPR and Upper Tribunal rules both have a short stop and a long stop limb: the claim must be brought promptly and, in any event, within three months. The promptness requirement generally has no application in cases raising EU law issues because it is so vague as to be contrary to EU law (*Sita UK Ltd v. Greater Manchester Waste Disposal Authority* [2011] EWCA Civ 156, §11). In other cases, it is potentially engaged, but its effect depends upon the nature of the decision being challenged: is it the type of decision that ought to be challenged immediately because of the potential effect on good administration?

“What is “prompt” depends on the nature of the challenge. This was in substance a challenge to a budgetary decision of central government. In my judgment it is self-evident that such a challenge has to be brought very promptly indeed, since it potentially threatens the budgetary arrangements of the Government for an entire year.” (*R (oao Liverpool CC) v. Secretary of State for Health* [2017] EWHC 986 (Admin), §45, Garnham J)

“Prompt action is necessary so that the parties, and the public generally, know whether they are able to proceed on the basis that a decision is valid and can be relied on and so that they can plan and make business decisions accordingly. In the context of a challenge to a decision affecting the sale of a significant, publicly-owned asset, the wider public interest, as well as the interest of the bidders, provide a real need to ensure that any challenge which may affect the sale process is resolved quickly.” (*R (oao Sustainable Development Capital LLP) v. Macquarie Corporate Holdings Pty Ltd* [2017] EWHC 771 (Admin), §31, Lewis J)

If the lapse of time causes no prejudice, there is unlikely to be a lack of promptness:

“Indeed, when considering whether an application is sufficiently prompt, the presence or absence of prejudice or detriment is likely to be the predominant consideration. The obligation to issue proceedings promptly will often take on a concrete meaning in a particular case by reference to the prejudice or detriment that would be likely to be caused by delay.” (*Maharaj v. National Energy Corporation of Trinidad and Tobago* [2019] UKPC 5, §37).

It is difficult to see how a challenge to a tax assessment, for example, requires any particular urgency above and beyond the three-month time limit or what prejudice HMRC could suffer as a result of a claim for judicial review not being commenced within the three month long-stop time limit. If HMRC consider that they have suffered any prejudice, it is incumbent upon them to identify it at the outset:

“Nowadays the pre-action letter of response allows a respondent or interested party to draw attention to the possibility of any prejudice or detriment. Compliance with pre-action protocols and the Civil Procedure Rules should ensure that in most cases issues of prejudice or detriment to good administration are identified at the

outset.” (*Maharaj v. National Energy Corporation of Trinidad and Tobago* [2019] UKPC 5, §41).

Extension of time

Claims brought outside this time limit require the Court or Tribunal to exercise its discretion to extend time. Consideration of the reason for the delay is a relevant factor but the Administrative Courts have not been applying the strict, modern case law on relief from sanctions to extending the time for bringing a claim for judicial review (despite HMRC sometimes attempting to rely on CPR 3.9 and the related case law).

Some cases pose the question in terms of whether there is a good reason to extend time (e.g. *R (oao Crompton) v. Police and Crime Commissioner for South Yorkshire* [2017] EWHC 1349 (Admin), §107; *R (oao Long v. Secretary of State for Defence* [2014] EWHC 2391, §111) which involves consideration of, inter alia, the reasons for the delay and any prejudice caused. Other cases ask whether there is a good reason for the delay; indicating that it is essential that the claimant provides a good reason for the delay with the question of prejudice to the public authority only arising once such an explanation has been provided. For example:

“In general, the courts require strict adherence to the time limit. It is open to the Court to grant an extension of time under CPR3.1(2)(a) in an appropriate case. However, there must be a good reason or adequate explanation for the delay and the Court must be satisfied that extending the time limits will not cause substantial hardship, or substantial prejudice or be detrimental to good administration.” (*R (oao NCM 2000 Ltd) v. HMRC* [2015] EWHC 1342 (Admin), §40)

This conflict in the authorities has now been resolved by the Privy Council in favour of the former approach: the time limit may be extended even where there is no good reason for the

delay and that absence of prejudice to the public authority is a key consideration in favour of extending time.

Absence of prejudice as a key consideration in favour of extending time

It is relevant to start by considering why the time limit for judicial review is relatively short (compared, for example, to the time limit for bringing a contract or tort claim. The one month time limit for appealing a HMRC assessment to the FTT is readily explicable by the fact that such an assessment will nearly always be the culmination of an investigation by HMRC of which the taxpayer is aware, will identify itself as an appealable decision and will indicate when and how that appeal should be lodged). In many areas of public life there are very good reasons why delay in bringing a claim for judicial review may be prejudicial to other persons or would otherwise be detrimental to good administration. This is for the simple reason that often public authorities take decisions that will require the implementation of real-world consequences: constructing a building or closing a public service, for example. It is obvious that a successful challenge to the decision after construction has commenced or the service has been closed will likely cause serious difficulties:

“[the Board of the Privy Council] is satisfied that where, as here, the proceedings would result in delay to a project of public importance, the courts were right to adopt a strict approach to any application to extend time. It was unnecessary to show specific prejudice or hardship to particular parties.” (*Fisherman and Friends of the Sea v. Environmental Management Authority* [2018] UKPC 24, §25 – concerning a challenge to the decision to grant a certificate of environmental clearance to BP Trinidad and Tobago).

There are, however, other cases where although a decision has been taken and although the time limit may have passed, the challenge is retrospective in nature. The Supreme Court

has recognised that such cases raise different considerations when it comes to delay and are more akin to tort claims:

“The judge placed at the forefront of his account of the relevant legal principles that “there is a significant public interest in public law claims against public bodies being brought expeditiously” (para 119). That is of course true in judicial review, when remedies are sought to quash administrative decisions which may affect large numbers of people or upon which other decisions have depended and action been taken. It is normally a prospective remedy, aiming not only to quash the past but also to put right the future. Expedition is less obviously necessary in a claim for a declaration in vindication of the claimant’s human rights, upon which nothing else depends, or of a claim for damages. These are retrospective remedies, aimed at marking or compensating what has happened in the past. Public authorities are no longer in any different position from other defendants in the general law of limitation (see limitation Act 1980, s 37(1)). This claim is more akin to a tort claim than to judicial review.” (*A v. Essex County Council* [2010] UKSC 33, §116, per Lady Hale).

A judicial review claim seeking to avoid payment of tax HMRC claim is due falls into this latter category. Given that the reason for the short time limit is the potential for prejudice to other persons/good administration, it would be illogical to exclude this factor from consideration in an application to extend time unless and until a good reason for the delay has been shown. The Privy Council has now confirmed that this is the correct approach in the context of a similar debate arising in the case law of Trinidad and Tobago:

“One school of thought would exclude the presence or absence of prejudice or detriment from an assessment of whether delay has been unreasonable and whether an

extension of time should be granted. On this approach it is only if there are good grounds to extend time that the court will go on to consider whether an extension of time would result in prejudice or detriment. If prejudice or detriment is shown, leave to apply for judicial review may still be refused. If, however, there are no good grounds for extending time, leave to apply for judicial review will be refused notwithstanding the fact that no likely prejudice or detriment has been established. In this way an applicant is deprived of the opportunity to rely on an absence of prejudice or detriment. Another school of thought considers the presence or absence of prejudice or detriment to be at least a relevant consideration when determining whether there is a good reason to extend time and in *Abzal Mohammed* the Court of Appeal went so far as to hold that the court may not refuse leave if there is no prejudice or detriment.” (*Maharaj v. National Energy Corporation of Trinidad and Tobago* [2019] UKPC 5, §32).

It was held that questions of prejudice or detriment are highly relevant to the grant of an extension of time:

“In the same way, questions of prejudice or detriment will often be highly relevant when determining whether to grant an extension of time to apply for judicial review. Here it is important to emphasise that the statutory test is not one of good reason for delay but the broader test of good reason for extending time. This will be likely to bring in many considerations beyond those relevant to an objectively good reason for the delay, including the importance of the issues, the prospect of success, the presence or absence of prejudice or detriment to good administration, and the public interest.” (§38).

“For these reasons the Board accepts the submission of Mr Fordham on behalf of the appellant that, far from constituting an insulated residual discretion,

considerations of prejudice and detriment are capable of being of key relevance to the issues of promptitude and extension of time.” (§43)

The Privy Council stopped short of endorsing the view that an extension should be granted unless there was *both* undue delay and prejudice or detriment:

“While prejudice or detriment will normally be important considerations in deciding whether to extend time, there will undoubtedly be circumstances in which leave may properly be refused despite their absence. One example might be where a long delay was wholly lacking in excuse and the claim was a very poor and inconsequential one on the merits, such that there was no good reason to grant an extension.” (§47).

In light of this, the position would appear to be as stated by Woolf LJ, three decades ago, in *R v Comr for Local Administration, Ex p Croydon* [1989] 1 All ER 1033, namely, that if the claimant has behaved sensibly and has a valid claim, he/she will not be denied a remedy if there is no prejudice:

“While in the public law field, it is essential that the courts should scrutinise with care any delay in making an application and a litigant who does delay in making an application is always at risk, the provisions of RSC Ord 53, r 4 and section 31(6) of the Supreme Court Act 1981 are not intended to be applied in a technical manner. As long as no prejudice is caused, which is my view of the position here, the courts will not rely on those provisions to deprive a litigant who has behaved sensibly and reasonably of relief to which he is otherwise entitled.” (at 1046 – cited at §29 of Maharaj in the context of setting out the position in England and Wales).

Such a conclusion is important because HMRC’s typical approach is to simply rely on the claimant’s delay as a sufficiently good reason of itself to refuse permission, without HMRC

advancing any case on prejudice at all. Plainly, in light of *Maharaj*, that is inadequate.

When HMRC do attempt to make out a case of prejudice, they have been known to rely on their own expectation that the FTT proceedings would determine the question of the validity of the assessment. It is difficult to see how that amounts to prejudice – what would HMRC have done differently if the judicial review had been commenced in time?

“There is no real prejudice to the Council caused by the delay as its case is not that if the judicial review application had been brought earlier, it would not have incurred the expense which it did because the Council has continued incurring expenses even after the present judicial review claim was brought. I assume that it would have acted in the same way if the judicial review claim had been brought more promptly. So I would not refuse permission on the grounds of delay.” (*R (oao Croydon Property Forum Ltd) v. Croydon LBC* [2015] EWHC 2403 (Admin) §35)

As a general rule, if the decision sought to be reviewed is under appeal to the FTT, it is difficult to see how HMRC can have suffered any prejudice by virtue of the fact that the taxpayer seeks to challenge the same decision on additional grounds in a claim for judicial review. Matters might well be different if the decision sought to be reviewed is not under appeal and a significant amount of time has passed during which HMRC were entitled to consider that the matter was closed.

Pursuing an appeal to the FTT as a good reason for delaying judicial review

For the reasons set out above, the presence or absence of prejudice is likely to be a key consideration when considering whether to grant an extension of time, but it is not the only consideration. Claimants, therefore, must still seek to explain why the delay has occurred with a view to showing that they have behaved reasonably/sensibly.

Pursuing an appeal to the FTT may provide a good explanation as to why judicial review was not sought earlier. There is authority in the form of *R (oao Greenwich Property Ltd) v. CCE* [2001] EWHC Admin 230 where this was accepted:

“The delay in seeking judicial review of that assessment is because the claimant initially appealed to a Value Added Tax tribunal. But on 20 July 2000 the tribunal decided that there was no right of appeal since the claimant’s case depended on an extra-statutory concession and it was “not within the jurisdiction of the tribunal, which is appellate in nature, to review the Commissioners’ application of the [concession] any more than it is within our jurisdiction to review the Commissioners’ “care and management’ powers, such as their conferring and withdrawing the benefits of extra-statutory concessions”. On 15 August 2000 this application for judicial review was made. On 18 September 2000 Richards J granted permission to proceed notwithstanding the delay since he was satisfied that there was a good reason for it. Mr. McKay, who appeared before me on behalf of the Commissioners, indicated that he did not propose to take any point based on delay.” (§1)

HMRC’s typical response to this is that because they (i.e. the Revenue) did not rely on delay, this authority has little weight. Given that extension of time is a matter for the Court and not the parties’ agreement (CPR 54.5(2)), and that, further, Richards J expressly did decide that there was a good reason for extending time, this argument appears misplaced.

There is more recent authority in the form of *R (oao Manhattan Systems Limited) v. HMRC* [2018] EWHC 1682 (Admin), where Lewis J considered that seeking expedition of an appeal from the FTT before applying to the Administrative Court for interim relief provided a good explanation for the delay:

“Initially, I was unimpressed by the period of time taken

by the claimant to bring this claim for judicial review. However, analysing the chronology, the issue of expedition was, in fact, flagged up by the claimant on 6 June 2017. The grounds attached to the Notice of Appeal expressly referred to expedition. The decision on expedition was not given by the First-tier Tribunal until 5 December 2017. The claimant could, in my judgment, put forward the argument...that it was reasonable to await the outcome of the First-tier Tribunal decision and then to apply for judicial review with a view to seeking interim relief. I accept that argument and that explains the delay between the end of the three months from 18 May decision to a period of 5 December 2017. I also accept [the claimant's] submission that the claimant would need a reasonable period of time thereafter in order to bring the judicial review claim. The decision refusing expedition did not restart any 3-month period.” (§13)

On the facts, seven weeks (including Christmas) was at the “outer limits of any acceptable time” for responding to the FTT decision refusing expedition.

Conclusion

The safest advice must always be to commence judicial review as soon as possible and within three months of HMRC setting out the decision that is objected to. Nevertheless, upon proper consideration of the authorities, delay after that time ought not to be a bar to a claim for judicial review if, as is usually the case, HMRC have suffered no prejudice and the taxpayer has been diligently pursuing an alternative challenge to the same decision (e.g. via the FTT).

If HMRC raise the prospect that there is an alternative remedy, typically in the form of an appeal to the FTT, that ought to be unsuccessful unless the grounds raised in the judicial review are the same as would be considered by the

FTT in the statutory appeal. If there is any doubt as to whether there is an equally suitable and effective remedy to judicial review, the correct course is not to dismiss the claim but to stay it and to wait and see if the putative alternative remedy lives up to HMRC's expectations. The right to advance substantive tax law arguments before the FTT is not, however, an alternative remedy to advancing public law arguments in a claim for judicial review.