[2015] UKUT 0092 (TCC)
Case number: TCC-JR/01/2014

Self-assessment and claim for repayment of overpayment on account - tax return including self-assessment and claim for repayment filed with HMRC after 4 year time limit in s.34(1) TMA 1970 – judicial review of decision of HMRC that claim out of time – whether s.34(1) applicable to self-assessment – no - whether decision of High Court in Morris & anr v HMRC [2007] EWHC 1181 (Ch) wrongly decided – no - alternative ground of review that HMRC required to exercise discretion to extend s.34(1) time limit not arising in light of conclusion on main ground, but if Upper Tribunal wrong on that ground then matter to be remitted to HMRC to give full and proper consideration to question whether to exercise discretion to extend - s.3 and s.6 Human Rights Act 1998 and Article 1 of Protocol 1 to the European Convention on Human Rights considered – relief on main ground granted - HMRC ordered to process the Claimant's tax return including self-assessment

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

THE QUEEN **Claimant**

(on the application of ANDREW MICHAEL HIGGS)

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Defendants**

TRIBUNAL: The Honourable Mr Justice Barling

Sitting in public in London on 24th and 25th November 2014

Laurent Sykes and Deborah Clark for the Claimant

Elizabeth Wilson instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Defendants

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DECISION

Introduction: the essence of the dispute

1. This is an application for judicial review of a decision of the Defendants ("HMRC") contained in a letter dated 7 March 2013. Permission to apply was granted on 13 December 2013 by Professor Andrew Grubb sitting in the Administrative Court as a Deputy High Court Judge. At the contested oral hearing at which permission was granted the learned Deputy High Court Judge also granted an extension of time to bring the application. Thereafter the case was transferred to the Upper Tribunal.
2. The dispute arose as follows. In accordance with the requirements of the relevant tax legislation, Mr Higgs ("the Claimant") made payments on account in respect of the tax year 2006/2007 of £46,317, that being an amount equal to the previous year's tax liability. However, the actual tax liability for the year 2006/2007 shown by his tax return, filed on 2 November 2011, is £18,830. There was therefore an overpayment of £27,487. Such an overpayment is repayable automatically by virtue of s.59B(1) of the Taxes Management Act 1970 ("TMA") once the 2006/2007 tax return has been processed, unless there is a decision to enquire into the return, in which case the repayment is frozen: s.59B(4A) TMA. No such decision has been taken here.
3. However, HMRC say that the Claimant's tax return (and more particularly the self-assessment contained in it) was received too late to be valid, as the deadline for making the self-assessment was 5 April 2011, when the 4 year limitation period referred to in s.34(1) TMA expired. It is common ground that that would be the deadline, based on the wording of s.34(1) which has applied from 1 April 2010. Prior to that date the deadline provided for by that provision would have been 31 January 2013. Nothing turns on this, as the essential dispute between the parties is whether s.34(1) has any application to the present case. HMRC submit that it does apply, whereas the Claimant contends that s.34(1) applies only to assessments made by HMRC, and therefore does not apply to a self-assessment such as that contained in the disputed tax return.

4. Many points have been made by the parties, in both written and oral submissions. The fact that I do not specifically mention all of these points does not mean that I have not considered them in reaching my conclusions.

Factual background

5. The salient facts are largely uncontroversial. It seems that at some point in the period 2006-2007 the Claimant resigned his partnership with a leading firm of solicitors. At the end of January 2007 and July 2007 respectively he made two payments on account to HMRC for the year of assessment 2006/7, totalling £46,317. Between these two payments, on 6 April 2007, HMRC issued a notice under s.8 TMA requiring a tax return for that year. Pursuant to that notice the filing date for the tax return was 31 January 2008.
6. In her witness statement dated 2 November 2014 Ms Julie Crowley of HMRC states that the record shows the issue on 22 February 2008 of an automatic reminder letter in respect of the then outstanding tax return. No copy of the letter was retained on file. The Claimant states that he has no record of having received it. His accountants, Knox Cropper, have no record of it.
7. In any event, on 26 March 2008 Knox Cropper completed the Claimant's 2006/7 tax return, including a self-assessment as required by s.9 TMA, and sent it to the Claimant for signature, along with their fee note. In the return the box used for claiming a refund of sums overpaid on account was ticked. The Claimant wrote to Knox Cropper on about 25 April 2008 enclosing a cheque in payment of their fee note. Also in April 2008 the Claimant notified to HMRC his change of accountant to Knox Cropper.
8. The Claimant is unable to provide an explanation as to why the return, which had been prepared for him and which included a self-assessment and a claim for repayment of the overpayment on account, was not signed, dated and returned to his accountants for onward transmission to HMRC when he wrote to them with payment of their fee note on 25 April 2008. He refers to a number of possible distractions in this period, including family pressures arising out of the death of his mother-in-law in Ireland in January 2008.
9. On 27 November 2009 HMRC sent the Claimant and Knox Cropper a statement of his payments on account, including those in respect of the year 2006/7, and a letter requesting a completed tax return for that year "as soon as possible." HMRC state, and it is not in dispute, that a number of further such

statements of payments on account were sent to the Claimant thereafter, all of which included the payments on account for 2006/7. The Claimant states that none of these expressly referred to the outstanding tax return for that year, and that the letter of 27 November 2009 was the first and only reminder he received in that regard.

10. The deadline in s.34(1) for "an assessment" to be made in respect of the relevant year came to an end on 5 April 2011.
11. In July 2011, in the absence of tax returns for 2006/7, 2007/8, 2008/9 and 2009/10, HMRC visited the Claimant's home in order to distrain on his goods in respect of a self-assessment balance. The Claimant duly paid the sum in question.
12. On 14 October 2011 HMRC wrote to the Claimant about outstanding returns for 2007/8, 2008/9 and 2009/10. It seems from an initialled and dated handwritten note that on sight of this letter Mr Adam Page of Knox Cropper telephoned HMRC on 25 October 2011 and was told that the return for 2006/7 was "still outstanding". HMRC have not been able to confirm this conversation, but Ms Elizabeth Wilson, who appears for HMRC, conceded that HMRC were not in a position to dispute it. Some confusion may have arisen because a different representative of Knox Cropper (Geoffrey Burningham) also appears to have made contact with HMRC separately on the same day.
13. The Claimant states in his evidence that following Mr Page's telephone conversation with HMRC "I immediately proceeded to ensure the duplicate return was sent in." This was done on 2 November 2011.
14. Thereafter, it became clear that HMRC were not going to process the tax return on the basis that it was out of time, and were of the view that they were entitled to retain the overpayment on account. The arguments on both sides were rehearsed in correspondence, and then a formal appeal against HMRC's position was made by the Claimant. This culminated in a final decision of 7 March 2013 confirming HMRC's original position not to process the 2006/2007 return and to retain the overpayment on account ("the Decision"). The Decision stated:

> "When the Return was received on 7 November 2011 it was, as per Section 34[TMA]….outside the time limit of 5 April 2011 to be processed.

> The effect of this means the Payments on Account are final and conclusive and cannot be displaced by the actual liability declared in the 2006-07 Income Tax Return."

15. The Claimant now seeks a judicial review of the Decision.

The tax legislation

16. The key provisions of the relevant tax legislation, all of which are comprised in the TMA, are now set out for convenience:

Section 1:

Responsibility for certain taxes

The Commissioners for Her Majesty's Revenue and Customs shall be responsible for the collection and management of—
(a) income tax,
(b) corporation tax, and
(c) capital gains tax.

Section 8

(1) For the purpose of establishing the amounts in which a person is chargeable to income tax and capital gains tax for a year of assessment, and the amount payable by him by way of income tax for that year, he may be required by a notice given to him by an officer of the Board—
(a) to make and deliver to the officer on or before the day mentioned in subsection (1A) below, a return containing such information as may reasonably be required in pursuance of the notice, and
(b) to deliver with the return such accounts, statements and documents, relating to information contained in the return, as may reasonably be so required.

(1A) The day referred to in subsection (1) above is—
(a) the 31st January next following the year of assessment, or
(b) where the notice under this section is given after the 31st October next following the year, the last day of the period of three months beginning with the day on which the notice is given.
……

Section 9

(1) Subject to subsections (1A) and (2), every return under section 8 or 8A of this Act shall include a self-assessment, that is to say—
(a) an assessment of the amounts in which, on the basis of the information contained in the return and taking into account any relief or allowance a claim for which is included in the return, the person making the return is chargeable to income tax and capital gains tax for the year of assessment; and
(b) an assessment of the amount payable by him by way of income tax, that is to say, the difference between the amount in which he is assessed to income tax under paragraph (a) above and the aggregate amount of any income tax deducted at source and any tax credits to which section 397(1) or 397A(1) of ITTOIA 2005 applies……..
……
(3) Where, in making and delivering a return, a person does not comply with subsection (1) above, an officer of the Board shall if subsection (2) above applies, and may in any other case—
(a) make the assessment on his behalf on the basis of the information contained in the return, and
(b) send him a copy of the assessment so made;
…….
(3A) An assessment under subsection (3) above is treated for the purposes of this Act as a self-assessment and as included in the return.
……..

Section 9ZA

(1) A person may amend his return under section 8 or 8A of this Act by notice to an officer of the Board.

…..

Section 28C

Determination of tax where no return delivered

(1) This section applies where—

(a) a notice has been given to any person under section 8 or 8A of this Act (the relevant section), and

(b) the required return is not delivered on or before the filing date.

(1A) An officer of the Board may make a determination of the following amounts, to the best of his information and belief, namely—

(a) the amounts in which the person who should have made the return is chargeable to income tax and capital gains tax for the year of assessment; and

(b) the amount which is payable by him by way of income tax for that year;

and subsection (1AA) of section 8 or, as the case may be, section 8A of this Act applies for the purposes of this subsection as it applies for the purposes of subsection (1) of that section.

(2) Notice of any determination under this section shall be served on the person in respect of whom it is made and shall state the date on which it is issued.

(3) Until such time (if any) as it is superseded by a self-assessment made under section 9 of this Act (whether by the taxpayer or an officer of the Board) on the basis of information contained in a return under the relevant section, a determination under this section shall have effect for the purposes of Part VA, VI, IX and XI of this Act as if it were such a self-assessment.

…..

(5) No determination under this section, and no self-assessment superseding such a determination, shall be made otherwise than—

(a) before the end of the period of 3 years beginning with the filing date; or

(b) in the case of such a self-assessment, before the end of the period of twelve months beginning with the date of the determination.

(6) In this section "the filing date" in respect of a return for a year of assessment (Year 1) means either-

(a) 31st January of Year 2, or

(b)if the notice under section 8 or 8A was given after 31st October of Year 2, the last day of the period of 3 months beginning with the day on which the notice is given.

Section 29

(1) If an officer of the Board or the Board discover, as regards any person (the taxpayer) and a year of assessment —

(a) that any income, or chargeable gains which ought to have been assessed to capital gains tax have not been assessed, or

(b) that an assessment to tax is or has become insufficient, or

(c) that any relief which has been given is or has become excessive,

the officer or, as the case may be, the Board may, subject to subsections (2) and (3) below, make an assessment in the amount, or the further amount, which ought in his or their opinion to be charged in order to make good to the Crown the loss of tax.

……

Section 31

(1) An appeal may be brought against–

.....

(d) any assessment to tax which is not a self-assessment.

….

Section 34

Ordinary time limit of 4 years

(1) Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case, an assessment to income tax or capital gains tax may be made at any time not more than 4 years after the end of the year of assessment to which it relates.
(2) An objection to the making of any assessment on the ground that the time limit for making it has expired shall only be made on an appeal against the assessment.

Section 35

(1) Where income to which this section applies is received in a year of assessment subsequent to that for which it is assessable, an assessment to income tax as respects that income may be made at any time not more than 4 years after the end of after the year of assessment in which it was received.

…..

Section 36

(1) An assessment on a person in a case involving a loss of income tax or capital gains tax brought about carelessly by the person may be made at any time not more than 6 years after the end of the year of assessment to which it relates (subject to subsection (1A) and any other provision of the Taxes Acts allowing a longer period).

…..

Section 59B

(1) Subject to subsection (2) below, the difference between –
(a) the amount of income tax and capital gains tax contained in a person's self-assessment under section 9 of this Act for any year of assessment, and
(b) the aggregate of any payments on account made by him in respect of that year (whether under section 59A of this Act or otherwise) and any income tax which in respect of that year has been deducted at source,
shall be payable by him or (as the case may be) repayable to him as mentioned in subsection (3) or (4) below…..
…..
(5A) Where a determination under section 28C of this Act which has effect as a person's self-assessment is superseded by his self-assessment under section 9 of this Act, any amount of tax which is payable or repayable by virtue of the supersession shall be payable or (as the case may be) repayable on or before the day given by subsection (3) or (4) above.
….

Section 93

Failure to make return for income tax and capital gains tax

(1) This section applies where—
(a) any person (the taxpayer) has been required by a notice served under or for the purposes of section 8 or 8A of this Act to deliver any return, and
(b) he fails to comply with the notice.
(2) The taxpayer shall be liable to a penalty which shall be £100.
(3) If, on an application made to it by an officer of the Board, the tribunal so directs, the taxpayer shall be liable to a further penalty or penalties not exceeding £60 for each day on which the failure continues after the day on which he is notified of the direction (but excluding any day for which a penalty under this subsection has already been imposed).
(4) If—
(a) the failure by the taxpayer to comply with the notice continues after the end of the period of six months beginning with the filing date, and
(b) no application is made under subsection (3) above before the end of that period,
the taxpayer shall be liable to a further penalty which shall be £100.

(5) Without prejudice to any penalties under subsections (2) to (4) above, if—

(a) the failure by the taxpayer to comply with the notice continues after the anniversary of the filing date, and

(b) there would have been a liability to tax shown in the return,

the taxpayer shall be liable to a penalty of an amount not exceeding the liability to tax which would have been so shown.

(6) No penalty shall be imposed under subsection (3) above in respect of a failure at any time after the failure has been remedied.

...

(9) References in this section to a liability to tax which would have been shown in the return are references to an amount which, if a proper return had been delivered on the filing date, would have been payable by the taxpayer under section 59B of this Act for the year of assessment.

(10) In this section –

"the filing date" in respect of a return for a year of assessment (Year 1) means—

(a) 31st January of Year 2, or

(b) if the notice under section 8 or 8A was given after 31st October of Year 2, the last day of the period of three months beginning with the day on which the notice is given.

"the period of default", in relation to any failure to deliver a return, means the period beginning with the filing date and ending with the day before that on which the return was delivered.

Schedule 1AB, paragraph 3A

Determinations under section 28C: special rules

(1) This paragraph applies where—

(a) a determination has been made under section 28C of an amount that a person is liable to pay by way of income tax or capital gains tax, but the person believes the tax is not due or, if it has been paid, was not due,

(b) relief would be available under this Schedule but for the fact that—

(i) the claim falls within Case C (see paragraph 2(4)),

(ii) the claim falls within Case F(a) (see paragraph 2(7)(a)), or

(iii) more than 4 years have elapsed since the end of the relevant tax year (see paragraph 3(1)), and

(c) if the claim falls within Case F(a), the person was neither present nor legally represented during the enforcement proceedings in question.

(2) A claim under this Schedule for repayment or discharge of the amount may be made, and effect given to it, despite paragraph 2(4), paragraph 2(7)(a) or paragraph 3(1), as the case may be.

(3) But the Commissioners are not liable to give effect to a claim made in reliance on this paragraph unless conditions A, B and C are met.

(4) Condition A is that in the opinion of the Commissioners it would be unconscionable for the Commissioners to seek to recover the amount (or to withhold repayment of it, if it has already been paid).

(5) Condition B is that the person's affairs (as respects matters concerning the Commissioners) are otherwise up to date or arrangements have been put in place, to the satisfaction of the Commissioners, to bring them up to date so far as possible.

(6) Condition C is that either—

(a) the person has not relied on this paragraph on a previous occasion (whether in respect of the same or a different determination or tax), or

(b) the person has done so, but in the exceptional circumstances of the case should be allowed to do so again on the present occasion.

(7) For the purposes of sub-paragraph (6)—

(a) a person has relied on this paragraph on a previous occasion if the person has made a claim (or a composite set of claims involving one or more determinations, taxes and tax years) in reliance on this paragraph on a previous occasion, and

(b) it does not matter whether that claim (or set of claims) succeeded.

(8) A claim made in reliance on this paragraph must include (in addition to anything required by Schedule 1A) such information and documentation as is reasonably required for the purpose of determining whether conditions A, B and C are met.

17. The effect of these provisions, in very general terms, is that on receipt of a notice from HMRC pursuant to s.8, a taxpayer is under an obligation to file a tax return which complies with s.9 within the time specified in s.8(1A). To comply with s.9 the return "shall include a self-assessment" (with one exception, not relevant for present purposes). If there is non-compliance with the obligation to include a self-assessment, then HMRC may make the assessment themselves, which is then treated as a self-assessment and as included in the return. Similarly, if no return is filed HMRC may make a determination under s.28C, which has effect as a self-assessment until "superseded by a self-assessment made under section 9". S.28C includes deadlines for the making of both determinations and superseding self-assessments under the section. S.93 provides for financial penalties where a taxpayer fails to comply with a notice under s.8.

The issues

18. The Claimant makes his challenge under two heads. First, he submits that s.34 imposes no deadline for the making of the relevant assessment. Second, and alternatively, he submits that if a relevant deadline is imposed by s.34(1), then HMRC has a discretion to extend that deadline which they are obliged to exercise in the Claimant's favour, as in the absence of an extension the Claimant would suffer disproportionate damage resulting in an infringement of his rights under Article 1 of Protocol 1 to the European Convention on Human Rights ("A1P1").

The s.34 issue

Nature of the issue

19. The question here is whether the reference to "an assessment" in s.34(1) includes a self-assessment made by the taxpayer. If it does then it is accepted that the Claimant's self-assessment was filed outside the 4 year period referred to in the sub-paragraph, and was out of time. If, as the Claimant contends, s.34(1) applies only to an assessment made by HMRC, then the 4 year period in that subsection is irrelevant.

The Morris case

20. Before examining the parties' respective arguments I should refer to the decision of Patten J (as he then was) in *Morris & anr v HMRC* [2007] EWHC

1181 (Ch). This concerned an earlier version of s.34, when the time limit imposed by s.34(1) was longer than the current 4 years. One of the issues before the learned judge was whether the time limit applied to closure notices served by HMRC under s.28A(2) TMA which had the effect of amending the taxpayers' returns containing their self-assessments in accordance with the requirements of s.9. The taxpayers' contention was that because a closure notice operated to amend the return and in particular the assessment to tax contained within the return, it constituted an assessment within the meaning of s.34(1) and must therefore be made within the time prescribed. The judge considered that this issue involved a consideration of whether s.34 and other related provisions of the TMA applied to self-assessment.

21. His conclusion was that s.34 had no application to a self-assessment. His reasoning was as follows:

> "28. The starting point has to be s.34 itself. As explained earlier, this pre-dates the introduction of self-assessment and was drafted to accommodate a scheme under which all assessments were made by the Revenue and not by the taxpayer. These included discovery assessments under what was then s.29(3). The draftsman therefore clearly thought that in order to give effect to the scheme of self-assessment as finally settled, it was not necessary nor appropriate to alter the terms of s.34. Under this the time limits imposed continue to apply only to the making of an "assessment". The first issue therefore is whether the service of a closure notice under s.28A constitutes the making of an assessment within the meaning of s.34. Mr Baker submits and the Revenue accepts, that it cannot rely on the opening words of s.34 in this case because the enquiry provisions (beginning with s.9A) all precede s.34 and none of them prescribes a longer period of time. The most obvious provision which falls within those words is s.36 itself although TA s.806 was given as an example of a provision specifying a longer period of time.
>
> 29. Mr Baker's primary submission is that self-assessment is simply one form of assessment and therefore falls within the meaning of s.34. He accepts that if this is right it must mean that s.34 also applies to the making of an assessment (in the form of a self-assessment) by the taxpayer and at one point in his argument he suggested that the same applied to s.36 which also depends for its application on there being an assessment.
>
> 30. In support of this he referred to a number of provisions in the amended TMA. The most obvious of these are s.9(1) which defines a self-assessment as an "assessment" of the tax payable on the basis of the information in the return; s.30A (1) which requires all assessments which are not self-assessments to be made by an officer of the board; and s.31(1)(d) which grants the taxpayer a right of appeal against any assessment to tax which is not a self-assessment.
>
> 31. It seems to me difficult to identify any obvious reason why the provisions of ss.34 and 36 which were originally introduced to set time limits to the Revenue's power to assess a taxpayer should have been applied to the obligations of the taxpayer to include a self-assessment as part of his own tax return. TMA s.8 requires a return to be made within the time limits specified by s.8(1A) and to include a self-assessment of the taxpayer's liability to tax on the declared income and capital gains. As explained earlier, s.9(3) contains default provisions enabling the Revenue to make the assessment in place of the taxpayer if he does not comply with this obligation and

> to make a determination of tax with the same effect as a self assessment in the event that no return at all is delivered by the filing date: see s.28C. In these circumstances there is no purpose to be served by imposing a further (and inconsistent) time limit under s.34 and in my judgment s.34 was not intended to have that effect.
>
> 32. It seems to me that this section has always been and remains concerned only with assessments by the Revenue. This is made clear by reading s.34 in conjunction with s.36 which was obviously intended to extend the time limits in cases of fraudulent or negligent conduct by the taxpayer. Section 36 can have no application in the case of a self-assessment by the taxpayer because that is not "an assessment on any person .. for the purpose of making good to the Crown" a loss of tax. It would involve the taxpayer in effect alleging negligence or fraud against himself. Mr Baker ultimately accepted this."

22. I was shown a passage from the June 2013 update of the current edition of the textbook Whiteman on Income Tax, in which the learned editor referring to *Morris* stated that the time limit in s.34(1) applies

> "only to discovery assessments, not to a taxpayer's self-assessment or to HMRC amendments to a self-assessment, in a closure notice or otherwise – there seem to be no time limits there at all." (See paragraph 27.078)

23. Ms Wilson submitted that *Morris* was wrongly decided in so far as the judge held that the relevant statutory time limit for making an assessment (as distinct from filing the return) was imposed by s.8(1A). She also submitted that the learned judge was in error in holding that s.34(1) did not apply to self-assessments.
24. It is common ground that the decision in *Morris* is not binding on the Upper Tribunal. Nevertheless, the decision is clearly persuasive and I should follow it unless I conclude that it was wrong. See in that regard the judgment of the Upper Tribunal (David Richards J and Julian Ghosh QC) in *Gilchrist v HMRC* [2015] 2 WLR 1, at paragraphs 85-101.

Submissions and discussion

25. It is not disputed that, depending on context, the word "assessment" in the TMA is capable of meaning either an assessment by HMRC or a self-assessment by a taxpayer, or both. It is also common ground that in certain provisions of the TMA the word refers exclusively to an assessment by HMRC. An important example of the latter is s.34(2), which HMRC accept only applies to HMRC assessments. Another example is s.36.
26. The Claimant, represented by Mr Laurent Sykes and Ms Deborah Clark, submits that in the light of the wording of s.34 itself, the wording of other relevant provisions of the TMA, and the nature of the scheme, s.34(1) has no

application to a self-assessment. Unsurprisingly the Claimant relies upon s.34(2) as supporting his interpretation of s.34(1). The Claimant submits that it would be very surprising if Parliament had used the same word in consecutive subsections of a single section with two such different scopes of application as would exist on HMRC's interpretation. Therefore, he submits, given that it is common ground that "assessment" in s.34(2) does not extend to a self-assessment by a taxpayer, this is a very strong indication that s.34(1) is similarly restricted.

27. HMRC's response is that the two subsections are entirely different in nature: s.34(1) is dealing with the essential validity of an assessment, whereas s.34(2) is merely procedural. The latter's purpose is to prevent a taxpayer using procedures other than an appeal to the tax tribunal in order to challenge an assessment as out of time under s.34(1). Since, by virtue of s.31(1)(d), there is no right of appeal against a self-assessment, the procedural rule in s.34(2) is simply irrelevant.

28. In my view that is a bold submission, given the juxtaposition and apparent connection of the two subsections, the first setting a time limit and the second making provision for how a challenge based on the expiry of that time limit is to be made. The natural interpretation of these measures is that they are both dealing with the same "assessments". Indeed, that was clearly the case when the provisions were originally drafted, as at that time self-assessments did not exist.

29. The Claimant makes a second point in relation to s.34(2). Since that subsection provides an exclusive mechanism for challenging the s.34(1) time limit, and since that mechanism admittedly cannot be used here, HMRC are not entitled to invoke the time limit in order to challenge the 2006/7 self-assessment. This was referred to as "the procedural point". I agree that it would be odd for Parliament to impose a time limit on the making of an assessment and yet exclude any possibility of an interested party invoking that time limit. Therefore, this point may be better viewed as a point in favour of the Claimant's construction rather than as a separate procedural bar.

30. Another point made by the Claimant relates to the existence of a rival and inconsistent time limit for the making of a self-assessment. This time limit, which is identified in s.8(1) and s.8(1A), resulted in the deadline of 31 January

2008 for the filing of the Claimant's tax return for 2006/7, as already mentioned. Given the statutory obligation under the s.8/s.9 procedure to submit a tax return containing a self-assessment by this date, it would, it is submitted by the Claimant, be odd if the words "an assessment ….may be made at any time….[up to the 4 year deadline]" in s.34(1) also applied to a self-assessment. This was a point which also struck Patten J when he was considering in *Morris* whether s.34(1) could have any application to self-assessment. He concluded that there was "no purpose to be served by imposing a further (and inconsistent) time limit under s.34" (see the passage in his judgment cited above).

31. The Claimant pointed to the fact that a return filed after the s.8(1)/s.8(1A) time limit has expired is still valid and falls to be processed. This, he submitted, was simply a function of HMRC's duty to collect the right amount of tax, and of the principle that one cannot benefit from one's own wrong - no one would suggest that a return filed after the 31 January deadline is invalid and incapable of being processed. He submitted that the same point was also reflected in s.59B(5A), which expressly contemplates that a late tax return is still viewed as one made under s.9. The Claimant also relied upon s.93: where there is a failure to comply with s.8, a daily penalty may be imposed under s.93 until the breach is remedied. The Claimant submits that if HMRC were correct in its construction of s.34(1), such a breach could not be remedied after four years had passed and the daily penalties would continue indefinitely.

32. HMRC's main response to these points was to draw a distinction between the obligation to file a tax return pursuant to s.8, and the obligation under s.9 to include a self-assessment in that return. HMRC submitted that s.8 creates the obligation to make and deliver a return of such information as may be reasonably required by HMRC for the purpose of establishing the amounts in which a person is chargeable to tax. S.9(1)(a) creates the obligation to make a self-assessment of the amounts in which the person making the return under s.8 is chargeable to tax. A self-assessment should be included in a return made and delivered under s.8, which is how the assessment under s.9 is "made" in practice. However, s.9(3) shows that a person is capable of "making and delivering a return" under s.8 while not complying with his s.9(1) obligation to include in the return his self-assessment. In other words, they are separate

obligations, to be separately satisfied. Nor did s.34(1) have anything to say about the filing of tax returns.

33. As for s.93, HMRC submitted that there is no difficulty in a taxpayer delivering a late return in order to avoid daily penalties arising under s.93. S.93 applies where a taxpayer fails to comply with a notice under s.8 to deliver a return. Where a tribunal has imposed daily penalties in respect of the failure to deliver a return, s.93(3) provides that no penalty shall be imposed in respect of a failure at any time after the failure "has been remedied". For the purposes of s.93, the failure to deliver the return is "remedied" when the return described in s.8 is delivered (albeit late by reference to s.8(1A)). It follows, in HMRC's submission, that where a taxpayer chooses to include in his (late) tax return a self-assessment purportedly made under s.9, then notwithstanding that the late return does remedy the failure to comply with s.8(1), and therefore has the effect of stopping penalties, the self-assessment is ineffective if it is out of time under s.34(1).

34. In the course of oral argument Ms Wilson submitted that if a taxpayer filed a return having failed to complete Question 18 of HMRC's pro-forma (dealing with self-assessment), HMRC would not be able to impose a penalty for non-compliance with s.9(1) (even where it was not one of the exceptional cases where a self-assessment need not be included in the return). This was because s.93 is only concerned with the filing of the return required by the notice under s.8(1); although Question 18 is part of the tax return pro forma, a taxpayer who filed a return omitting to complete Question 18 would, she submitted, still be complying with the s.8(1) notice, which refers to "details of your income and capital gains".

35. In my view the weight which HMRC seek to place upon the distinction between the obligation to file a tax return pursuant to s.8 and the obligation under s.9 to include in that return a self-assessment, is too great for it to bear. Even though they are notionally separate obligations, they are inextricably linked ("every return under section 8….of this Act shall include a self-assessment…"). The wording of the s.8 notice sent to the Claimant is very general – he was required to "send us a Tax Return containing details of your income and capital gains, together with any documents asked for". However, there is no real distinction between Question 18 and any other question in the

pro forma return; it is an integral part of the return. It does not therefore advance the case to submit, as HMRC do, that the time limit in s.8 "only" applies to the making and delivering of returns under s.8.

36. Also worthy of note is s.9(3A), pursuant to which any assessment by HMRC in the event of failure by a taxpayer to comply with his obligation to self-assess under s.9, is treated as a self-assessment "and as included in the return." Similarly, s.28C is concerned with the situation where a s.8 notice has been given but the required return has not been delivered by the due date. In those circumstances HMRC may make a determination of the tax due, which is treated as a self-assessment until there is a tax return and "such time as [the determination] is superseded by a self-assessment made under s.9." Another provision to which reference was made in the course of argument is s.9ZA. HMRC accepted that pursuant to this a taxpayer is able to amend his tax return by including a self-assessment. All these provisions serve to emphasise that the only way in which a taxpayer can make a self-assessment is through the s.8/s.9 process, using a return, and that a self-assessment is part and parcel of the return.

37. In these circumstances (and leaving aside the irrelevant exception in s.9(2)) a taxpayer would not in my judgment properly comply with a notice under s.8(1) if the return filed was non-compliant with s.9 by reason of the absence of a self-assessment. By the same token, a taxpayer is not in my view rendered immune from the risk of a penalty under s.93 by filing a return which is non-compliant in that respect, for liability under s.93 arises where a taxpayer "fails to comply with the [s.8] notice."

38. The Claimant submits that there are further problems with HMRC's interpretation of s.34(1).

39. First, since HMRC may start the s.8/s.9 process by serving a s.8 notice at any time, such a notice may be served at a time when the s.34(1) time limit has already expired, with the result that no valid self-assessment could be made under s.9(1). I am not aware that HMRC in their submissions responded specifically to this point.

40. Second, as HMRC acknowledge, a self-assessment superseding a s.28C(1A) determination by HMRC may be made *after* the four year time limit in s.34(1) has expired. This is because an HMRC determination can be made three years

from the filing date (usually 31 January following the year of assessment) and the superseding self-assessment may, under s.28C(3), (5) and (6), be made twelve months thereafter, whereas the four year time limit under s.34(1) is four years from the end of the year of assessment. In fact, given the ability to issue a s.8 notice at any time, it is conceivable that the HMRC determination (which operates by reference to the filing date, which is in turn determined by the s.8 notice) could be issued many years after the year of assessment, thereby extending the periods in s.28C(5)(a) and s.28C(5)(b). The Claimant submits that this represents a further inconsistency with s.34(1) as interpreted by HMRC.

41. In response to this point HMRC contend that there is no inconsistency because s.34(1) is expressly "Subject to the following provisions of this Act, and to any other provisions of the Taxes Acts allowing a longer period in any particular class of case", and s.28C(5)(b) is a provision in the latter category.
42. I do not find this response convincing. First, s.28C(5) is not couched in the permissive terms envisaged by the qualifying words of s.34(1); rather it is expressed in prohibitive terms - "no determination….and no self-assessment….shall be made otherwise than". I agree with Mr Sykes that this is a limitation and not an extension, and that if s.28C(5) were extending the s.34(1) time limit, it would be expressed in different terms. Second, it is surprising that no reference is made to s.34 in s.28C if the former is relevant to self-assessment. Third, it is also a little odd that s.34(1) should refer specifically to the "following" sections of the TMA but not to "preceding" sections if earlier sections are also relevant to the qualification.
43. In my view there would be an inconsistency with the time limits in s.28C if HMRC's interpretation of s.34(1) were correct. I note that Patten J appears to have taken the same view at paragraph 34 of his judgment in *Morris*.
44. Ms Wilson submitted that there is a self-evident public interest in achieving finality in fiscal transactions, which was recognised in cases such as *Monro v The Commissioners for Her Majesty's Revenue and Customs* [2008] EWCA Civ 306, [2008] STC 1815. She also submitted that there was ample evidence of a general policy of imposing time limits on repayments of excess payments on account. She referred to a number of examples, including s.28C(5). After that deadline had passed there was no right to repayment of amounts overpaid. If

the Claimant's interpretation was correct there would be no time limit at all for obtaining repayment of payments on account under section 59B(1). That, Ms Wilson submitted, would create an unprincipled distinction. There would also be disparity in the treatment of overpayments on account by taxpayers, and underpayments by taxpayers. Further, the Claimant's interpretation would be a recipe for administrative chaos, in that all taxpayers who have overpaid on account could wait for as long as they wish before deciding to make a self-assessment and seek repayment. Similarly, taxpayers who have underpaid could also self-assess at any time. That, she submitted, would not be conducive to the good administration of a tax system.

45. I accept that there is a public interest in achieving finality in fiscal transactions. But that interest cannot justify a construction of s.34(1) which is not otherwise justified. Nor am I at all convinced that the Claimant's interpretation would result in administrative chaos. I find it hard to believe that there are likely to be multitudes of cases where taxpayers have made overpayments on account and then failed to claim repayment in a timely manner. HMRC provided no evidence of the number of such cases. In any event where, as in this case, no tax return has been submitted in a timely manner pursuant to a s.8 notice, HMRC can achieve finality by making a s.28C determination, which brings into play the time limit in s.28C(5) for the making of a self-assessment.

Conclusion on the s.34 issue

46. For the reasons set out above I have reached the conclusion that the Claimant's interpretation of s.34(1) is to be preferred, and therefore that the time limit in that subsection has no application to a self-assessment such as that which the Claimant made in this case. That interpretation is consistent with the natural reading of the section as a whole, including s.34(2) which admittedly has no application to self-assessments. It is also consistent with the placing of this section alongside other sections such as s.36 which relate exclusively to assessments by HMRC. Further, the interpretation espoused by HMRC would result in inconsistency with other provisions of the TMA, including those which contain different time limits such as s.8 and s.28C. For these reasons, far from being satisfied that the conclusion reached by Patten J in *Morris* as to the scope of application of s.34(1) was wrong, I agree with it.

47. My conclusion on the s.34 issue is sufficient to dispose of this application for judicial review. I identify the precise relief granted at the end of this judgment.

The discretion issue

48. In the circumstances the Claimant's alternative ground of review does not strictly arise. However, the matter was argued before me and I will therefore briefly express my views on it, on the hypothesis that I am wrong on the s.34 issue, and that absent some waiver or extension of the time limit the Claimant's self-assessment is time-barred and his overpayment on account irrecoverable.

A1P1 and the Human Rights Act 1998

49. A1P1provides:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

50. The Human Rights Act 1998 ("HRA") provides (so far as relevant):

> ***"3 Interpretation of legislation***
>
> *(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.*
>
> *(2) This section—*
>
> *(a) applies to primary legislation and subordinate legislation whenever enacted;*
>
> *(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and*
>
> *(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.*
> *………….*
> ***6 Acts of public authorities.***
>
> *(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.*
>
> *(2) Subsection (1) does not apply to an act if—*
>
> *(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or*
>
> *(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the*

Convention rights, the authority was acting so as to give effect to or enforce those provisions.
……"

Submissions and discussion

51. The Claimant submits that the effect of the Decision would amount to a disproportionate interference with his right to peaceful enjoyment of his possessions under A1P1. HMRC have the power to prevent this infringement by exercising their discretion to extend the time limit in question. In those circumstances it would be unlawful not to exercise the discretion in the Claimant's favour. For this purpose Mr Sykes relies upon both s.3 and s.6 HRA. He submits that s.3 is relevant because it enables (indeed requires) the court to construe s.1 and s.34(1) TMA together in such a way as to import the discretion to extend the time limit for which the Claimant is contending. S.6 is relevant because it would render unlawful a refusal by HMRC to exercise the discretion in the Claimant's favour.

52. In support of this contention Mr Sykes points in particular to the following features of the Claimant's case :

    (1) The overall amount borne by the Claimant is c.2.5 times his tax liability for the year in question, and more than one year's post-tax income.

    (2) The overpayment, amounting to c.1.5 times the actual tax liability, is entirely irrecoverable despite the deadline having been exceeded by only about six months.

    (3) HMRC sent only one reminder about the outstanding tax return (in November 2009), and this did not draw attention to the 5 April 2011 deadline and/or the drastic consequences of failing to meet it.

    (4) HMRC's duty is to collect the right amount of tax which is properly due, no more and no less.

    (5) No penalty imposed for (for example) making false statements about tax liabilities could be as much as 1.5 times the amount of tax due - the maximum is 100% of the tax. (See, for example, s.95 TMA).

    (6) Had the s.28C procedure been used by HMRC, the Claimant would have had the notice which he was denied. It is unfair to penalise him because he made payments on account.

(7) Similarly, if the s28C procedure been used, the Claimant may have had a remedy for an "unconscionable" result through a claim under Schedule 1AB TMA. Again, he is penalised by having made payments on account.

(8) To all intents and purposes the law at the material times has been, and has been generally understood to be, set out in *Morris*; this can be seen from the current edition of Whiteman on Income Tax (see above). HMRC did not make clear to taxpayers that they disagreed with the law as set out in *Morris.*

53. As far as the discretion to waive the time limit in question is concerned, it was common ground before me that HMRC have such a discretion. This arises by virtue of the care and management provision in s.1(1) TMA (above), as explained by Sir Thomas Bingham MR in *R v Commrs of Inland Revenue ex parte Unilever plc and related application* [1996] STC 681, at p.686

> "At the relevant time the Revenue enjoyed no express statutory power to extend or waive that two-year time limit, which on its face bound both the Revenue and companies seeking to set off losses against profits in the same accounting year. But s 1(1) of the Taxes Management Act 1970 provided that corporation tax should be under the care and management of the Commissioners of Inland Revenue, and it is common ground on these appeals that the Revenue had a discretion under that section to accept late claims for loss relief. Under what is now s 393A(10) of the 1988 Act, not in force at the material time, claims for loss relief must be made within two years of the end of the accounting period 'or within such further period as the Board may allow'. This express new statutory discretion is not said to vary the discretion which the Board already enjoyed under s 1 of the Taxes Management Act 1970."

The Claimant also referred to the dicta of Lord Hoffmann in *R (Wilkinson) v Inland Revenue Commissioners* (2005) 77 TC 78 at paragraph 21, where he confirmed the existence of the discretion.

54. It is also trite law that where a national measure imposes tax on an individual A1P1 is engaged, in the sense that the measure constitutes an interference with the taxpayer's enjoyment of his/her possessions, namely financial resources. According to well-established principles, if it is to comply with A1P1 such interference "must strike a 'fair balance' between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights." This means that "there must therefore be a reasonable relationship of proportionality between the means employed and the aims pursued." (See *National & Provincial Building Society and Others v United Kingdom* (1997) 25 EHRR 127, at paragraph 80.) In the same paragraph the European Court of Human Rights continued:

> "Furthermore, in determining whether this requirement has been met, it is recognised that a Contracting State, not least when framing and implementing policies in the area of taxation, enjoys *a wide margin of appreciation* and the Court will respect the legislature's assessment in such matters *unless it is devoid of reasonable foundation….*"
> (My emphasis)

55. In the present case HMRC accept that A1P1 is engaged and that the principles referred to above are applicable. In this regard Ms Wilson drew to my attention the decision of the Court of Appeal in *Monro v HMRC* [2008] EWCA Civ 306, [2008] STC 1815, in which the Court confirmed that measures relating to the right of a taxpayer to recover overpaid tax are within the margin of appreciation to which the ECHR referred in its case law. (See per Arden LJ at paragraphs 29-33, and per Longmore LJ at paragraph 41.) She also pointed out that the ECHR had recognised that limitation periods pursue a legitimate aim, and that if they are to achieve their aim, they are to be applied regardless of the quantum involved. In this regard reference was made to *Case of JA Pye (Oxford) Ltd and anor v The UK* (44302/02) [2007] ECHR 5559 at paragraphs 68 – 69, and 84.
56. Ms Wilson submitted that in the present case the enforcement of the time limit would not amount to a breach of A1P1, and that it was not otherwise a case where it was appropriate for HMRC to exercise its discretion to extend the time limit.
57. In support of her submission, and as an example of the wide margin of appreciation in such cases, she referred to the facts considered by the Court of Appeal in *Munro* (above). There the taxpayer had paid some £800,000 in tax on the basis of a generally prevailing view of the law which was later held by the courts to be wrong. The taxpayer made an in-time claim for repayment under section 33 TMA, which gave HMRC a defence to such a claim on the grounds that the sum had been paid in accordance with a generally prevailing practice. Whilst expressing considerable sympathy for the taxpayer, the Court of Appeal rejected the taxpayer's argument that the restriction on recovery was a violation of his rights under A1P1.
58. Ms Wilson submitted that in the present case, by contrast, the Claimant had had ample right and opportunity to secure repayment of amounts overpaid by him on account; this opportunity extended over about 4.5 years from the time

of his payments in 2007 until 5 April 2011 when the time expired. He had engaged the services of an accountant, who had prepared a tax return (and self-assessment) for him to sign and return. There was no explanation as to what (if anything) his accountant did to chase up the return thereafter. A statement of account dated 27 November 2009 had been sent to him by HMRC listing the payments on account for 2006/7. He had received at least one reminder to submit his return for 2006/7. There had been no explanation as to why the Claimant did not make a self-assessment within the 4 years or so available to him. Unlike Mr Monro, who was refused a repayment because he paid tax in accordance with the generally prevailing practice, the Claimant has failed to comply with the very rules which would have protected him and with which everyone else was required to comply, and he had failed to exercise the rights to repayment available to him.

59. Notwithstanding the force of HMRC's arguments, I am left with a number of concerns. The first is that the Decision itself (in March 2013) makes no mention whatsoever of the discretion to extend/waive the time limit in question, let alone of any consideration of whether it should be exercised. Mr Sykes submitted that it was only at a later stage that HMRC accepted that the discretion existed. There appears to be something in that submission, as even in their Summary Grounds for contesting the judicial review, submitted to the Administrative Court in about July 2013, HMRC's position on this was somewhat ambivalent: whilst stating that they had "power to make concessions under" s.1 TMA or at common law (paragraph 25), they also stated that "HMRC do not accept that they have any relevant discretion or power which they (could or) should exercise in the particular circumstances of this case." (Paragraph 29.) Be that as it may, I have not been shown any evidence that HMRC *actually* considered whether it was appropriate to exercise their discretion, other than in the context of forensic argument.

60. Even so, it would almost certainly not be appropriate for this Tribunal to grant any relief if the circumstances are such that the outcome of a proper consideration by HMRC of its discretion would inevitably be adverse to the Claimant. As far as the Claimant's reliance on A1P1 is concerned, I am reluctant to pronounce upon the lawfulness or otherwise of a decision (ie to refuse to extend the time limit pursuant to s.1 TMA) which has not yet

actually been made and which, in the light of my earlier conclusion, is in any event hypothetical. It is nevertheless right to indicate that, in the circumstances of this case so far as they are currently known, and having regard to the principles and case law discussed above, such a decision would be unlikely to fall outside a tax authority's wide margin of appreciation, so as to infringe A1P1.

61. However, the Claimant's failure in that respect would not necessarily be the end of the matter. On the basis of the arguments I have heard is not clear to me that if HMRC were to give full and proper consideration to their discretion, the outcome would necessarily be a refusal to extend time. The principles on the basis of which the exercise of that discretion should be considered (other than those relating to the application of A1P1) were not really canvassed before me in any depth. Ms Wilson merely indicated that the necessary criteria, which included the ability to attribute some responsibility or fault to HMRC, were not present in this case.

62. Furthermore, since 2007 there has been in existence an unappealed decision of the High Court to the effect that the time limit relied upon by HMRC is not applicable in a case such as this. Ms Wilson submitted that this did not matter as there is no evidence that any reliance was placed upon *Morris* by the Claimant, and as it had caused no confusion. The latter point is clearly not correct in the light of the extract from Whiteman on Income Tax to which I have referred. Further, regardless of any reliance on the part of the Claimant or his advisers, in my view Patten J's finding in *Morris* is at the very least a relevant factor to be taken into account in the exercise of HMRC's discretion, yet there is nothing to suggest that it has been properly considered by them.

63. For these reasons, I consider that in the event that on an appeal my decision on the construction of s.34(1) is held to be wrong, so that the time limit in that subsection applies in this case, the matter should be remitted to HMRC for them to give full and proper consideration to whether it would be appropriate to exercise their discretion to extend the time limit so as to permit the Claimant's self-assessment and repayment claim to be processed. In so considering the matter, HMRC should have regard (in addition to the factors relevant to whether the Decision amounts to a disproportionate interference with the Claimant's rights under A1P1) to all other relevant factors urged by

the Claimant, including the existence since 2007 of the decision in *Morris,* and the promulgation in a highly reputable practitioner's textbook of the effect of that decision.

Relief in relation to the s.34 issue

64. Both parties indicated that if I held that the time limit in s.34(1) was not applicable, then I should order HMRC to process the Claimant's tax return including the self-assessment in respect of the year 2006/7. Therefore, in the light of my conclusion on the s.34 issue, I so order.

The Honourable Mr Justice Barling

Judge of the Upper Tribunal

Release date: 11 March 2015