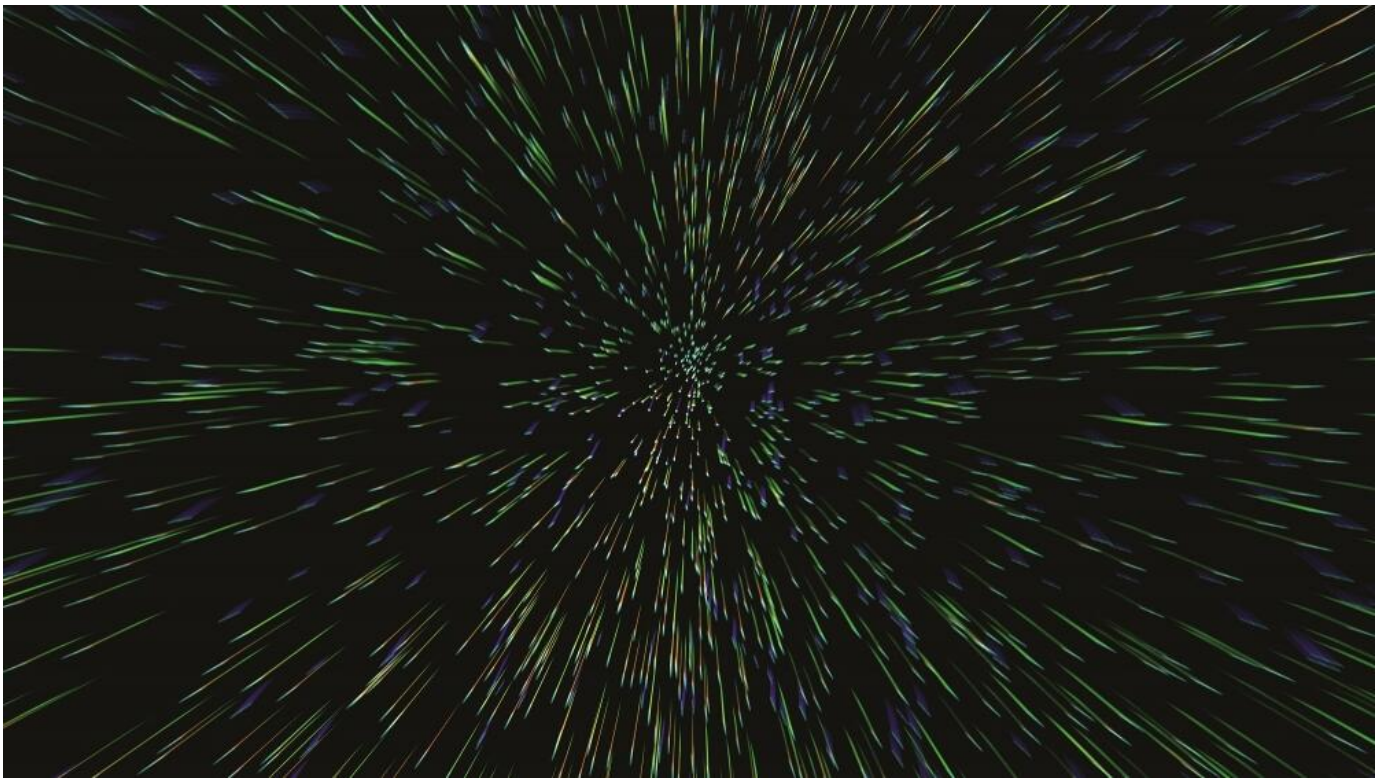
The return of the taxpayer

Management of taxes | Personal tax



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Keith Gordon discusses the First-tier Tribunal's decision in *Revell v HMRC* and the broader implications of the case

Key Points

What is the issue?

The First-tier Tribunal's decision in *Revell v HMRC* has endorsed the approach now being taken by HMRC in cases where, as in Higgs, a taxpayer is seeking a repayment but, unlike Higgs, the tax return is unsolicited.

What does it mean to me?

Advisers should check whether HMRC have validly issued clients with notices to file tax returns and not just assume that a UTR will be sufficient to make a tax return valid.

What can I take away?

If a taxpayer has not received a notice to file a tax return, the return, any enquiry into the return and any closure notice following such an enquiry could all be invalid. When there is an invalid assessment, penalty determination or closure notice, the FTT will accept jurisdiction to hear any appeal challenging the validity of the notice itself.

In the May 2015 issue of *Tax Adviser*, I wrote about the Upper Tribunal's decision in *R (oao Higgs) v HMRC* [2015] UKFTT 92 (TCC). That case confirmed that the ordinary four-year time limit for assessments does not apply to self-assessments, meaning that, contrary to HMRC's previously-stated position, taxpayers are free to submit tax returns (and, where appropriate, claim repayments) at any time. As has since been reported in the Technical pages of *Tax Adviser* in December 2015 and March 2016, HMRC have now accepted the correctness of the Higgs decision, but will be introducing legislation to come into effect on 6 April 2017 which will impose a four-year time limit on self-assessments (see F(No.2)B 2016 clause 156 inserting a new TMA 1970 s 34A). In the meantime, HMRC has said that it will accept tax returns outside the four year period but only in cases where the taxpayer is responding to a notice to file: unsolicited or voluntary tax returns will continue to be rejected.

Although the factual background was very different, the recent decision in Revell sheds some light on the stance taken by HMRC in relation to unsolicited returns.

Facts of the case

Mr Revell was a professional footballer who had a series of employments with a number of clubs outside the top flight. All of his income had been subject to PAYE and Mr Revell was at no point within the Self Assessment system.

On 28 March 2011, HMRC identified an underpayment on Mr Revell's PAYE record and accordingly wrote to Mr Revell with what was presumably a P800 showing the alleged underpayment. However, rather than write to Mr Revell's home address in Brentwood, which had been shown on a P45 prepared by Wycombe Wanderers the previous year, HMRC chose to wrote an address in Newhaven which Mr Revell had long since vacated. Mr Revell did not receive the P800.

A year and a half later, in September 2012, in the absence of any response from the P800, HMRC then sent Mr Revell a notice to file a tax return for the 2008/09 tax year, this time to the Brentwood address. However, by then, Mr Revell had moved to a different address in Brentwood, as would have been clear from the P14 issued by Rotherham United earlier that year. Mr Revell did not receive the notice nor the accompanying return.

In the meantime, Mr Revell's adviser telephoned HMRC to update their records, this time to show an address in Doncaster to which he had recently moved.

HMRC's records show the return having been sent back to HMRC unsigned, although it transpires that what HMRC actually received was the blank return as it had not been undelivered. Not only did HMRC record this event inaccurately but the undelivered return prompted HMRC to add two more entries to the catalogue of errors in handling Mr Revell's case.

First they overrode the previous notification of change of address so that, instead of showing the correct address in Doncaster, Mr Revell's record now showed the historical address in Brentwood. Secondly, they issued to that incorrect address a duplicate tax return and notice, but without any name or address on it.

This led to a series of a further correspondence between Mr Revell's adviser and HMRC until, in December 2013, HMRC realised that – at least in accordance with their stance in *Higgs* – it was too late for Mr Revell to self-assess for the 2008/09 tax year.

HMRC decided therefore to issue a determination under s 28C given their belief that a taxpayer had failed to respond to a notice to file a return. This was in February 2014. A determination has the effect of crystallising an enforceable debt and can be displaced only by a taxpayer submitting a self-assessment (within specific time limits – as made clear in *Higgs*, there are different time limits in relation to tax returns that are made in order to displace a determination). Mr Revell, under

coercion, then submitted a tax return in order to displace the determination. However, HMRC were not happy with the return as submitted and sought to open an enquiry into it. This return was duly closed, with suggested amendments increasing the tax payable by £16,500. The case before the First-tier Tibunal (FTT) was Mr Revell's appeal against the amendments made by the closure notice.

The FTT's decision

The FTT concluded that HMRC's failure to use the latest address that they had for Mr Revell on their records overrode any provision in the Interpretation Act 1978 that could deem service of the notice to file a 2009 tax return. Therefore, Mr Revell had not been served with a notice to file a tax return for the 2008/09 tax year.

The lack of notice meant that the subsequent s 28C determination was invalid. But the FTT went on to consider the status of Mr Revell's tax return which, as a matter of fact, had been submitted in response to the purported determination. As the FTT noted, the legislation does not create a category of tax returns being those made in response to a determination (except when dealing with time limits). Instead, the validity of the tax return turned on normal principles. HMRC tried to argue that, given the non-delivery of a notice to file, Mr Revell had sent in an unsolicited return and thereby waived the requirement for a notice. However, the FTT concluded that, on a proper interpretation of the statutory scheme, there is in fact no such thing as an unsolicited return.

Without a prior notice, a return is not a return. Without a return, there can be no enquiry into the return. Therefore, the closure notice had no effect and the additional tax charged was declared to be non-payable. Mr Revell's appeal was therefore allowed.

Commentary

The FTT's conclusion has therefore endorsed the approach now being taken by HMRC in cases where, as in *Higgs*, a taxpayer is seeking a repayment but, unlike *Higgs*, the tax return is unsolicited. It also accords with another recent decision of the FTT in the corporation tax case of *Bloomsbury Verlag GmbH v HMRC* [2015] UKFTT 660 (TC). Both decisions (*Revell* and *Bloomsbury* i.e. that a return must follow a notice to file) make good sense when reading the statutory code, although the

converse is certainly arguable. In particular, there is nothing in either the income tax or corporation tax codes that specifically precludes taxpayers from submitting returns in the absence of any formal notice.

Nevertheless, the FTT's two decisions can give rise to difficulties. If an unsolicited return is not in fact a return, any self assessment included in that return will not then be an enforceable debt. Similarly, all subsequent enquiries, closure notices and penalties will be invalid. In the main, these difficulties might well be overcome, mainly as a result of the deemed delivery of a notice under the Interpretation Act.

Nevertheless, if a taxpayer can successfully assert non-delivery of the notice, then that should override any statutory deeming. Furthermore, HMRC's record-keeping is not always ideal (as exemplified in *Revell*). As a result, the *Revell* and *Bloomsbury* cases highlight a possible new way of challenging certain actions undertaken by HMRC.

What is not clear from the FTT's decision was the extent to which there remained an underlying dispute between Mr Revell and HMRC concerning the amount of tax payable. In other words, was it agreed that Mr Revell had underpaid tax by £16,500 or was this also being challenged?

I raise this because it would be strange for a taxpayer to put in a tax return which deliberately understates his income (but this is not impossible given the view being taken that the tax return was too late). On the other hand, given that Mr Revell's income was all covered by PAYE, HMRC would have had full access to the details of his income. Therefore, there should have been no need for them to issue an excessive determination (other than to flush out a return) or to revise the return when it was eventually made.

What I consider more concerning is HMRC's willingness to say one thing yet do the complete opposite (as I noted in my article in the May 2016 issue of *Tax Adviser*, the irony of HMRC's inconsistent approach in another case was not lost on the Court of Appeal). In their response to Higgs (and indeed in their submissions to the FTT in *Bloomsbury*) HMRC made it perfectly clear that a tax return is not valid unless it is in response to a notice to file. Yet, in their submissions to the First-tier in *Revell*, HMRC cited from what was described as 'long-standing advice from their solicitors' which read as follows:

‘In my view that which is intended to be a return, whether paper or electronic and is in an appropriate form may properly be regarded as a statutory return. I appreciate that the statutory scheme puts an obligation on the taxpayer to make a return arise [sic] only once he receives a notice which requires him to do so. But in any case in which an unsolicited return has been received, the better view, as it seems to me, is that the taxpayer has waived the formal notice step.’

If HMRC’s legal advice was to the effect that ‘the better view’ is that a taxpayer can waive the need for a notice and can submit a return without one, one has to wonder why a government department (whose integrity should never have to be questioned) feels able to assert the contrary whenever it suits them?

This kind of conduct does not exactly set a good example to the taxpaying public – nor does it encourage cordial relations between citizen and the State. It also contravenes the recently watered-down *HMRC Charter* in which HMRC say that taxpayers can expect them to be professional.

The FTT’s decision has also highlighted one of the practical difficulties faced by taxpayers who receive defective demands (as opposed to ones that are merely incorrect). When there is an invalid assessment, penalty determination or closure notice, the FTT will accept jurisdiction to hear any appeal challenging the validity of the notice itself. The FTT will do so even though, applying a literal approach to the statute, its jurisdiction is dependent on their being a valid assessment etc in the first place. (This can be justified because, as a matter of common sense, the FTT must have jurisdiction to consider questions regarding its own jurisdiction in any particular case.) Under the statute, however, the FTT has no jurisdiction to deal with determinations (valid or otherwise).

Therefore, Mr Revell could not get the specialist tax tribunal to opine on the validity of the determination made against him. Mr Revell then chose to submit a protective return in order to displace the determination. However, this could have backfired had the FTT concluded (in accordance with HMRC’s long-standing legal advice) that unsolicited returns were valid. Alternative approaches that he could have taken were similarly far from ideal: he could have ignored the determination altogether and challenged its validity only in enforcement proceedings in the County Court or he could have commenced judicial review proceedings. The former is a perfectly valid way forward but nevertheless a high-risk strategy; the latter is expensive (particularly given the amount potentially at stake in the present case). These

difficulties would have been overcome if the FTT had a general right to hear judicial review claims made against HMRC.

However, the case also highlights a further practical difficulty that can be faced by taxpayers. Suppose a taxpayer wants to claim a repayment. If a return will be invalid unless submitted in response to a notice, how can a taxpayer require HMRC to issue a notice? On what grounds can HMRC actually refuse to issue a notice? Should HMRC ever refuse to issue a notice (and such refusal is unreasonable), a taxpayer's only effective remedy would be judicial review.

Finally, many of HMRC's difficulties as experienced in the *Revell* case were self-inflicted (or, to put it slightly more charitably, a consequence of ever-reducing budgets and poor training of staff). However, there is no point in having a government department that is not fit for purpose. In particular, taxpayers have no choice but to deal with HMRC and, therefore, HMRC should be performing far better than they did in this case.

Furthermore, the FTT noted that Mr Revell's complaints were not properly investigated: it certainly seems as if HMRC proceeded on the misguided assumption that their computer records were correct.

If there is one thing that HMRC should improve immediately is their attitude when dealing with complaints: they should learn that their role is not to justify or excuse the conduct being complained of but is in fact to investigate the subject matter of the complaint, resolve it and try to prevent it from happening again. Will HMRC learn from their mistakes and give taxpayers a new hope or will it be business as usual and taxpayers will simply have to wait for the HMRC menace to strike back?

Further information

Read Keith's article 'Red card' on HMRC's inconsistent approach in *BPP Holdings v HMRC*.