

The Quick Guide to Legitimate Expectation in Tax Cases

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The case law on legitimate expectation is wide-ranging and often complex, making it time-consuming to get to grips with the key guiding principles. This guide summarizes the key points to look out for when considering the circumstances in which a taxpayer may rely upon a representation made by HMRC, either in a publication or in a direct communication with the taxpayer. All cases necessarily turn on their own facts but it is hoped that this guide will be a helpful starting point.

It is only in exceptional cases that taxpayers are permitted to pursue judicial review rather than having recourse to the normal statutory appeals system. However, one such exceptional circumstance is where a taxpayer claims that the Commissioners are acting in breach of a legitimate expectation which they have engendered in the taxpayer (see, most recently, *R (on the application of Glencore Energy Ltd) v Revenue and Customs Commissioners* [2017] EWCA Civ 1716, at paragraph 62).

In *Veolia ES Landfill Ltd and Viridor Waste Management Ltd v HMRC* [2016] EWHC 1880 (Admin) Mr Justice Nugee delivered a lengthy analysis of the principles applicable to a claim for breach of legitimate expectation. The taxpayers recently withdrew their appeal to the Court of Appeal and so the decision of Nugee J stands as one of the most authoritative on the subject of legitimate expectations and contains the most comprehensive guidance on that subject.

As the purpose of this note is to summarise the key principles discussed in the Court's eighty-seven page judgment, it is necessarily incomplete. For convenience we have sought to liberally cross-reference the issues summarised here so that interested readers can explore the Court's reasoning in further detail.

The claims by Viridor and Veolia were separate and contained significant factual complexity but, at a high level, they both claimed that they had been led to believe that the refund claims they had made in respect of landfill tax would be paid. This expectation was said to have arisen from the terms of a business brief issued by the Respondents, from correspondence received from the Respondents and from partial repayments already made by the Respondents.

Whilst we wish to avoid burdening this note with unnecessary detail, in essence, in the wake of the Court of Appeal decision in *Waste Recycling Group v HMRC*

[2008] EWCA Civ 849 the taxpayers submitted claims to HMRC for refunds of Landfill Tax which had been paid on materials which the taxpayers said (and HMRC initially agreed) were repayable in consequence of the Court of Appeal's decision in that case. The material to which the claim related was material received at the site as waste but which was in fact used by the site operator to line the cells (the holes in the ground lined to prevent contamination) in which waste was to be placed. This waste used for lining is referred, depending upon its position in the cell, as 'base fluff' 'top fluff' or 'side fluff'.

Mr Justice Nugee framed the claim for legitimate expectation as requiring determination of three questions:

- I. Was there a clear and unambiguous statement, either in Brief 58/08, or in the correspondence from the relevant HMRC officers to Veolia and Viridor respectively, that base and side fluff were not taxable, giving rise to an expectation that the repayment claims would be met; in other words, 'did the taxpayers have a legitimate expectation?'
- II. Did Veolia and Viridor fail to put their cards face up on the table such as would prevent them from relying upon any expectation they may have had? and
- III. Was HMRC's decision to refuse repayment objectively justifiable or conspicuously unfair?

These are the same questions which will have to be considered in any claim for legitimate expectation and so this note will follow the same structure as the judgment considering, in each case, what guidance the Court provided in respect of each criterion. In the main, this note will not set out the arguments for and against each element of the test but will seek simply to summarise the court's conclusions.

Issue 1 – Was there a clear and unambiguous statement creating an expectation?

The Court adopted the following summary of the principles which apply to determine whether or not a legitimate expectation exists:

- i. HMRC may create a legitimate expectation that a person's tax affairs will be treated in a particular way either by the promulgation of general guidance to a body of taxpayers or by a specific statement or ruling given to a taxpayer. (paragraph 103)
- ii. A legitimate expectation will only arise if the guidance or the

specific statement is clear, unambiguous and devoid of any relevant qualification. (paragraph 103)

- iii. If a taxpayer approaches HMRC for a ruling, he has an obligation to place all his cards face up on the table, in the sense of giving full details of the transaction on which seeks the revenue's decision. (paragraph 103)
- iv. Provided there was a clear and unambiguous statement, and provided the taxpayer has placed all his cards face up on the table, he will generally be entitled to rely on an assurance given to him as binding on HMRC. A similar entitlement arises in relation to guidance issued by HMRC. (paragraph 103)

If these four conditions are met then the taxpayer has a legitimate expectation. Note, however, that the 'cards face up' principle (iii above) must be satisfied in order for a legitimate expectation to arise. We turn now, as the court did, to consider the requirements of that principle.

Issue 2: Did the Taxpayer put all his cards face up on the table?

The Court described the applicable principles as follows:

"It is an established principle that where a taxpayer approaches HMRC to ask for a ruling as to how a proposed transaction will be taxed, he has to "put all his cards face upwards on the table": MFK at 1569E per Bingham LJ. Bingham LJ went on to explain what he meant by that, namely that he must (i) give full details of the proposed transaction; (ii) indicate the ruling sought; (iii) make plain that a fully considered ruling is sought; and (iv) indicate the use he intends to make of any ruling given (at 1569E-G). Judge J referred to a taxpayer who approached the revenue with "clear and precise proposals" about the future conduct of his fiscal affairs, and that where a taxpayer had approached the revenue for guidance the Court would be unlikely to grant judicial review unless satisfied that the taxpayer had treated the revenue with "complete frankness" about his proposals (at 1574H-1575B). [paragraph 130]

...

I do not think [the principle 'he who comes to equity must come with clean hands'] should be confused with the "cards face up" principle which is not a principle about the refusal of relief as a matter of discretion, but operates at an earlier stage in the analysis, namely whether a taxpayer asking for a ruling can rely on the ruling as generating a legitimate expectation. If the taxpayer has not been frank in obtaining the ruling, he cannot rely on

it as giving rise to a legitimate expectation; but if there has been no lack of frankness, no misrepresentation, no failure to comply with cards face up obligation by the time the ruling is given, I do not see that a later alleged breach of the obligation is either here or there. [paragraph 135]"

The Court then engaged in a careful analysis of precisely what had been said by the taxpayers in correspondence with HMRC and concluded that there was no causal link between HMRC's decision to declare the fluff non-taxable and any statements within the correspondence which had been challenged as 'lacking frankness'. In other words, the issue was really whether anything the taxpayer said or omitted to say caused HMRC to issue a ruling which they would not otherwise have issued.

If one has satisfied the foregoing requirements, then the existence of a legitimate expectation has been proven. That is not, however, the end of matters since it is then necessary to proceed to ascertain whether HMRC's decision to refuse repayment is objectively justifiable, or conspicuously unfair. The case before the High Court proceeded on the basis that these two requirements were in fact "two sides of the same coin" (see paragraph 153)

Issue 3: Objective Justification

Ultimately, applying *R v IRC ex p Unilever* [1996] STC 681, the Court held that this requirement boils down to a simple question namely "*whether the decision [to depart from the legitimate expectation which had been engendered in the recipient] was so unfair as to amount to an abuse of power*".

As to whether the decision would amount an abuse of power the Court applied the test as set down in *Unilever* namely whether it would be "*illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power*."

The High Court held that the concept of "conspicuous unfairness" did not refer to "conduct that the Court could readily discern to be unfair, but conduct that went beyond being just a little bit unfair and was a good deal more unfair than that." Since the judgment in this case the Court of Appeal has reaffirmed the applicability of the Unilever test stating that the change of course had to be "outrageously or conspicuously unfair" (see *R (on the application of Hely-Hutchinson) v Revenue and Customs Commissioners* [2017] EWCA Civ 1075 at paragraph 72).

The Court relied also upon the statement by the Court of Appeal in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 that it was only permissible for a public body to depart from a promise as to future conduct where to do so was:

“a proportionate response (of which the court is the judge, or the last judge) having regard to a legitimate aim pursued by the public body in the public interest.”

Importantly, although the absence of detrimental reliance was held not to be a condition for the existence of the legitimate expectation itself (so that it was possible to have a legitimate expectation simply that money would be refunded) the absence of detrimental reliance was held to be a factor which required consideration under the conspicuous unfairness test:

“In applying this test, proportionality is to be judged by the competing interests arising in the particular case. Factors which will be likely to make the denial of the promise harder to justify are where the representation relied on amounts to an unambiguous promise, where there is detrimental reliance, where the promise is made to an individual or specific group. On the other hand where the decision-maker is concerned to raise wide-ranging or macro-political issues of policy, the expectation’s enforcement in the courts will encounter a steeper climb (at [69]).”

The Court reinforced that the absence of detrimental reliance was a factor in considering the unfairness of the decision at paragraph 191.

At paragraph 163 the Court held that in considering whether the act of withdrawing the promised benefit was proportionate the Respondents were not entitled to engage in ex-post facto rationalization. The Court held that the proportionality of HMRC’s position was to be judged *“by reference to the decision it actually took and the reasons for it, not matters that have only subsequently come to light.”* (paragraph 166)

On the application of these principles the Court held that the amount of tax at stake cannot by itself be a justification for resiling from a promise. (paragraph 172)

The Court analysed the unfairness of the presumption that the fluff was taxable since, the Court held, if the fluff was not taxable then that would in due course be established by the Tribunal and no unfairness would arise. (Paragraph 190)

It examined several factors in relation to each taxpayer’s claim which ultimately led it to conclude that it was not unfair for HMRC to resile from their previous promise. Perhaps, however, the most telling is that contained at paragraph 201, where the Court held:

“The mere fact of HMRC raising a taxpayer’s hopes by telling it that it is due a refund, and then dashing them by telling it that on further consideration no refund is due, is bound to cause the taxpayer disappointment but is

not I think in itself necessarily productive of unfairness. What may make it so is the extent to which the taxpayer has relied to its detriment in the meantime, but although I have accepted that there was in Veolia's case some detrimental reliance, it is not of the most extensive type and is small compared to the amount of tax in issue." (Paragraph 201)

It may come as a surprise to many that one can have a legitimate expectation at all without the existence of detrimental reliance but the Court's confirmation that this is so, is greatly tempered by the fact that ultimately it would, in our view, be an exceptional case in which HMRC's revocation of a promised benefit would be conspicuously unfair in the absence of any detrimental reliance.

A further interesting aspect of this case was the taxpayers' reliance upon the inequality of treatment between the applicants (whose claims had been refused) and their competitors (whose claims had been paid).

This was raised not in the context of seeking equal treatment, per se, but rather that the inequality of treatment was a reason why it would be abusive for the legitimate expectation to be withdrawn. The Court held that, in the circumstances, it was appropriate to take into account any comparative unfairness in the overall assessment. This was a distinction of some importance since there is strong authority for the proposition that a mistake made in respect of one taxpayer does not constitute a reason for perpetuating the mistake in favour or another. (See paragraph 2016)

In the circumstances the learned Judge accepted that this was not an easy question to answer on the facts but ultimately held that the decision to reverse the earlier decisions to make repayments was not conspicuously unfair.

In the context of a dispute where it was being alleged that those, such as the Applicants, who were making claims for base and side fluff and other 'gas claims' were seeking fundamentally to undermine the tax the High Court held that:

"it seems to me well within the scope of legitimate aims for the Commissioners to want to make it entirely clear to the industry that if they were going to go down a route of repeated challenges to the tax, constantly seeking to extend the concept of waste being used, and in doing so undermining the fundamentals of the tax, HMRC would take every point available to them to defend it. That does not seem a particularly surprising or unreasonable attitude for HMRC to wish to take, or message to wish to send." [paragraph 184]

The same point was made by Sir Kenneth Parker J at paragraph 60 of the recent case *R (on the application of Aozora GMAC Investment Ltd v HMRC*

[2017] EWHC 2881 (Admin) in which he refused to rule out the possibility that HMRC's statement or interpretation of the law in its internal guidance could constitute a relevant representation. He found that there is no point of principle standing in the way of such a conclusion.

Ultimately, Nugee J held:

"the Court should have a degree of reticence before castigating as conspicuously or substantially unfair the decision of the Commissioners in weighing up what are essentially incommensurable matters, namely the public interest on the one hand against the potential unfairness to individual taxpayers; and on the facts of this case I am persuaded that the Commissioners' decision was not so unfair to Veolia as to fall into that category." [paragraph 215]

It is clear that HMRC can be held to account where they have created an expectation on which a taxpayer has relied but it is equally clear that enforcing such a claim is fraught with difficulty in particular where the expectation is merely one as to the repayment of monies.

The comments made in this case note are wholly personal and do not reflect the views of any other members of Monckton Chambers, its tenants or clients.