Adviser Q&A: AG's opinion in FII Test Claimants

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The advocate general's opinion on Test Claimants in the FII Group Litigation v HMRC (Case C-362/12) was delivered on 5 September.

What is this about?

Following the decision in Deutsche Morgan Grenfell PLC v IRC [2003] EWHC 1779 (Ch), claims seeking restitution of tax paid by mistake benefited from the extended time limit in the Limitation Act 1980 s 32(1)(c). The effect of that extension for claims in relation to tax paid in breach of EU law was to bring within time any claims made within six years of the date of the relevant judgment establishing the breach. A claim issued within that six year period could cover tax whenever paid, provided the relevant EU right was in force at the time.

On 8 September 2003, it was announced in Parliament that claims of that nature issued on or after that date would be restricted to tax paid within six years of the date of issue of the claim. This became FA 2004 s 320. On 6 December 2006, further legislation was announced (which became FA 2007 s 107) imposing in effect the same restriction on claims issued before 8 September 2003. Both provisions were without notice. There were also no transitional arrangements to enable claims benefiting from the previous extended time limit to be issued before the provisions took effect (for s 107 transitional arrangements would have been irrelevant anyway, given that it sought to cancel claims which had already been made).

In its judgment of 23 May 2012 ([2012] UKSC 19), the Supreme Court unanimously found s 107 to be contrary to EU law. However, it reached the same outcome for the earlier provision, s 320, only by a majority and therefore referred the question of the lawfulness of that provision to the CJEU. This is advocate general Wathelet's opinion to the court as to how he proposes they should answer that question.

Why was FA 2004 s 320 considered valid by the minority in the Supreme Court?

The introduction of retrospective legislation like these provisions potentially offends the EU principles of effectiveness, legitimate expectation and legal certainty. To the minority, the only relevant principles were the latter two. As a result of another part of the Supreme Court's judgment in May 2012, it is now clear that claimants had two remedies available: this remedy for tax paid in mistake (with its extended time limit); and a remedy under the Woolwich case (Woolwich Equitable Building Society v IRC [1993] AC 70, HL) for tax unlawfully exacted. By its judgment in May last year, the Supreme Court had found that the Woolwich remedy did not require a demand, a requirement that would be problematic for claims concerning self-assessed taxes, and did not benefit from the

same extended time limit available under the Limitation Act 1980 s 32(1)(c) – two long outstanding issues of debate. Thus, although they may not have realised it at the time, the claimants had both a mistake remedy and a Woolwich remedy, albeit the latter was restricted to a six year period which had largely expired by the time the claims were issued.

The minority concluded that, as the claimants had at the time an effective remedy with a reasonable limitation period of six years in Woolwich, the principle of effectiveness was sated. The mistake remedy was an extra, unprotected by that principle. At the time s 320 was announced (midway through DMG's career through the courts), the law was in such a state of uncertainty that claimants could not have had any legitimate expectation that their claims could benefit from the extended time limit for mistake claims. The principles of legal certainty and legitimate expectation were not offended by retrospectively taking away those rights before they had been finally established. Adopting that reasoning, the minority, however, concluded that the subsequent change in FA 2007 s 107 was unlawful, as by then the law had been clearly established.

What is the advocate general's view?

The advocate general's opinion expressly follows the reasoning of the majority in the Supreme Court.

The principle of effectiveness, he considers, is engaged whenever a domestic remedy is used to enforce an EU right. That principle prohibits the reduction in a time limit without both notice and transitional arrangements: 'a legal remedy cannot offer "effective" protection unless the conditions in accordance with which it may be used and achieve a positive outcome are known in advance' (para 47). The existence of another remedy would not cure an incompatibility with EU law.

He also concludes, again in keeping with the majority of the Supreme Court, that the principles of legitimate expectation and legal certainty are also offended. The claimants were entitled to expect that their claims would be ruled upon on the basis of what the law was determined to be and not to be deprived of that right by statute.

Will the court follow his opinion?

It is still the case that the court usually does follow its advocate general's lead, although there has been a noticeable recent trend not to do so. In this case, the advocate general does, however, have the support of the European Commission and a sizeable majority (5:2) in the Supreme Court, whom he concludes reached the right decision for the right reasons.