

Tax Representation



TAXREP 9/07

**SIX YEAR LIMITATION PERIOD FOR ALL DIRECT TAX CLAIMS
LETTER TO THE PAYMASTER-GENERAL (PMG) DATED 9 JANUARY 2007 AND
REPLY FROM PMG DATED 1 FEBRUARY 2007**

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INTRODUCTION

1. In the 2006 Pre-Budget Report on 6 December 2006 the Government announced that it would be taking action to ensure that the limitation period for recovery of direct tax paid by mistake of law will be six years from the date of payment of the tax.
2. This overturns the House of Lords decision in *Deutsche Morgan Grenfell Group plc v HM Commissioners of Inland Revenue and another* [2006] UKHL 49 (Deutsche Morgan Grenfell) when it was decided that the six year limitation period, under the existing law, runs from the date when it is known that there has been a mistake of law.
3. Our concern is that this change of law, which is to be introduced with immediate effect, does not allow for a transitional period and is, therefore, in our view contrary to EC law as established in the 2002 judgment in the case of *Marks & Spencer v Customs & Excise* (Case C-62/00).

Letter to the Paymaster General from the Chairman of the Technical Committee of ICAEW Tax Faculty

4. The text of the letter sent by the Chairman of the Technical Committee of ICAEW Tax Faculty on 9 January 2007 to the Paymaster General is reproduced below.

Rt Hon Dawn Primarolo MP
Paymaster General
HM Treasury
1 Horse Guards Road
London SW1A 2HQ

Dear

Six year Limitation Period for all Direct Tax Claims

I believe it necessary to alert you to the concern of the members of the ICAEW Tax Faculty in regard to a particular measure included in the Pre-Budget Report of December 2006 and its consistency with EU law. Their concerns arise from the potential for significant extra costs for the Exchequer and the impact of the proposal on the reputation of the UK's tax system.

In the PBR, the Chancellor announced that Government is taking action to ensure that the limitation period for recovery of direct tax paid by mistake of law will be six years from the date of payment. This overturns the House of Lords decision in *Deutsche Morgan Grenfell Group plc v HM Commissioners of Inland Revenue and another* [2006] UKHL 49 (Deutsche Morgan Grenfell) when it was decided that the six year limitation period, under the existing law, runs from the date when it is known that there has been a mistake of law.

It is intended that the new provision will apply not merely to future cases but for any action brought before 8 September 2003 unless the claimant is subject to a final judgment given by the Courts before 6 December 2006.

We are concerned that the proposed provision could be contrary to EU law as there is no allowance for a transitional period. From the information we have available we believe this is contrary to the 11 July 2002 Judgment of the European Court of Justice (ECJ) in *Marks & Spencer v Customs & Excise* (Case C-62/00), in which the relevant facts are identical. Citing earlier judgments, the ECJ held in this case that national legislation which retroactively curtails limitation periods is incompatible with the principles of effectiveness and the protection of legitimate expectation if no transitional provision is made available.

By way of background for the reason for our concern, the ECJ stated in its judgment

‘38. Whilst national legislation reducing the period within which repayment of sums collected in breach of Community law may be sought is not incompatible with the principle of effectiveness, it is subject to the condition not only that the new limitation period is reasonable but also that the new legislation includes transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the original legislation. Such transitional arrangements are necessary where the immediate application to those claims of a limitation period shorter than that which was previously in force would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right.’

If this proposed provision is enacted, we believe there will inevitably be litigation, with the subsequent extra costs of both sides likely to be met out of the public purse.

We drew the attention of the Government to similar concerns in relation to the earlier legislation introduced following the High Court decision in the *Deutsche Morgan Grenfell* case: that earlier legislation is contained in section 320 Finance Act 2004. The potential legal action to be taken in respect of this earlier legislation was stayed pending the House of Lords decision in *Deutsche Morgan Grenfell* but it will now come before the UK Courts.

We share the Government’s concern to protect the public finances. However, we do not believe that this should result in legislative proposals that disregard a clear rule of law laid down by the ECJ. This will likely invite further litigation on the part of taxpayers who have paid tax in good faith but now find that the tax in question was not lawfully payable.

We request that the proposal is amended to allow for a transitional period which is consistent with EU law.

We would be grateful for clarification of whether Government will amend the proposal or alternatively if it could clarify as to how the proposal is consistent with EU law.

Yours sincerely

Ian E Hayes
Chairman
Technical Committee, ICAEW Tax Faculty

Reply from the Paymaster General

5. The response of 1 February 2007 from the Paymaster General is reproduced below:

'Ian E Hayes
Chairman, Technical Committee
ICAEW Tax Faculty
Chartered Accountants' hall
PO Box 433 Moorgate Place
London EC2P 2BJ

Dear Mr Hayes

Thank you for your letter of 9 January concerning the PBR announcement of a six-year limitation period for all direct tax claims.

I welcome your concern for the Government's tax revenue, however I do not agree with the substance of your letter. The Government is confident that it is proper to legislate as proposed and would robustly defend any challenge to the legislation in the courts.

For most direct tax provisions, there is already a six-year limitation period that balances the legitimate interests of claimants and the general body of taxpayers. This measure will simply ensure that this six-year period applies to all direct tax claims. It is important to act now because of the sheer size of the potential figures at stake, with some claims going back over 30 years.

Yours sincerely

Dawn Primarolo MP

lky/13 February 2007

WHO WE ARE

1. The Institute of Chartered Accountants in England and Wales ('ICAEW') is the largest accountancy body in Europe, with more than 128,000 members. Three thousand new members qualify each year. The prestigious qualifications offered by the Institute are recognised around the world and allow members to call themselves Chartered Accountants and to use the designatory letters ACA or FCA.
2. The Institute operates under a Royal Charter, working in the public interest. It is regulated by the Department of Trade and Industry through the Accountancy Foundation. Its primary objectives are to educate and train Chartered Accountants, to maintain high standards for professional conduct among members, to provide services to its members and students, and to advance the theory and practice of accountancy, including taxation.
3. The Tax Faculty is the focus for tax within the Institute. It is responsible for tax representations on behalf of the Institute.