

## Analysis

# Staleness refreshed: delay and abuse of process in the FTT

## Speed read

Issues surrounding delay by HMRC are back before the FTT, as recent decisions confirm the view that the FTT has jurisdiction to bar HMRC from proceeding in cases where their delay during investigations causes evidential issues for hearings amounting to an abuse of process. This is likely to be of interest to taxpayers and cause concern for HMRC. It remains to be seen what the higher courts will have to say about whether this is truly an issue that directly affects the fairness of the hearing before the FTT or is an issue of public law outside the FTT's jurisdiction.



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Delays by HMRC are nothing new, but two recent First-tier Tribunal (FTT) decisions show a new approach by the FTT in dealing with such delays when they impact upon a hearing.

Earlier this year, in *Nuttall v HMRC* [2022] UKFTT 192 (TC), the FTT determined that it had jurisdiction to bar HMRC from proceeding in circumstances where HMRC's delay in undertaking an enquiry meant there could not be a fair trial.

More recently, the FTT in *Kingdon and others v HMRC* [2022] UKFTT 407 (TC) considered HMRC's delay in issuing discovery amendments and, referring to *Nuttall*, found that it was clear it had jurisdiction to consider the appellants' abuse of process argument and to bar HMRC from defending the appeal if there was such an abuse.

Those reading the above may experience a certain amount of déjà vu. When it comes to discoveries and delay, one would be forgiven for thinking that the Supreme Court had dealt with this issue in *Tooth v HMRC* [2021] UKSC 17 when it concluded that staleness was not a concept. Strictly, the delay in *Tooth* was the delay between making a discovery and issuing an assessment, whereas the FTT in *Nuttall* and *Kingdon* was considering other lengthy delays by HMRC that meant a fair trial may no longer be possible.

Delay can clearly create a lack of fairness in a hearing. Both *Nuttall* and *Kingdon* noted that it can lead to issues with respect to evidence, which can unfairly prejudice a taxpayer, who usually bears the burden of proof. It often means there is less documentary evidence available, and that the memories of the witnesses will have faded. This is undoubtedly a serious issue, but is it one for the FTT to deal with?

## Revisiting *Foulser*

The lead case dealing with abuse of process in the context of the FTT is *Foulser v HMRC* [2013] UKUT 38 (TCC). In *Foulser*, Morgan J considered the case law on abuse of process in the criminal context and found support for dividing cases into two broad categories (at para 35):

'The first category is where the alleged abuse directly affects the fairness of the hearing before the FTT. The second category is where, for some reason not directly affecting the fairness of such a hearing, it is unlawful in public law for a party to the proceedings before the FTT to ask the FTT to determine the matter which is otherwise before it.'

Subsequent cases have considered the distinction drawn in *Foulser*, and two cases worth mentioning here are *Always Sheet Metal Ltd and others v HMRC* [2017] UKFTT 198 (TC) and *Hackett v HMRC* [2020] UKUT 212 (TCC). In *Always*, the FTT determined that, as the alleged excessive delay by HMRC concerned conduct prior to notification of the appeals, it would be an inappropriate use of its case management powers to punish HMRC by barring them from proceeding. The Upper Tribunal (UT) in *Hackett* appeared to endorse the decision in *Always*, noting that the decision could also be justified on the basis that the complaint was, in reality, a complaint about how HMRC had exercised its powers and that had to be addressed through judicial review. In *Always*, the matter before the UT concerned HMRC's actions in bringing civil penalty proceedings, rather than concerning an issue that directly affected the fairness of the hearing in the FTT. As such, it was within the second category of abuse cases. The UT concluded (at para 40) that:

'As was the position in *Always Sheet Metal*, the matters complained of in this case occurred before the proceedings were instituted in the FTT and do not relate to any alleged abuse of the FTT's own proceedings.'

**It appears that, while confirming that the FTT does have the jurisdiction and power to bar HMRC from proceeding in these circumstances, the FTT is choosing to exercise that power cautiously**

## Comparing *Nuttall* and *Hackett*

When looking at *Nuttall* and *Hackett* side by side, the obvious question is: how did the FTT in the former square its decision with the UT's decision in the latter?

The short answer is that the FTT did not consider that *Hackett* established a principle that conduct prior to proceedings could not support an argument that the FTT should provide a remedy for abuse of process. The FTT in *Kingdon* then had no issue in relying on *Nuttall* as authority for the FTT having the necessary jurisdiction to bar HMRC from proceeding, where their inordinate delay caused evidential issues that meant a fair hearing was not possible.

While taxpayers should clearly be entitled to protection from excessive delays by HMRC, it is noteworthy that the FTT is picking up this issue, particularly given the decision of the Supreme Court in *Tooth* in the context of discovery assessments. While the delay in question is of a different

nature, it is still in the context of essentially the same regime, and it is a regime that has its own time limits in place.

Where those time limits have been satisfied it is not immediately obvious that it should be a matter for the FTT. On the contrary, the Supreme Court noted in *Tooth* that, when issuing an assessment, HMRC must act in accordance with the ordinary principles of public law but, if it fails to do so, the taxpayer's remedy is exercised by way of judicial review proceedings.

In the context of an enquiry, the taxpayer has the express ability to curtail excessive enquiries by applying to the FTT for a direction that HMRC should issue a closure notice. Despite that, the FTT in *Nuttall* did not consider that this affected HMRC's culpability for the delay or the remedies that were open to the FTT to grant.

## It seems inevitable that the courts will be asked again to consider whether the FTT has a supervisory role in relation to HMRC's delays or if that role is reserved for judicial review proceedings

### Where does this leave us?

At present, it appears that, while confirming that the FTT does have the jurisdiction and power to bar HMRC from proceeding in these circumstances, the FTT is choosing to exercise that power cautiously. Although there was a 12 year delay in *Nuttall* and a six year delay in *Kingdon*, the FTT ultimately found that these considerable delays had not in fact affected the fairness of the hearing (despite the delay being inordinate and, in the case of *Nuttall*, 'inexcusable'). This raises the question of what level of delay would be sufficient and whether the FTT would be any more willing to grant a remedy than would be the case in judicial review proceedings.

Nonetheless, even if the FTT is circumspect in granting a remedy to taxpayers, HMRC will likely be concerned at the principle that its actions could be scrutinised more generally by the FTT. Similarly, it is likely that, as with staleness, there will be a number of taxpayers who have grounds to make this argument and will be keen to do so.

It seems inevitable that this issue will be revisited, and the courts will be asked to consider whether the FTT has a supervisory role in relation to HMRC's investigative delays in the context of protecting the FTT's own processes, or if that role is reserved for judicial review proceedings. There will be keen observers on both the taxpayer and HMRC side when the higher courts have the opportunity to weigh in on the issue again.

With continued disputes and uncertainty as to the FTT's jurisdiction when it comes to certain public law arguments, there is also a wider question as to whether the FTT should be given a judicial review function, or if further legislative clarity on the scope of the FTT's existing jurisdiction is required. ■

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