TC01531

Appeal number: TC/2011/1723

VAT – Appeals – Extension of time to appeal – Delay of over 3 years – Application dismissed

FIRST-TIER TRIBUNAL

TAX

BIGGLESWADE AND DISTRICT CONSERVATIVE CLUB **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL: JUDGE THEODORE WALLACE
MRS SUSAN LOUSADA

Sitting in public in Bedford on 26 September 2011

Ian Spencer, of Ian Spencer and Associates Ltd, for the Appellant

Mrs Lynne Ratnatt, presenting officer, for the Respondents

DECISION

1. This was an application for an extension of time to appeal against a decision on 19 July 2007 rejecting a repayment claim dated 28 December 2006 of £14,422 for VAT paid on gaming machines between 1 January 2003 and 30 September 2005.

2. The repayment claim followed the decision of the European Court of Justice in *Finanzamt Gladbeck v Linneweber* (Case C-453/02) [2005] All ER (D) 254.

3. In a decision released in 2008 the VAT and Duties Tribunal held that the exclusion of gaming machines from exemption from VAT prior to 5 December 2005 infringed the principle of fiscal neutrality under Community law. This decision was affirmed by the High Court in *Revenue and Customs Commissioners v Rank Group plc* [2009] STC 2304. On further appeal the Court of Appeal made a reference to the Court of Justice on which no decision has yet been given.

4. A large number of appeals to the Tribunal have been stood behind *Rank*. Mr Spencer told us that there are a considerable number of other cases where claims have been refused but no appeal has yet been made to the Tribunal.

5. The Notice of Appeal to the Tribunal was served by Mr Spencer on behalf of the Appellant on 1 March 2011 coupled with the application for an extension of time to appeal which was based on the fact that the decision letter on 19 July 2007 made no direct reference to the right of appeal to the Tribunal. Mr Spencer, who was only instructed by the Appellant earlier this year, told the Tribunal that a large number of Conservative and Labour clubs, working men's clubs and British Legion Clubs had received similarly worded letters.

6. The letter to the Appellant dated 19 July 2007, which was from the Nottingham Voluntary Disclosure Team, rejected the repayment claim in the first five lines, stating that it was the view of HM Revenue and Customs that the UK "does not breach fiscal neutrality" in the taxation of gaming machines. We note that the reason for rejection was expressed in the present tense but that there had been a change in the law from 6 December 2005. The letter continued,

> "If you wish to appeal against this decision, you will need to write to the VAT Appeals and Reconsiderations Team where the evidence to support your request will be examined. Any comments should be addressed to … ."

The letter then gave the address of the VAT Appeals and Reconsiderations Team in Birmingham. The letter continued,

> "This team will review all of the facts of the case and advise you of their outcome.
>
> Please note that there are strict time limits for reconsiderations and appeals. You must lodge your appeal within 30 days of the date of

the decision. Please refer to paragraph 26.5 of Notice 700, The VAT Guide, for further details.

… [T]his letter supersedes any previous corresp0ondence received from HM Revenue and Customs in relation to this matter. If you have already lodged an appeal, there is no requirement to resubmit an appeal on the basis of this letter."

7. Peter Vickers, the chairman of the club, who was an accountant had submitted the repayment claim, told the Tribunal that since the VAT Office had already ruled on the repayment claim there seemed no point in appealing to the Appeals and Reconsideration Team. He did not remember whether he had looked at paragraph 28.5 of Notice 700. He had put the correspondence on the club's file where it remained until he saw something in a magazine of the Association of Conservative Clubs; he contacted the Association which directed him to Mr Spencer.

8. Mr Spencer said that the letter of 19 July 2007 failed to inform the club of its right to appeal to an independent Tribunal and misled the club into believing that an appeal involved the same people reconsidering the decision. The letter confused reconsideration and the right of appeal. He said that HMRC had a public duty to be clear in its advice.

9. Mrs Rattner said that the notice of appeal should have been served within 30 days of the decision letter of 19 July 2007 under the VAT Tribunals Rules 1986 which applied at the time. Rule 5(3)(a) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 which now apply give power to extend time limits without specifying any basis. However the overriding objective in Rule applies requiring the Tribunal to deal with cases fairly and justly.

10. She submitted that the circumstances to justify an extension should be exceptional. No good reason had been shown in this case. No advice had been sought after the letter. Notice 700 specifically referred to the right of appeal to the Tribunal. There was a public interest in the finality of decisions. The inordinate delay since 2007 weighed heavily against any extension. She said that there was no legislative requirement to inform a trader of the right of appeal.

11. She cited a decision in *Wombwell Sports and Social Club v Revenue and Customs Commissioners* (2011) UKFTT where the Tribunal had refused leave to appeal 3 years and 11 months out of time and *The Medical House Plc v Revenue and Customs Commissioners* (2006) Decision No.19859 where the Tribunal refused leave to appeal against a decision made some 14 months earlier when HMRC failed to give notice initially of the right of appeal, see at paragraph 31.

12. She submitted that it was not relevant that in the present case, subject to any contrary decision by the Court of Justice, the tax had been collected in breach of Community law.

13. In reply Mr Spencer said that the letter of 19 July 2007 had clearly said that an appeal was to the Appeals and Reconsideration Team; that conflicted with Notice 700. He asked which the taxpayer was supposed to rely on. He said that Revenue and Customs owed a duty of care to the individual taxpayer. The Appellant had been misled by the 2007 letter; this was a matter to which the Tribunal should give substantial weight when deciding whether to extend time.

Conclusions

14. At the relevant time in 2007 the VAT Act 1994 did not specify a time limit for appeals, but the VAT Tribunals Rules 1986 which were made pursuant to Schedule 12, paragraph 9 of the Act specified under Rule 4 that a notice of appeal shall be served within 30 days after the disputed decision. Rule 19 gave the Tribunal power to extend time limits under the Rules; this clearly included extending time to appeal.

15. The 1994 Act was amended by the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 inserting sections 83A to 83G introducing a right to require a review and specifying the 30 days time limit for appeals unless the Tribunal gives permission.

16. Rule 5(3)(a) of the 2009 Rules provide for extending time limits but lays down no criteria. The extension now sought must be under the 2009 Rules since the 1986 Rules no longer operate. However, when deciding whether to extend time limits, the Tribunal must clearly consider the position when the original time limit expired.

17. The time limit which was in a statutory instrument approved by Parliament is clearly designed to bring finality and certainty. The Tribunal is given specific power to extend time limits; this is a discretion which must be exercised judicially having regard to the facts in any case these may vary widely.

18. When exercising any power the Tribunal must seek to give effect to the overriding objective under Rule 2 to deal with cases justly and fairly. Under Rule 2(2)(e) this includes avoiding delay.

19. Delay is relevant to dealing with cases justly for a number of reasons. As a general proposition justice delayed is justice denied. Delay can result in a loss of documentary evidence and of witnesses' memory of events. Since the entitlement to repayment would primarily depend on the judgment of the Court of Justice as to whether the legislation infringed fiscal neutrality and it has not been suggested that witnesses of fact would be required before the Tribunal, the loss of evidence and recollection would not seem relevant here.

20. However, the Respondents do have a legitimate interest in finality in that it is their duty to collect tax on behalf of the Revenue and any repayments impinge on the revenue available to meet public expenditure.

21. The delay in the present case of over 3½ years is very substantial on any view and an extension of time of this extent requires proper justification.

22. The justification put forward was that the letter of 19 July 2007 was misleading. We readily accept that it was misleading.

23. The statement,

> "If you wish to appeal against this decision, you will need to write to the VAT Appeals and Reconsiderations Team"

was incorrect as a matter of law. There was no requirement to write to the Team as a pre-requisite to appealing. The later statement that "there are strict time limits for reconsiderations and appeals" wrongly conflated the two; furthermore there was in 2007 no statutory provision for reconsideration, let alone a "strict" time limit.

24. Notice 700 surprisingly remains unchanged in spite of the 2009 changes, having been last updated in May 2006.

25. Paragraph 28.5 deals with time limits for reconsiderations and appeals. It starts with reconsideration stating,

> "If you want the VAT Office to reconsider a decision, you should apply, with your reasons and any additional information, within 30 days of the date of the decision."

Paragraph 28.5 goes on to state that an appeal can be lodged with a VAT Tribunal within 21 days if the original decision is confirmed. Paragraph 26.5 goes on to provide for appeals direct to the Tribunal.

26. Anyone reading paragraph 28.5 of Notice 700 with reasonable care would realise that it conflicted with the letter of 19 July 2007 in that the letter stated "You will need to write".

27. Mr Vickers said that he did not remember whether he looked at paragraph 28.5. We are satisfied that he cannot have done, since he would immediately have realised the conflict.

28. However, there should not have been a conflict and the club should have been able to assume that the letter was correct.

29. On the other hand it would have been very surprising if the only appeal lay to Customs themselves. We would have thought that an accountant would know that it is possible to appeal to an independent Tribunal and would at the least have queried the position. Even taking the letter of 19 July 2007 at face value, the Team from which it was written at Nottingham was not the same as the Appeals and

Reconsiderations Team at Birmingham so that different people would have considered the matter.

30. It is also relevant that we are not here concerned with a delay of weeks or months arising from confusion over the letter but a delay of over three years.

31. The application of an extension of time to appeal is dismissed

32. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

THEODORE WALLACE
TRIBUNAL JUDGE
RELEASE DATE: 28 October 2011