TC01612

Appeal number: TC/2011/05627

VALUE ADDED TAX – Application by the Appellant for an extension of time to appeal against decisions by HMRC – Balancing exercise undertaken setting off the loss to the Appellant if the extension was not granted against (a) the public interest in the need for good administration, legal certainty and respect for the general time limit for bringing an appeal which Parliament has laid down; (b) the discerned prejudice to HMRC in having to reopen their examination of the Appellant's claim were an extension of time for appealing to be granted; and (c) the Appellant's discerned culpability for the long delay in initiating its appeal – held on the facts that the balance was against granting an extension of time to appeal – application refused and appeal struck out

FIRST-TIER TRIBUNAL
TAX

JEM LEISURE LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS (*Value Added Tax*) **Respondents**

TRIBUNAL: JOHN WALTERS QC (TRIBUNAL JUDGE)
R J FREESTON FRICS

Sitting in public at Nottingham on 9 November 2011

Mr. P. Jeffrey, RSM Tenon, for the Appellant
Mr. P. Oborne, Senior Officer, HMRC, for the Respondents

The Respondents applied by a Notice dated 18 August 2011 to strike out the appeal as being made out of time and in the Notice stated their opposition to the Appellant's request for an extension of time to serve its Notice of Appeal and its application for the appeal to be stood over behind the appeal of Rank plc.

At the hearing on 9 November 2011, the Tribunal heard both the Appellant's request for an extension of time and the Respondent's application for the appeal to be struck out. The Tribunal reserved its decision.

Following consideration, the Tribunal's decision is to refuse to extend the time for the service of the Appellant's Notice of Appeal and to strike out the appeal. Accordingly, the following Directions are made, for the Reasons which appear below.

DIRECTIONS

1. The Appellant's application for an extension of time in which to appeal against the decision of HMRC contained in HMRC's letter dated 9 July 20009 is REFUSED.

2. The appeal is STRUCK OUT pursuant to rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). This is by reason of the Tribunal not having jurisdiction in relation to the appeal (rule 8(2)(a) of the Rules) because (a) the extension of time in which to appeal having been refused, the appeal is brought out of time in relation to the decision of HMRC contained in HMRC's letter dated 9 July 2009; and (b) there was no appealable decision contained in HMRC's letter dated 1 July 2011 – the appeal having ostensibly been brought against such a decision : see paragraph 1 of the Grounds for appeal in the Notice of Appeal.

REASONS

Introductory facts

1. On 20 March 2009 RSM Bentley Jennison ("BJ"), Chartered Accountants, lodged a claim with the Respondents ("HMRC") on behalf of their client JEM Leisure Limited ("the Appellant") to recover output VAT on gaming machine income which BJ asserted was not properly liable to VAT.

2. The claim was a 'Fleming' claim based on the decision of the European Court ("the ECJ") in *Finanzamt Gladbeck v Linneweber* (C-453/02) which, BJ argued, established that income from gaming machines was exempt for VAT purposes. The claim was in the amount of £490,669 plus interest and covered the period from 1987 to 1996.

3. On 12 March 2009 HMRC responded to BJ with a holding letter promising a later substantive reply.

4. On 9 July 2009 HMRC wrote again to BJ asserting that the ECJ's decision in *Linneweber* did not give rise to the result claimed by BJ and specifically did not provide a basis for an argument that the UK's VAT treatment of gaming machines had 'breached fiscal neutrality'. The letter contained in terms a formal rejection of the claim made by BJ on behalf of the Appellant. It concluded with advice on an appeal against the decision to an independent tribunal.

5. Mr. Jeffrey, for the Appellant, gave evidence to the Tribunal that the letter of 9 July 2009 was never received and that the Appellant was not aware of it or of the decision which it contained until 2010 (see: below). We note, however, that the letter of 9 July 2009 was addressed to BJ at the same address as the earlier letter of 12 March 2009 which apparently was received by BJ.

6. Later in 2009, according to Mr. Jeffrey's evidence, the Appellant ceased to retain BJ and became a client of his firm, RSM Tenon ("Tenon"). However no instructions were apparently given by the Appellant to Tenon to pursue the claim.

7. At some later stage Tenon acquired the practice of BJ, but this appears not to have impacted on the conduct of the Appellant's affairs. Mr. Jeffrey of Tenon was himself introduced to the Appellant early in 2010. At that stage the Appellant informed Mr. Jeffrey that its claim for repayment of VAT was ongoing but at first did not instruct him to act in that particular matter. Mr. Jeffrey explained that the Appellant was aware that a claim in a complex area of VAT was likely to take a long time to resolve and was not especially concerned that no decision, nor indeed anything substantive, had been received from HMRC in relation to the claim.

8. However, Mr. Jeffrey told the Tribunal that the Appellant did later instruct Tenon to chase the matter with HMRC and this resulted in a chain of emails in May 2011. The first email was an enquiry by Tenon as to what the latest position was in relation to the claim. The writer appears from the wording of the email to have been unaware of the refusal in the letter dated 9 July 2009.

9. The second email was a follow-up by Tenon saying that they had met with their client (the Appellant) 'and it is our understanding that [the claim] is being dealt with by HMRC but we are unsure as to what stage it is at'.

10. These emails were replied to by HMRC on 20 May 2011. HMRC informed Tenon that they had examined the Appellant's file and noted that a decision on the claim had been issued on 9 July 2009. A copy of the letter dated 9 July 2009 was sent to Tenon by post on the same day.

11. Tenon responded by a letter dated 13 June 2011 informing HMRC that they had made enquiries 'but no one has ever received the decision letter dated in July 2009'. Tenon's letter went on to make a point that the position adopted in the decision letter 'does not appear to be in accordance with HMRC policy as per Business Brief 20/06' and asked that 'in view of this and more recently cases being processed along with the fact never having received the original letter would it be possible for the Fleming claim to be reinstated as submitted' [*sic*].

12. HMRC replied by a letter dated 1 July 2011 stating that the claim could not be reinstated and 'the decision letter issued … dated 9 July 2009 remains in place'. The letter went on to explain that the claim had been made in respect of an alleged breach of fiscal neutrality in UK VAT law on the liability of gaming machines before 6 December 2005 and that, when the claim had been submitted, in March 2009, these issues were already being considered by the VAT Tribunal in the case of *Rank Group plc* (LON/2006/0875).

13. HMRC explained in the letter why their policy before the Tribunal's decision in the *Rank* appeal was issued in December 2009 had been that no claims for refunds of VAT relating to periods before 2001 could be accepted. HMRC further explained that following the issue of the Tribunal's decision in the *Rank* appeal, Customs brief 11/10 had been issued (in March 2010) according to which claims could only be accepted for accounting periods from November 1998 to December 2005 (being periods after the periods in relation to which the Appellant's claim had been made).

14. In response to HMRC's letter dated 1 July 2011 the present appeal was filed. The Notice of Appeal is dated 26 July 2011. The appeal is in terms 'against the decision of [HMRC] dated 01/07/2011 … to reject a portion of the Appellant's voluntary disclosure of £490,669', which is explained later in the Notice of Appeal to refer to supplies of gaming machines prior to 1 November 1998. By the Notice of Appeal the Appellant also applies for a direction that the appeal be stood over and all time limits extended for a period of 60 days from the date of the release of the decision of the Court of Appeal in the case of *Rank Group plc*, on the grounds that the *Rank* litigation addresses issues of law which are of direct relevance to the appeal. (We were told that the Court of Appeal in the *Rank* case made a reference to the ECJ for a preliminary ruling which was pending at the time of the hearing of this Application but delivered before the release date of these Directions and which was – at least in part – favourable to Rank Group plc.)

15. The Tribunal holds that HMRC's letter dated 1 July 2011 does not contain any decision against which an appeal can lie to this Tribunal. At the hearing, the Tribunal understood Mr. Jeffrey to accept this. The only decision the letter does contain is the decision not to reinstate the claim and to confirm that the decision letter dated 9 July 2009 'remains in place'. The remainder of HMRC's letter dated 1 July 2011 was in effect an answer to Tenon's point, made in their letter dated 13 June 2011, that the decision letter dated 9 July 2009 'does not appear to be in accordance with HMRC policy as per Business Brief 20/06'.

16. The Tribunal went on to consider whether it should give permission to the Appellant to amend its Notice of Appeal so as to bring the appeal against the decision contained in the letter dated 9 July 2009 – which was HMRC's formal decision to refuse the claim – and allow an extension of time for the making of the appeal. Mr. Oborne, for HMRC, did not oppose in principle the amendment of the Notice of Appeal but maintained his objection to an extension of time to enable the Appellant's appeal to be deemed to have been made in time.

Principles relating to the extension of time to bring an appeal and their application in this case

17. Section 83G(6) VAT Act 1994 gives the Tribunal power to extend the time within which this appeal may be brought, and in the exercise of the discretion involved in the power we must give effect to the overriding objective in rule 2(1) of the Rules to deal with cases fairly and justly.

18. We were referred by Mr. Oborne to four previous Tribunal decisions: *The Medical House plc* (2006) (VTD 19859) – a decision of Judge Demack refusing an extension of time to appeal; *Former North Wiltshire DC* [2010] (UKFTT) 449 – a decision of the present judge extending time for appealing; *Pen Associates Ltd.* [2011] (UKFTT 554) – a decision of Judge Demack refusing an extension of time; and *Black Pearl Entertainments Limited* [2011] (TC01223) – a decision of Judge Michael S. Connell refusing an extension of time to appeal, which incidentally involved a proposed appeal against a refusal of a repayment claim relating to output tax on income from gaming machines.

19. We hold that we must pay particular attention to whether the Appellant has shown good reason for the delay in lodging the appeal and whether extending time would be prejudicial to the interests of good administration and legal certainty.

20. Beyond this, we must take account of all factors relevant to the proportionate exercise of our discretion (proportionality being an aspect of fairness and justice) and such factors would in principle include a consideration of the merits of the proposed appeal so far as they can conveniently (and proportionately) be ascertained. If some factors point one way and some another, we must carry out a balancing exercise.

21. As to the merits of the proposed appeal, we face a difficulty in that it appears to us that the area of law sought to be explored in the proposed appeal is complex and developing, and the precise facts of the Appellant's case are obscure. Further, neither Mr. Jeffrey nor Mr. Oborne was able to give us any indication at all of the strength of the Appellant's case on the breach of fiscal neutrality point (an issue of substantive law), or on any other procedural points arising (such as the merits of the "Fleming" claim), or on the facts, and we cannot conveniently proceed independently to any evaluation of the strength of the Appellant's case.

22. We can however say that it does not appear to us that the case the Appellant wishes to advance is obviously hopeless or even weak. In the circumstances we will, at this stage, assume that the case is strong.

23. It is certainly potentially valuable. A consequence of striking out the appeal will be to extinguish the Appellant's right to litigate a claim quantified at just under £500,000 plus interest.

24. We conclude that, taking no account of the difficulties caused by the lateness of the appeal, a refusal by this Tribunal to entertain the appeal would be a real and practical loss or injury to the Appellant – cf *Former North Wiltshire DC* at [63].

25. That is a factor in favour of extending time for appealing. It cannot however "trump" all other factors (cf *Former North Wiltshire DC* at [61]).

26. Against it we must balance the public interest in the need for good administration, legal certainty and respect for the general time limit for bringing an appeal which Parliament has laid down (cf section 83G VAT Act 1994). The facts on which the Appellant relied in quantifying its claim in BJ's letter of 20 March 2009 are to some extent estimates and we conclude that the prejudice to HMRC in having to reopen their examination of the Appellant's claim would be real, and more significant than it was in *Former North Wiltshire DC*, where HMRC had not opposed a grant of an extension of time to appeal a related decision to that in issue in the decided application (cf *ibid.* at [67]). This is a factor of some significance pointing against the grant of an extension of time to appeal.

27. A crucial factor in our judgment is our estimate of the Appellant's culpability in delaying to lodge its Notice of Appeal. The delay was almost two years and a delay of this length would, in most normal cases, prevent the exercise of the discretion to extend time to appeal.

28. The explanation received by the Tribunal for the delay was given us by Mr. Jeffrey. We indicated during the hearing that it was unfortunate that a representative of the Appellant was not present at the hearing to give first-hand evidence on this point. Indeed we suggested that it might be right for us to adjourn the hearing in order to receive such evidence and we gave Mr. Jeffrey the opportunity to take instructions by telephone from his client as to whether he wished to apply for an adjournment for this purpose. In the event Mr. Jeffrey made no such application.

29. Mr. Jeffrey's explanation for the delay in initiating the appeal was that the Appellant and BJ and Tenon were all unaware that HMRC had refused the claim by their letter dated 9 July 2009. This state of unawareness continued until Tenon received the email dated 20 May 2011 from HMRC. During this period the Appellant thought that HMRC was taking a long time in dealing with the claim (which the Appellant did not think was strange) and did not

press for information on HMRC's progress in dealing with it. We infer from what Mr. Jeffrey told us that BJ did not press HMRC for an update following HMRC's letter of 12 March 2009 because the Appellant shortly thereafter (how shortly, we do not know) withdrew their instructions from BJ. Mr. Jeffrey told us that Tenon had first received instructions to chase up the claim sometime shortly before the date of the first email from them to HMRC on the subject (13 May 2011).

30. Mr. Oborne submitted that in a case such as this where the Appellant had professional advisers at all times, HMRC would expect Tenon (the Appellant's new accountants) to liaise with BJ (the Appellant's old accountants) to ascertain what the position was in relation to all matters being dealt with on behalf of the Appellant. One or other of those accountants should have followed the matter up long before 13 May 2011, and, in practice, this would have been rendered easier to do by the fact that Tenon acquired BJ's practice.

31. We conclude that the Appellant was seriously culpable for the delay in initiating its appeal, even on the basis that HMRC's decision letter dated 9 July 2009 was not received by BJ or known about by the Appellant, BJ or Tenon before 20 May 2011. We do not regard the complete lack of attention to a claim for a VAT repayment of just under £500,000 for a period of almost two years to be reasonable business conduct. Moreover we discern no conduct by HMRC in relation to the delay which would mitigate the Appellant's culpability – compare the position on the facts in *Former North Wiltshire Council DC – ibid.* at [74] to [78].

32. Our discussion above effectively covers the criteria in CPR rule 3.9(1) which, as HMRC submitted and as the Tribunal decided in *Former North Wiltshire DC* – see: *ibid.* [55] to [56] – the Tribunal is not obliged expressly to consider but which the Tribunal will often in practice consider in giving effect to the overriding objective of the Rules – see: paragraph [17] above.

33. The necessary balancing exercise involves our weighing against the assumed real and practical loss or injury to the Appellant of being prevented from pursuing a claim of this value and assumed merit – (a) the public interest in the need for good administration, legal certainty and respect for the general time limit for bringing an appeal which Parliament has laid down; (b) the discerned prejudice to HMRC in having to reopen their examination of the Appellant's claim were an extension of time for appealing to be granted; and (c) the Appellant's discerned culpability for the long delay in initiating its appeal.

34. We conclude that the factors pointing against the grant of an extension of time for appealing in this balancing exercise outweigh the assumed real and practical loss or injury to the Appellant of being prevented from pursuing a claim of this value and assumed merit. Had we concluded otherwise we would have wished to examine more closely the actual merit of the claim but in the circumstances this is unnecessary. We refuse the Appellant's application to extend time to bring an appeal against HMRC's decision of 9 July

2009, which has the consequence that the Tribunal has no jurisdiction to entertain the appeal and it must be struck out. We direct accordingly.

Right to apply for permission to appeal

35. This document contains full findings of fact and reasons for our decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Rules. 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.

JOHN WALTERS QC

TRIBUNAL JUDGE
RELEASE DATE: 1 December 2011