TC02504

Appeal number: TC/2012/05873

VAT–Strike out application- VAT treatment of gaming machines income – "reconsideration" - appeal – extension of time- administrative error – dilatory agents – emigration and de registration – extension of time not granted – appeal struck out.

FIRST-TIER TRIBUNAL
TAX CHAMBER

TAMAR LEISURE SPOT **Appellant**

- and -

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

TRIBUNAL: JUDGE RACHEL SHORT
WILLIAM HAARER

Sitting in public at St Catherines House 5 Notte Street Plymouth on 12 December 2012

Having heard Mr Tromans and Mr Marker of Parkhurst Hill Chartered Accountants for the Appellant

Mr Leslie Bingham, Higher Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against an application by HMRC to strike out the Appellant's (Tamar Leisure Spot "TLS") case under Rule 8 of the Tribunal Procedures (First tier Tribunal)(Tax Chamber) Rules 2009 ("the Tribunal Rules"), on the basis that TLS' appeal against HMRC's decision of 20 October 2009 not to repay VAT in respect of periods 7/2004 – 1/2006 is out of time under s 83G Value Added Tax Act 1994 ("VATA 1994").

Agreed facts.

2. TLS was a leisure business run as a partnership by Mr and Mrs Woolcock which was registered for VAT in the UK.

3. TLS made a "voluntary disclosure" of £15,820.95 being over paid out put VAT in respect of gaming machine income to HMRC on 2 July 2007 (Folio1). This was rejected by HMRC on 31 July 2007 (Folio 35) and TLS appealed against this rejection on 22 August 2007 (Folio 34), requesting that their appeal be stood over behind the lead VAT case – *Rank Group Plc* (C-259/10 and C-260/10). This was confirmed by HMRC to TLS in a letter of 17 September 2007 (Folio 6).

4. HMRC wrote to TLS on 20 October 2009 stating that "It is no longer HMRC policy to delay the conclusion of reconsiderations pending the outcome of on going litigation" and confirmed that TLS's original claim had been refused. The letter also pointed out, in its final paragraph, the TLS had the right to appeal against this decision to the First Tier Tribunal (HMRC letter at Folio 32).

5. TLS responded to HMRC on 11 November 2009 (Folio 31) appealing against this refusal. This letter was incorrectly sent to HMRC's office in Bristol, not to the First Tier Tribunal. The letter was not forwarded by HMRC to the Tribunal.

6. TLS applied to cancel its UK VAT registration in August 2010, the partnership business was sold and the partners, Mr and Mrs Woolcock emigrated to Australia.

7. On 16 March 2012 TLS's UK agent wrote to HMRC explaining that the TLS business had been disposed of and that their client had de-registered for VAT and emigrated to Australia. However, prior to closing their files, the agent wished to confirm the status of the outstanding VAT claim (Folio16). HMRC wrote in response on 18 May 2012 that TLS's claim had been rejected and was not under appeal (Folio 17). TLS therefore appealed to this Tribunal on 21 May 2012 and HMRC applied for the application to be struck out on 6 August 2012 on the basis that the appeal was out of time.

The Relevant Legislation:

8. The time limits for making an appeal in respect of a decision of HMRC concerning VAT are set out at s 83G (1)(a) VATA and stipulate that appeals must be made within 30 days of the date if the issuance of the HMRC document notifying the decision.

9. The Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009, SI 2009/273, set out at Rule 8 the circumstances in which a party's case may be struck out. Rule 5 sets out the Tribunal's case management powers, including the ability to grant extensions of time for making an appeal. Rule 2 sets out the overriding objective of the Rules "*to deal with cases fairly and justly*".

10. We have not been asked to consider the substantive basis of this appeal, but it is worth briefly rehearsing the history of litigation in this area to put this case into context. The lead UK case concerning the VAT treatment of "mechanised cash bingo machines" is the *Rank plc* case, referred to above, heard first before the UK VAT Tribunal in 2006, itself following on from a 2005 decision of the ECJ known as *Linneweber* (*Finanzampt Gladbeck v Linneweber* (C-435/20)), concerning the treatment of a different type of gaming machine. The *Rank* Case made its way to the UK High Court in 2009 and to the ECJ at the end of 2011. A final decision in the Rank case is still awaited. It is fair to say therefore that litigation in this area has been extensive and complex.

11. Throughout the course of this litigation HMRC have issued a number of Business Briefs setting out their views of the impact of the Courts' decisions on UK taxpayers. Mr Bingham referred to these Business Briefs, including 40/09, referring to the High Court decision in *Rank Plc* and 11/10 in response to the First Tier Tribunal final ruling. These Business Briefs included information about which VAT claims HMRC considered to be valid and which claims had been or would be paid out.

The Arguments.

12. For TLS, it was argued that it is unjust for HMRC to refuse this claim on the basis that they changed their procedure for making appeals in 2009, forcing the client to make a new appeal. Second, TLS had made a valid appeal in response to this change of procedure, being their letter of 11 November 2009, and genuinely believed that their claim was still live on the basis of that letter. The TLS claim had been made in time and HMRC were incorrect to state that the appeal was out of time.

13. TLS's agents referred to a number of decisions of the First Tier Tribunal concerning similar claims, but stressed that TLS' situation could be distinguished from all of them because in this case a claim had actually been made on time.

14. TLS also referred to the three year time limit for making claims, established by the *Marks & Spencer* case and referred to in the *Medical House PLC* Tribunal decision (19859) and pointed out that their appeal to this Tribunal had been made within three years of HMRC's letter of October 2009. TLS' agents accepted that there had been some delay in prosecuting their case, as a result of the sale of the taxpayers'

business and their emigration, but stressed that nevertheless the appeal had been made in time. They also pointed out that HMRC themselves had not corresponded directly with TLS in the intervening period and the agents had only become aware that this claim had not been paid because they knew of other claimants whose claims had been paid out in 2011.

15. TLS said that, whatever changes in procedure had been introduced by HMRC, they had an agreement with HMRC made in September 2007 (letter of 17 September 2007) that their case would be stood behind the *Rank plc* decision, this agreement was still valid and therefore there was no need for any further appeals to be made.

16. For HMRC Mr Bingham did not dispute that the letter of 11 November 2009 had been received by HMRC, but argued that this could not be treated as a valid claim because it was incorrectly sent to HMRC rather than to the First Tier Tribunal. The appeal is therefore now four years and nine months out of time. Mr Bingham accepted that this has arisen as the result of an administrative error and that it would otherwise have been treated as a valid appeal. He also stated that in some circumstances appeals incorrectly addressed to HMRC had been passed on to the Tribunals, but this had not been done in this instance.

17. Mr Bingham queried why this VAT re claim had not been dealt with as part of TLS' de registration for VAT in 2009 and said that TLS' agents should have been aware of the position in respect of *Rank plc* based re claims because of the details set out in the Business Briefs published by HMRC. It was TLS' (and their agents') obligation to monitor the progress of their reclaim and ensure that the claims were properly made. TLS had not been diligent in pursuing this appeal. Even if TLS could argue that they were not aware of the progress of these claims until other claims were paid out from March 2011, it had still taken them until March 2012 to take any action.

DIRECTIONS

18. At the hearing the Tribunal reserved its decision on the application for a strike out, but now makes the following Directions: HMRC's application to strike out TLS' case under Rule 8 of the Tribunal Rules should be allowed on the basis that TLS' appeal against HMRC's refusal of their claim in October 2009 is out of time.

Decision

19. The Tribunal has come to this conclusion on the basis that the administrative error made by TLS in November 2009 in failing to correctly address their appeal to the Tribunal has been compounded by their failure subsequently to diligently follow up the progress of any potential appeal.

20. In TLS' favour, their error in writing to HMRC in November 2009 was understandable, given that the process for making appeals had only recently been changed and appeals would previously have been made to HMRC. Mr Bingham accepted that at this time HMRC were helping taxpayers with this transition by passing wrongly addressed appeals to the Tribunal, TLS were unlucky that this was

not done in their case. If the issue here had been turned only on this administrative error, the decision of the Tribunal might well have been different.

21. However, there is a secondary consideration and that is the dilatory behaviour of TLS (and their agents), in circumstances where the taxpayers were attempting to tidy up their affairs, sell their business and de register for VAT. Despite all of this being done by TLS during 2010, it is clear that this VAT re-claim would never have been picked up had it not been noticed as part of the agent's archiving process in 2012. We agree with HMRC that in these circumstances the onus is on the taxpayer to ensure that claims are dealt with in a timely fashion, and that was clearly not what occurred here. In fact, neither the taxpayer nor their agents seem to have taken any interest in pursuing the appeal.

22. This Tribunal can grant an extension of time to make an appeal under Rule 5, if, as stated in Rule 2(1) of the Tribunal Rules, to do so would ensure that the case was dealt with "fairly and justly". Previous decisions in this area suggest that this entails a balancing exercise, considering both the taxpayer's rights to pursue a claim and HMRC's need for certainty and closure. In this regard, while not binding, the criteria set out in the Civil Procedure Rules, in particular Rule 3.9 concerning relief from sanctions are also relevant and we have considered them as part of coming to this decision, although neither party cited these to the Tribunal. We have also been guided by the general principle set out by Lord Wool C J in *Taylor v Lawrence* ([2002] EWCA Civ 90) that the circumstances in which appeals should be allowed out of time should be the exception rather than the rule.

23. Considering each of the CPR test in turn; (i) *The interests of the administration of justice*; While we have not considered the validity of the substantive appeal in this case, it is clear that TLS will have no other straightforward avenue to pursue these claims if this appeal is not allowed.

24. (ii) *Prompt application for relief*; TLS' agents accept that they have been dilatory in not pursuing this claim, and we assume, TLS themselves were not aware of the existence of the claim at the time when they de registered for VAT.

25. (iii) *Intentional failure to comply*. TLS genuinely believed that their appeal of November 2009 was properly made and the administrative error in addressing the appeal to the wrong place was an honest error, but TLS' lack of action subsequently is we think more culpable.

26. (iv) *Explanation for the failure*, as above, there is a genuine explanation for the initial failure, but not we think, for the subsequent lack of activity, particularly given the significant factual changes in relation to the TLS business (sale and de registration) and the decisions of its owners (emigration).

27. (v) *Compliance with other rules and practices* – No evidence was provided to the Tribunal concerning TLS' compliance record other than in respect of the case under consideration.

28. (vi) *Responsibility for the failure* – We think the responsibility is shared here between TLS itself and their agents, but both TLS and their agents have failed to diligently pursue this claim.

29. (vii) *Can the trial date still be met* – If an extension of time is granted, there is no reason why the appeal cannot proceed.

30. (viii) *The effect of the failure to comply and* (ix) *Effect of granting the relief*– Mr Bingham has confirmed that the fact that TLS is no longer registered for VAT does not have any impact on the validity of this claim, but we view the act of de - registration, sale of the business and emigration as suggesting that TLS' owners consider all its UK VAT affairs to be closed. Any payments made now could only be an unexpected windfall for TLS' owners. In comparison, HMRC will have to re open a claim which they consider closed and consider whether this gives other taxpayers in similar circumstances the potential of making claims which are technically out of time.

31. Taking all of these factors into account, the Tribunal considers while it would not be in the interests of justice to deny TLS the right to make an appeal merely on the basis of an administrative error, nevertheless the later failure by TLS to pursue the claim at all, including their agent's admission that the claim was only picked up coincidentally as part of their archiving process, suggests that TLS have fallen below the standards which HMRC rightly expect of taxpayers and have failed to prosecute their appeal with reasonable diligence.

32. We consider that to allow an appeal in these circumstances would expose HMRC to other claimants who have failed to comply with the time limits for making claims, for similar, or other reasons and that there is considerable weight in the argument that HMRC need to be able to apply objective and consistent criteria in assessing the validity of claims and determining which claims should be treated as closed, and that it is only in extreme circumstances that the time limits in the VAT legislation should be overruled.

33. The Tribunal have considered TLS' arguments that their rights should not be impacted by HMRC's change of procedure in 2009. The fairness of the way in which that change of procedure was notified is outside the remit of this Tribunal, but HMRC's letter of October 2009 did clearly state both the change of procedure and what was required of TLS. Therefore this Tribunal cannot accept TLS' argument that their original 2007 appeal letter should be treated as surviving this change of process, particularly since TLS did attempt to make a new appeal in response to the October letter.

34. As regards TLS' arguments that they are within the three year window for appeals established in the European Court by the M&S case (*Marks and Spencer Plc v HMRC* [2002] STC 1036), we do not think that this is relevant to the question of whether this appeal has been made in time. The "three year cap" established in that case is a three year period from the date of any contested tax payment for a claim to

be made. This is quite separate from the procedural rules applied by HMRC and now this Tribunal for making appeals against decisions of HMRC.

35. For these reasons we agree with HMRC that no extension of time should be granted to TLS under Rule 5 and the appeal should therefore be struck out under Rule 8.

36. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 30 January 2013