TC02623

Appeal number: TC/2012/04689

VAT – Application for leave to appeal out of time – application granted

FIRST-TIER TRIBUNAL
TAX CHAMBER

HEALD GREEN SOCIAL CLUB AND INSTITUTE LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE J. BLEWITT
MISS S. STOTT

Sitting in public at Manchester on 12 December 2012

Mr Tomlinson and Mr Podolanski for the Appellant

Ms Ellwood, Officer of HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant is a VAT registered organisation with premises at 17a Finney Lane, Heald Green, Cheadle. It is run primarily by a volunteer committee.

2. This is the Appellant's application for an extension of time for admission of its appeal lodged out of time.

3. HMRC object to the application and seek the appeal to be struck out.

Undisputed Background Facts

4. The Appellant made a claim by way of voluntary disclosure in a letter to HMRC dated 15 December 2006. The claim, received by HMRC on 8 January 2007, sought recovery of overpaid output tax in respect of income from gaming machines in the sum of £4,208.00 for the periods 12/03 to 12/05.

5. HMRC refused the claim by letter to the Appellant dated 15 January 2007.

6. A letter dated 3 March 2011 was received by HMRC from the Appellant's representative Beever and Struthers. The letter stated:

"…A reply was sent by yourselves…the letter stated that you considered the claim invalid but the client had the right of appeal…our practice contacted Mark Crane, your Voluntary Disclosure Team Manager, on 17 January 2007 to discuss the rejected claim. Mr Crane informed us that providing the Rank Organisation was successful with their case, our client's claim would be valid and therefore no written appeal was necessary…"

7. HMRC responded by letter 5 May 2011 in which it stated that as the Appellant's claim had previously been rejected and was not under appeal the claim would not be considered. The letter advised that an application could be made to the Tribunal to admit the late appeal.

8. By Notice of Appeal dated 5 April 2012 the Appellant appealed to the Tribunal. The grounds of appeal reiterated the contents of the letter to HMRC dated 3 March 2011 and stated that the appeal should be admitted as the Appellant was misinformed by an HMRC officer.

Legislation and Case Law

9. There was no dispute between the parties as to the legislation applicable in this case and we will not set out the same in any detail.

10. The Value Added Tax Act 1994 (VATA 1994) S83 permits an appeal against revenue decisions on VAT repayment claims. The VAT Tax Tribunal Rules S1 1986/590 (1986 Tribunal Rules) were in force at the time of the decision.

11. The Transfer of Tribunal Functions and Revenue and Customs Appeals Order SI 2009/56 Schedule 3, para 2, which provided that the application which is made should be dealt with under the current Rules. With regard to this application it was accepted by both parties that the application would be dealt with under the now existing tribunal legislation namely, 2009 Tribunal Procedure Rules, in terms of the amendment to VATA 1994 contained in the Transfer of Tribunal Functions and Revenue and Customs Appeal Order 2009.

12. The power to extend time for lodging an appeal is contained in Rule 20(4) of the 2009 Tribunal Procedure Rules which states:

"(4) If the appellant provides the notice of appeal to the Tribunal later than the time required by paragraph (1) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—

(a) the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time; and
(b) unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Tribunal must not admit the notice of appeal".

The decision must take account of Rule 2(1) of the 2009 Tribunal Procedure Rules which provides:-

"The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly".

13. We were referred to the following cases:

- *Medical House v HMRC* (2006)
- *Black Pearl Entertainments Ltd v HMRC* (TC/2010/07835)
- *Former North Wiltshire District Council (now abolished and replaced by Wiltshire Council)* [2010] UKFTT 449 (TC)
- *Pen Associates Europe Ltd* [2011] UKFTT 554 (TC)
- *Eltham Hill Club and Institute [2012] UKFTT 487 (TC)*
- *JEM Leisure v HMRC* (TC/2011/05627)
- *Bathgate Leisure Ltd (TC/2010/09091)*
- *Kirkern Ltd (TC/2011/02821)*
- *Data Select Ltd v Revenue and Customs [2012] STC 2195*

- *John and Elaine Graham T/A Xs & Os Amusements (formerly T/A Satellite Amusements) TC/2011/02821*

14. Many of the cases to which were referred were First Tier (Tax Chamber) decisions which are not binding upon us, however provided useful guidance as to the approach adopted by the Tribunal in this type of case.

15. Recently, the Upper Tier held, in *Data Select Ltd*, that the correct approach to adopt was consideration of the overriding objective and all the circumstances of the case, including matters listed in CPR r3.9. Those matter include:

(1) the interests of the administration of justice;

(2) whether the application for relief had been made properly;

(3) whether the failure to comply was intentional;

(4) whether there was good explanation for the failure;

(5) compliance with other rules, practice directions etc;

(6) whether the failure was caused by the party or his legal representative;

(7) whether any fixed date could still be met;

(8) the effect which the failure to comply had had on each party;

(9) the effect which the granting of relief would have on each party

Submissions and Evidence

16. It was submitted by Ms Elwood on behalf of HMRC that in balancing the matters set out above the Tribunal should not grant the Appellant's application.

17. Ms Elwood submitted that it is not in the interests of justice to permit appeals after undue delay and that there is a public interest in the finality of decisions of HMRC. The inordinate delay in this case weighs against the granting of the Appellant's application.

18. The Appellant made its claim in 2006 and was aware that its claim had been rejected by January 2007. The Appellant did not query the progress of its claim until 2011.

19. It was submitted by Ms Ellwood that the Appellant made a deliberate decision not to appeal but rather decided to await the outcome of the *Rank* appeal. The Appellant's accountants should have been aware that HMRC did not have the power to stay cases behind existing appeals.

20. HMRC contended that the Appellant has provided no reasonable explanation for the failure and it was not accepted that HMRC had misinformed the Appellant. Ms Ellwood stated that HMRC had not been put on notice that the Appellant would provide evidence regarding the information purportedly given by Officer Crane would be presented to the Tribunal and consequently the Officer was not in attendance. However, Officer Crane had been asked about the telephone call made by the

Appellant's representative to him in January 2007 and stated he could not recall the conversation.

21. It was submitted that the Appellant should be treated in the same way as other similar applications in which permission to appeal out of time has been refused.

22. Ms Elwood submitted that the delay in contacting the Tribunal was the failure of the Appellant; another factor which should weigh against the granting of this application. Furthermore, HMRC would suffer prejudice if the application is granted after such a lengthy delay.

23. It was submitted by Mr Tomlinson on behalf of the Appellant, that when HMRC's rejection letter dated 15 January 2007 was received, he had telephone Mr Crane on 17th January 2007. Mr Tomlinson stated that he had specifically asked Mr Crane whether an appeal in writing was required and that Mr Crane had stated it was not. Mr Tomlinson had made a note of the telephone call on the letter dated 15 January 2007. He stated that his action of seeking advice from HMRC, from the Officer with conduct of the case, so soon after the letter dated 15 January 2007 had arrived supported the fact that had he been made aware that a written appeal was necessary, he would have submitted one.

24. As a result of the information provided by Mr Crane, the Appellant believed that its appeal was valid and on-going until such time as the *Rank* case was finalised.

25. Mr Podolanski explained that the delay between contact with HMRC in May 2011 and the submission of the Notice of Appeal was caused by a change in the Committee members running the organisation. As soon as the new members were aware of the situation, the appeal was submitted. Mr Podolanski clarified that the members are voluntary and the Appellant should be distinguished from large corporate businesses in order to deal with the case fairly and justly.

Decision

26. We considered the submissions of both parties carefully, together with the authorities to which we were referred.

27. We accepted that it is often not in the interests of justice to allow appeals where there has been significant delay. That said, each case must be decided on its own merits and the reasons for delay will often differ. There was clearly a lengthy delay in this case and we went on to assess the reasons given for that delay.

28. We found Mr Tomlinson and Mr Podolanski to be credible and honest witnesses. We had no hesitation in accepting Mr Tomlinson's evidence that he spoke to Mr Crane on 17 January 2007 following receipt of HMRC's letter rejecting the Appellant's claim; we found as a fact that his evidence was corroborated by his handwritten note on HMRC's letter. We rejected Ms Ellwood's objection that HMRC had not been put on notice that such evidence was to be given; the Appellant had reiterated this aspect of its case on a number occasions, including the grounds of appeal set out in its Notice of Appeal to the Tribunal. We found as a fact that it can

have come as no surprise to HMRC. Furthermore, Ms Ellwood had spoken to the Officer in question who could not recall the telephone call. In those circumstances we did not see how HMRC would have been assisted by having the Officer present; the fact that he could not recall the telephone call does not mean it take not take place even if HMRC had no record of it. Having heard and assessed the evidence of Mr Tomlinson we were satisfied that the call did take place and that Mr Tomlinson had been advised that no written appeal was necessary. Our findings of fact on the advice given by HMRC to the Appellant, which the latter acted on led us to distinguish a number of cases referred to us by HMRC on their facts.

29. As regards the merits of the proposed appeal, we were unable to independently evaluate the strength of the Appellant's case; the area of law involved is complex and there was no clear explanation of the details of the case. We therefore made no findings of fact in this regard.

30. We accepted that there is a public interest in finality, however in our view this matter is not decisive of the issue and must be balanced against each of the factors to which we had regard.

31. We considered the submission by Ms Ellwood that the Appellant made a deliberate decision not to appeal but rather decided to await the outcome of the *Rank* appeal and that the Appellant's accountants should have been aware that HMRC did not have the power to stay cases behind existing appeals. We found as a fact that the Appellant's decision was made in reliance on the advice given by Mr Crane and therefore cannot be counted against the Appellant. Irrespective of whether the Appellant's representative was aware that HMRC have no power to stay cases, the fact remains that as a result of the information provided by Mr Crane, the Appellant understood that its appeal had been recognised by HMRC as valid and would remain so until the *Rank* case was finalised.

32. As regards the submission that the Appellant should be treated in the same way as other similar applications in which permission to appeal out of time has been refused, we found as a fact that a blanket policy of treatment would be wholly inappropriate. We accepted that consistency in the treatment of taxpayers is important, but each case must be decided on its own facts.

33. HMRC could not specify any particular prejudice it would suffer if the application is allowed. We accepted that there may be a general prejudice in having to reopen its examination of the Appellant's claim, but we found as a fact that the prejudice was not, on its own, so significant as to determine this application in favour of HMRC.

34. Having considered each of the factors set out in CPR r3.9, the overriding objective and all the circumstances in this case, we were satisfied that the factors weighing against the Appellant, such as the length of delay, did not outweigh those in its favour, principally the fact that the Appellant had acted on information provided by the Officer with conduct of the case which indicated that a valid appeal had been made and that no written document was necessary.

35. The application is allowed.

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.

J BLEWITT
TRIBUNAL JUDGE

RELEASE DATE: 2 January 2013