TC02789

Appeal number: TC/2011/04699

EXCISE DUTY – Appellant unable to produce amusement machine licence for period between expiry of previous licence and receipt of application for new licence following issue of a default notice – Default licence and "best judgement" assessment issued – Whether HMRC entitled to issue default licence – Yes – Whether HMRC had acted perversely or in bad faith in making assessment – No – Whether taxpayer had shown assessments were wrong – No – Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROYAL BRITISH LEGION (LLANDOUGH AND LECKWITH) CLUB LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS

With the written consent of both parties and as the Tribunal considered that it was able to determine the matter without a hearing, this appeal was determined on 25 June 2013 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009.

DECISION

Introduction

1. This is an appeal by the Royal British Legion (Llandough and Leckwith) Club Limited (which I shall subsequently refer to as the "Club") against an assessment in the sum of £190 which was issued by HM Revenue and Customs ("HMRC"). The assessment was issued on 20 October 2010 to recover excise duty due in relation to a "default licence" granted to the Club, by HMRC, as it was unable to produce an amusement machine licence for the period between 3 and 14 February 2008 as required by a default notice issued on 20 September 2010.

2. As the Club is "five miles outside Cardiff", in its Notice of Appeal, dated 17 June 2011, it requested that this appeal be heard in Cardiff otherwise the Club's Officers, who are all volunteers, would incur "significant costs". However, in his email to the Tribunal, of 25 March 2013, Mr Dave Taylor, on behalf of the Club Committee, stated that they were not planning to attend the hearing and that they were "happy for the matter to be dealt with as a paper exercise" as they did not have "anything further to add or send" to the information enclosed with their letter of 25 April 2012.

3. On 9 April 2013 the clerk to the Tribunal wrote to the Club noting that no-one was going to attend the hearing on its behalf and advising that, as HMRC had expressed an intention to attend, the Club would lose its opportunity to put its case to the Tribunal and question HMRC witnesses.

4. In his reply, by email dated 11 April 2013, Mr Taylor wrote:

> Thank you for your letter dated 9 April 2013.
>
> We understand your point that HMRC will attend and give evidence.
>
> We are unable to and cannot afford to attend. As previously pointed out we are part time volunteers.
>
> We sent you on 25 April 2012 (almost the anniversary!), all the relevant letters/forms in this case and believe HMRC are pursuing an unjust unnecessary and costly claim. Our letter dated 18 May 2011 stated that we sent you a cheque covering the period in question and whilst it may have been received late it did cover that period. Other public bodies eg DVLA which may receive payment after the due date, date the licence from the due date.

5. On 20 June 2013 there was a joint application by the parties that the appeal be determined on the papers on the grounds that there was to be no attendance on behalf of the Club and that HMRC agreed that this was a matter which could be decided on the papers which would avoid the need for travel from Manchester to Cardiff for the hearing, thereby saving taxpayers money as well as time and cost to the Tribunal.

6. Rule 29 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 provides that in a case such as this, which has been assigned to the "standard category", the Tribunal must hold a hearing before making a decision unless:

(1) each party has consented to the matter being decided without a hearing; and

(2) the Tribunal considers that it is able to decide the matter without a hearing.

With the written consent of both parties and having considered the papers before me, including the Notice of Appeal, the information provided with the Club's letter of 25 April 2012, HMRC's Statement of Case and documents, I am satisfied that the Tribunal is able to determine this appeal and therefore do so without a hearing under Rule 29.

Law

7. Section 21(1) of the Betting and Gaming Duties Act 1981 ("BGDA") provides:

> Except in the cases specified in Part 1 of Schedule 4 to this Act, no amusement machine (other than an excepted machine) shall be provided for play on any premises situated in the United Kingdom unless there is for the time being a licence in force granted under this Part of this Act with respect to the premises or the machine.

8. It is clear from s 22(1) BGDA that "a duty of excise shall be charged on amusement machine licences".

9. Paragraph 6 of schedule 4 to BGDA provides that an application for an amusement machine licence is to be made to HMRC "in such form or manner as they require".

10. Paragraph 7 of schedule 4 BGDA provides:

> The period for which an amusement machine licence is granted shall begin with the day on which the application for the licenced is received by [HMRC] or, if a later day is specified for that purpose in the application, with that day and the licence shall expire at the end of that period.

11. If it appears to HMRC that one or more amusement machines have been provided for play on specified premises (such as the Club) during a specified period HMRC may issue a default notice under paragraph 2 of schedule 4A BGDA requesting the production of an amusement machine licence by a specified date. Where a default notice has been given, and the due date specified by that notice has passed, HMRC may grant a "default licence" in relation to an amusement machine which has no licence (paragraph 3 schedule 4A BGDA).

12. Paragraph 4 of schedule 4A BGDA applies where a default licence has been issued and it enables HMRC to make an assessment "to the best of their judgement" the amount which would have been payable under the BGDA as amusement machine licence duty as if the default licence had been an amusement default licence.

13. The approach the Tribunal should adopt in a “best judgement” case has been considered by the Court of Appeal and the Tax and Chancery Chamber of the Upper Tribunal.

14. In his judgment in the Court of Appeal in *Khan v HMRC* [2006] EWCA Civ 8 Carnwath LJ (as he then was), said, at [69]:

> “The position on an appeal against a "best of judgment" assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:
>
> > "The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are *prima facie* right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right." (*Bi-Flex Caribbean Ltd v Board of Inland Revenue* (1990) 63 TC 515, 522-3 PC per Lord Lowry).
>
> That was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509; [2004] EWCA Civ 1015. We also cautioned against allowing such an appeal routinely to become an investigation of the *bona fides* or rationality of the "best of judgment" assessment made by Customs:
>
> > "The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the Tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment." (para 38(i)).
>
> It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see e.g. Brady v Group Lotus Car Companies plc [1987] STC 635, 642 per Mustill LJ).”

15. Sir Stephen Oliver QC, in the Tax and Chancery Chamber of the Upper Tribunal, in *Mithras (Wine Bars) v HMRC* [2010] STC 1370 said:

> “[10] In *Rahman (t/a Khayam Restaurant) v Customs and Excise Comrs* [1998] STC 826 ('*Rahman 1*'), Carnwath J (as he then was) stated that a tribunal should not treat an assessment as invalid merely because the members disagreed as to how the commissioners' judgment should have been exercised. A much stronger finding was required, for example that the assessments had been reached dishonestly or vindictively or capriciously, or was a spurious estimate or guess in which all elements of judgment were missing or was wholly unreasonable.
>
> [11] The principles established in *Van Boeckel* and *Rahman 1* indicate that the FTT's [First-tier Tribunal’s] jurisdiction when considering

> whether an assessment was raised to the best of the commissioners' judgment is akin to a supervisory, judicial review type jurisdiction. The FTT does not have a true appellate function in that it cannot set aside the assessment on the basis that it disagrees with the commissioners' decision to make the assessment. The circumstances in which the FTT can decide that the assessment was not raised to the best of the commissioners' judgment, and therefore should not have been made at all, are very limited, essentially being restricted to cases where the commissioners have acted perversely or in bad faith. Carnwath J in *Rahman 1* indicated that this 'kind of case is likely to be extremely rare' and that in the normal case 'it should be assumed that the Commissioners have made an honest and genuine attempt to reach a fair assessment': see page 836 of the judgment."

Facts

16. As its name implies the Club is a Social Club. It provides amusement machines for its members at its premises in Llandough. The Club required and held an amusement machine licence for the amusement machines on its premises.

17. However, on 2 February 2008 the amusement machine licence held by the Club expired. An application for a new licence was made by the Club on 10 February 2008. This was received by HMRC on 15 February 2008 and a new licence issued to the Club for the period between 15 February 2008 and 14 February 2009 leaving the Club without a licence for the 12 days between 3 and 14 February 2008.

18. On 20 September 2010 HMRC issued the Club with a default notice requesting that the Club produce an amusement machine licence in respect of this 12 day period by 4 October 2010.

19. The Club replied by email, dated 24 September 2010, explaining that there was a new Club Chairman, that the present Committee had only taken responsibility for the management of the Club from December 2008 and, as it had been unable to trace any licence prior to February 2009 it had been assumed that the previous committee had not retained or had destroyed these on expiry.

20. As the Club was unable to produce an amusement machine licence HMRC granted a default licence (in accordance with paragraph 3, schedule 4A BGDA) together with an assessment, made to "to the best of their judgement" (under paragraph 4, schedule 4A BGDA), in the sum of £190 in respect of the period between 3 and 14 February 2008.

21. Following a review in which HMRC upheld the grant of the default licence and assessment the Club appealed to the Tribunal. The grounds of appeal, set out in its Notice of Appeal which was prepared by Mr Taylor, are as follows:

> Our letter dated 25/10/10 requested a review of the decision to issue a Default Notice for the period 03/02/08 to 14/02/08 in the sum of £190.
>
> Our cheque sent to you at the time, whilst it may have been received late, covered the period from 03/02/08. It is not reasonable or fair in

> law to date and issue the licence from the date it is received, eg car licences are issued from the due date even if received after the due date. This is also common/acceptable practice in many other Public Bodies/Institutions
>
> Why are you different?
>
> On this basis the Default Notice should NOT have been issued and the licence period should have commenced, as we expected, from 2/2/08, the period which the cheque covered.

Discussion and Conclusion

22. First of all, given the question "why are **you** different?" (emphasis added) and the reference to a cheque having been "sent to **you**" and the in the grounds of appeal and "we sent **you** a cheque" in the email Mr Taylor sent to the Tribunal on behalf of the Club (see paragraph 4, above) on 11 April 2013 when it is clear that Mr Taylor is referring to HMRC, I feel it is necessary to stress, for the benefit of the parties and especially the Club, the Tribunal's independence.

23. I wish to make it abundantly clear that while the Tribunal hears appeals against decisions, relating to tax and duties, made by HMRC, it is not a part of HMRC but wholly and manifestly independent from it.

24. I should also make it clear that as the Tribunal was created by statute it does not have an inherent jurisdiction, rather its jurisdiction is defined and limited by legislation, eg the BGDA, and it has to apply the relevant law to the facts of the case.

25. This is apparent from decisions of the higher courts and Tribunals whose decisions are binding on the Tribunal and this principle was clearly stated in the decision of the Tax and Chancery Chamber of the Upper Tribunal of *HMRC v Hok Ltd* [2012] UKUT 363 (TC) in which the judges (Mr Justice Warren and Judge Bishopp) said, at [56]:

> "… the First-tier Tribunal has only that jurisdiction which has been conferred on it by statute, and can go no further, …It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct."

26. Therefore, applying the relevant legislation, the BGDA and in particular paragraph 7 of schedule 4 it is clear that the Club's argument, that HMRC should not have granted the default licence as the Club's cheque covered the period from 3 February 2008, cannot succeed.

27. This is because paragraph 7 of schedule 4 BGDA (which I have set out at paragraph 10, above) provides that the period for which an amusement machine is granted shall begin with the day on which the application for the licenced is received by HMRC or, if a later day is specified for that purpose in the application. There is no provision in the legislation for the licence period to commence any earlier.

28. In this case HMRC received the Club's application on 15 February 2008 and that, therefore, is the earliest date on which an amusement machine licence can be granted in accordance with the legislation.

29. As the previous licence had expired on 2 February 2008 and the Club had amusement machines for its members to play at its premises, HMRC were entitled to issue a default notice for the period between 3 and 14 February 2008 under paragraph 2 of schedule 4A BGDA. Also, as the Club was unable to produce a licence for that period by the due date, HMRC were entitled to grant the default licence and make a "best judgement" assessment under paragraphs 3 and 4 of schedule 4A BGDA respectively.

30. With regard to the "best judgement" assessment as there is no suggestion that HMRC has acted perversely or in bad faith in this case it is for the Club to show the assessment is wrong or what corrections should be made in order to make the assessment right or more nearly right.

31. In the absence of any evidence from the Club showing the assessment to be wrong, applying the principles enunciated in *Khan v HMRC* and *Mithras (Wine Bars) v HMRC*, I uphold the assessment in the sum of £190.

32. Accordingly I dismiss the appeal

Right to apply for Permission to Appeal

33. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 19 July 2013