TC04245

Appeal number: TC/2013/02801

FIRST-TIER TRIBUNAL
TAX CHAMBER

VAT – Strike out application – repayment claims – VAT returns submitted many years late –overpayments made on estimated assessments – all claims out of time - Human Rights Act and European Convention on Human Rights Article 1 Protocol 1 argued- held – Human Rights Act not engaged– application of time limits within state's margin of appreciation -no legal basis on which time limits could be extended –appeal no reasonable prospect of success - strike out allowed.

BRENT NEWSAGENTS **Appellant**

- and -

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

TRIBUNAL: JUDGE RACHEL SHORT
MRS SHEILA CHEESMAN

Sitting in public at Fox Court, 14 Gray's Inn Road, London on 16 December 2014

Mr Robert Bolland and Mr John Woods for the Appellant

Mr Mark Ratcliff and Mr Philip Rowe instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

This is an application on behalf of the Respondents for the Appellant's appeal to be struck out under Rule 8(3)(c) of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 ("the Tribunal Rules"). The appeal concerns a refusal by HMRC to accept late VAT returns for seventeen VAT periods from 09/96 to 03/01 and a repayment claim for those periods of £48,671.69. The VAT returns for all of these of these periods were submitted by the Appellant on 27 September 2012, up to sixteen years late.

Facts

1. The Appellant, Brent Newsagent carries on a business in the UK running a newsagent and post office in Wembley. For each of the periods in question VAT was paid by reference to estimated assessments made by HMRC.

2. Correct returns for each of the disputed periods were completed and submitted on 27 September 2012. HMRC wrote to the Appellant on 12 December 2012 refusing to repay the VAT claimed for those periods on the basis that the claims were made outside the four year time limit in s 80(4) Value Added Tax Act 1994 ("VATA 1994"). That decision was reviewed and confirmed by HMRC on 18 March 2013. The Appellant appealed to this Tribunal on 16 April 2013. The Respondents applied for the appeal to be struck out on 31 July 2013.

3. At a hearing before Judge Cornwell-Kelly on 12 August 2014 it was directed that the appeal be struck out unless further written submissions were received from the Appellant supporting its argument that Article 1, Protocol 1 European Convention on Human Rights ("ECHR") precluded the Respondents from refusing the Appellant's VAT reclaim. The Appellant provided further written submission on its arguments concerning the ECHR on 13 September 2014.

4. This hearing is to consider whether those arguments are sufficient grounds for refusing the Respondents' strike out application and allowing the Appellant's appeal to proceed.

The Law

5. The relevant legislation concerning the time limits for making reclaims of overpaid VAT is at:

6. S 80(4) VATA 1994:

> "*The Commissioners shall not be liable on a claim under this section-*
>
> *(a) to credit an amount to a person under subsection (1) or (1A) above, or*
>
> *(b) to repay an amount to a person under subsection (1B) above,*
>
> *if the claim is made more than 4 years after the relevant date.*"

S 80(4ZA)(d) VATA 1994 gives the definition of the "*relevant date*" in circumstances where an over assessment had been made by HMRC as

> "*in the case of a claim by virtue of subsection(1A) above in any other case, the end of the prescribed accounting period in which the assessment was made;"*

HMRC referred throughout to the four year time limit as currently applied by s 80(4) but subsequently explained that s 80(4) had gone through a number of iterations and that at the point the Appellant should have filed the returns for the periods in question 09/96 to 03/01 the time limit for requesting a refund of overpaid tax was three years.

The relevant articles of the European Convention on Human Rights are Protocol 1 Article 1 - *Protection of property*

> "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*"

And Article 6(1) which states:

> "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*".

And Article 6(3):

> "*Everyone charged with a criminal offence has the following minimum rights:*
>
> *(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;*
>
> *(b) to have adequate time and the facilities for the preparation of his defence;*
>
> *(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;*
>
> *(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;*
>
> *(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."*

7. It is not disputed that the Appellant overpaid VAT amounting to £48,671.69 or that the relevant statutory time limit for making a claim for these overpayments for each of the periods from 1996 – 2001 had expired by the time the claims were submitted in the Appellant's VAT returns in September 2012.

8. It was not disputed that the Tribunal should take account of the ECHR principles in considering the enforcement of the UK VAT legislation.

The Respondent's Arguments

9. HMRC argued that the appeal should be struck out because there was no legal basis on which a VAT re-claim could be accepted outside the statutory four year time limit. Article 1 Protocol 1 of the ECHR is not engaged because the four year time limit in s 80 VATA is legitimate and proportionate; states have a right to procure the payment of taxes, as stated in Article 1 and the UK tax legislation requires legal certainty to determine how long tax claims can remain outstanding. S 80 falls well within the state's "margin of appreciation" for applying legislation in accordance with the ECHR, as made clear in *R (on the Application of St Matthews* (*West*) *Ltd & Others) v HM Treasury & Another* [2014] EWHC 1848(Admin).

10. HMRC referred to the *Sporrong and Lonnroth* v *Sweden* case (reference 7151/75) to clarify that an individual's rights to the enjoyment of possessions is not unqualified; there is a need for a fair balance between the demands of the general interest of the community and the requirement of protection of individuals' fundamental rights. They also relied on the *National& Provincial Building Society & Others v United Kingdom* ([1997] STC 1466) case to support their contention that a "fair balance" had to be struck between the state's power to collect taxes and an excessive burden falling on individuals. The time limits in s 80 VATA were not devoid of a reasonable foundation and therefore could not be struck down by the ECHR.

11. HMRC suggested that the decisions in VAT cases such as *Revenue & Customs Commissioners* v *Total Technology (Engineering) Limited* ([2012] UKUT 418(TCC)) were not relevant to the Tribunal's decision in this case because they dealt with penalties for the payment of VAT which was only a few days late, rather than the making of re-claims many years after the deadline for making claims had passed.

12. HMRC argued that Article 6 ECHR was not in point firstly because the Directions issued on 2 September 2014 relating to this hearing had referred only to arguments relating to Article 1 Protocol 1 and in any event, taxation was outside the scope of civil rights and obligations falling within Article 6(1) and no criminal charges, or penalties which amounted to criminal charges, had been levied on the Appellant which could fall within Article 6(3).

Appellant's Arguments

13. The Appellant argued that its VAT returns had not been made in time for a number of reasons; pressure of work running a small business, ill health, family bereavements and lack of clear information from HMRC about the application of time limits which would mean that this VAT could not be re-claimed. The Appellant suggested that information made available by HMRC, such as on their website, was

not accessible to normal taxpayers and critical information about significant time limits should be clearly communicated to taxpayers.

14. The ECHR was in point because the four year time limit laid down by s 80 VATA is unfair and disproportionate. It was clear on the basis of the *Total Technology* case that the overall proportionality of the VAT legislation can be tested by ECHR Article 1, Protocol 1. In this instance, the law has been applied disproportionately because the state has assessed and demanded excessive amounts of VAT and there is no mechanism available to the taxpayer to remedy this.

15. There is authority in the UK and European courts for statutory time limits to be extended to ensure that individual's rights under the ECHR are respected, such as *R.V Hamilton and Lewis* ([2012] UKPC 31) where tight time limits were held to be counter to Article 6(1) ECHR. The inflexible time limit at s 80 VATA 1994 is not proportionate or just. The Appellant's representative referred to the Tribunal decision in *Beds Beds Beds* ([2012] UKFTT 353(TC)) but submitted that that decision was not relevant since it did not deal with any arguments relating to the ECHR but merely concluded that the four year time limit in s 80 was not counter to any fundamental legal principles.

16. In this case the Appellant was not attempting to avoid tax, it had merely paid what HMRC had assessed it for in their estimated assessments. This had resulted in a significant over-payment which did mean that the Appellant had suffered an "excessive burden" of taxation, the tax over-paid being equivalent to a year's earnings.

17. In the Appellant's view Article 6 of the ECHR was in point because accepting HMCR's strike out application would mean that the Appellant had no means of appealing against this overpayment of VAT

Discussion

18. It is not in dispute that the Appellant's VAT returns for each of the disputed periods were made out of time by some margin. It is also clear that there is no basis in the UK legislation on which either HMRC or the Tribunal can extend these time limits. The only basis on which the Appellant can succeed is on the basis that the application of the four year time limits in the VAT legislation has, in its particular case, meant that its right to the peaceful enjoyment of property has not been respected and that Article 1 Protocol 1 ECHR is relevant or that the refusal to hear this appeal will result in the Appellant's right to a hearing under Article 6 not being respected.

Article 1, Protocol 1.

19. Neither party suggested that the Appellant's right to make a claim for overpaid tax did not amount to a property or possession for the purposes of Article 1 Protocol 1 and we have therefore proceeded on the basis that this is not in dispute and that the only question is whether the application of the time limit in the VAT legislation has not been applied in a legitimate or proportionate manner.

20. In considering ECHR principles for these purposes, the first question for the Tribunal is whether HMRC, in applying their statutory time limits, have pursued a legitimate aim; it is therefore necessary to be clear what the aim of this legislation, s 80(4) VATA 1994, is. We would describe this as the imposition of a time limit to provide legal certainty and finality so both HMRC and taxpayers know when tax claims are closed and the tax position is agreed. From HMRC's perspective it would

not be practicable to administer a tax system in which claims could remain open for many years after the relevant profits had been made neither would it would be desirable for taxpayers to risk being assessed for tax many years after profits had been generated. It is well established that it is reasonable for HMRC to have a cut off point in their tax legislation and that, as stated in the *Beds Beds Beds* decision, this is not counter to fundamental legal principles. Although that decision did not consider the ECHR, the Tribunal's view is that a conclusion that a piece of legislation is not in contravention of fundamental legal principles must also mean that the legislation has a legitimate aim and does not contravene the ECHR for that reason.

21. The second question is whether HMRC have used proportionate means to pursue that legitimate aim, namely the imposition of an "inflexible" four year time limit for making claims for overpaid VAT. In considering this question the courts in the UK and EU have made clear that states have a "wide margin of appreciation" in determining what methods are used in a particular case for implementing tax legislation and it is only if legislation can be shown to produce a manifestly unfair result that it will be considered to be unfair and disproportionate. In other words, it is a high hurdle for a taxpayer to establish that legislation contravenes Article 1 Protocol 1. As referred to in the *Total Technology* case the question to be asked is *"is the scheme not merely harsh, but plainly unfair so that, however effectively that unfairness may assist in achieving the social goal, it simply cannot be permitted"*. The Tribunal does not consider that there is any realistic basis on which it can be argued that the statutory time limits in the VAT legislation are plainly unfair but Article 1 Protocol 1 will be in point if the taxpayer can demonstrate that s 80(4) has given rise to an unfair or disproportionate result in its particular case.

22. The essence of the Appellant's argument is that due to pressure of work, illness and family bereavements, lack of understanding of the VAT legislation and willingness to pay what HMRC assessed for on an estimated basis, it has ended up with a very significant amount of tax overpaid with no means of re-claiming it because of HMRC's inflexible imposition of its four year time limit. HMRC point out that the Appellant was made aware in a number of different ways of the deadlines for putting in returns and that it is the taxpayer's obligation to ensure that he is aware of time limits imposed by tax legislation.

23. In circumstances in which a taxpayer has had ample opportunity to make accurate returns but has failed to do so for reasons within their control we cannot see how it is possible to argue that the imposition of a statutory time limit gives rise to a result which is either unfair or disproportionate. To allow a taxpayer in the Appellant's position to make claims outside the statutory time limit would be to remove any force from the statutory time limits themselves, to the disadvantage of both HMRC and taxpayers. We would expect a taxpayer who is relying on the ECHR to demonstrate that they have done everything reasonably possible to comply with their statutory obligations. We do not consider that the Appellant comes near to establishing that there has been some unfairness by arguing that it has not been able to make claims in time due to pressure or work or failure to understand that the time limits apply. In particular, with respect, we do not think it is justifiable to draw parallels between the extension of time granted for unrepresented and illiterate prisoners to appeal against death sentences as in the *Hamilton* decision referred to, and the position of the Appellant here. That decision makes clear that time limits will only be extended on the basis of the ECHR in exceptional circumstances. The Tribunal does not consider that those exceptional circumstances exist here.

Article 6

24. It is correct that the Directions on which this hearing is based did not refer to arguments under Article 6 of the ECHR. Nevertheless both parties referred to Article 6 in their arguments before us and so for completeness we briefly consider those arguments here.

25. The Appellant argued that if its case were to be stuck out that would be denying it the right to a fair trial under Article 6 of the ECHR. HMRC suggested that Article 6 was only relevant if the trial in question related to a criminal matter or quasi criminal matter. On this point we agree with HMRC that Article 6(1) is not relevant to an appeal which considers the application of a limit which applies to tax claims and Article 6(3) is not relevant if the charge in question is not a criminal charge or does not relate to penalties which could be considered as equivalent to a criminal charge.

26. The Appellant's real issue appears to be with HMRC's failure to properly notify it of the relevant time limits for making these claims. The proper forum for complaints concerning HMRC's administration is either HMRC's own complaints procedures or through a judicial review claim in the administrative courts, neither of which are within the remit of this Tribunal.

27. For these reasons the Tribunal has concluded that there is little merit in the arguments made by the Appellant and that the ECHR is not engaged in these circumstances and allow HMRC's application that this appeal be struck out under Rule 8(3)(c) of the Tribunal Rules on the basis that the Appellant has no reasonable prospect of success.

28. 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: 20 January 2015