[2016] UKFTT 613 (TC)

TC05349

Appeal number:TC/2015/02009

EXCISE DUTY – assessments and penalties arising from the absence of amusement machine licences – whether appellant had shown assessments were wrong – no – whether appellant had shown reasonable excuse in respect of penalties – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

NORTH WEST ARROW **Appellant**

- and -

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

TRIBUNAL: JUDGE JENNIFER DEAN
MR DEREK ROBERTSON

Sitting in public at Manchester on 23 August 2016

Mr M. Haycock and Mr C. G. Bennett for the Appellant

Ms J. Vicary, Counsel instructed by HM Revenue and Customs, for the Respondents

DECISION

Appeal and background

1. This is an appeal by North West Arrow ("the Appellant") against assessments and penalties issued by HMRC. The disputed decisions are:

(a) The decisions to raise 25 Amusement Machine Licence Duty Assessments totalling £5,870 pursuant to paragraph 4 of Schedule 4A to the Betting and Gaming Duties Act 1981 ("BGDA"); and

(b) The decisions to issue 3 related Civil Penalties totalling £4,000 pursuant to section 24(5) BGDA and section 9 of the Finance Act 1994 ("FA 1994").

2. By way of background HMRC had applied to strike out the appeal. In a short decision issued on 29 September 2015 following the hearing of the strike out application the history of the case was set out as follows:

"This was an application by HMRC to strike out the Appellant's appeal. In summary, the Appellant is liable for two separate amounts totalling £20,065.07. We were not provided with a breakdown of the amounts but we were told, and for the present purposes accepted (there being no dispute by the Appellant) that £13,195 comprised amusement machine licences that the Appellant purchased on a direct debit basis and in respect of which it defaulted on payment and £6,870 comprised Amusement Machine Licence Duty assessments and penalties raised between 2009 and 2011.

HMRC's application was based on the following:

(a) The decision under appeal is a response to a letter from HMRC's complaints department and does not contain a decision on an assessment or penalty. It is therefore not an appealable decision;

(b) £13,195 relates to cancelled direct debits which are not relevant decisions under section 13A Finance Act 1994 and therefore the matter falls outside of the Tribunal's jurisdiction;

(c) £6,870 relates to penalties and assessments however the decisions in respect of these matters have not been included and HMRC cannot respond without full particulars of the Appellant's grounds of appeal;

(d) The decisions in respect of the penalties and assessments are old and the Appellant would need to make an application to appeal out of time;

(e) The disputed amounts have not been paid nor has the Appellant made an application for hardship.

We agreed that the amount relating to cancelled direct debits is not a matter which falls within the Tribunal's jurisdiction and we therefore strike out this part of the appeal.

As regards the remaining amount (that we were told amounts to £6,870) the Appellant has clearly disputed this liability for some time. It also seemed to us that the merits of the Appellant's arguments, which to a limited degree were set out in correspondence, should at least be considered by HMRC.

In conclusion:

> *The appeal against that part of the liability relating to amusement machine licences purchased on a direct debit basis in respect of which the Appellant defaulted is struck out.*
>
> *Of its own motion the Tribunal extends time for the Appellant to appeal against Amusement Machine Licence Duty assessments and penalties and treats the Notice of Appeal dated 21 February 2015 as such an appeal."*

3. Thereafter HMRC confirmed that one assessment was issued in the incorrect amount and did not follow the correct legal procedure; the disputed sum in respect of the duty assessments was therefore reduced by £2,300 to reflect the withdrawal of the assessment. The disputed sums now total £4,480 in respect of Amusement Machine Licence Duty Assessments and £1,000 Civil Penalties.

Preliminary matter

4. At the commencement of the substantive hearing the Appellant applied to have HMRC's case struck out. We indicated that we would determine the application and set out our reasons as part of this decision in order not to delay proceedings.

5. The basis of the Appellant's application was set out in a letter to the Tribunal dated 28 march 2016 which, for reasons unknown to us, was not dealt prior to the hearing with as requested by the Appellant. In summary the Appellant argued that the Amended Statement of Case submitted by HMRC (in response to a request from the Tribunal that it rectify the lack of reference to the onus of proof or legislation relevant to the appeal in the original Statement of Case) did not comply with the Tribunal's request in that the burden of proof was not shown. The Appellant also submitted that references in the Amended Statement of Case to the Finance Act are irrelevant to the appeal.

6. Mr Haycock expanded on the application by explaining that the assessments issued referred to payments being made under CEMA 1979 and that as the BGDA makes no reference to the Finance Act HMRC's reliance on the legislation is flawed.

7. Ms Vicary submitted in response that the Amended Statement of Case complied with the Tribunal's direction by setting out the burden of proof in relation to both the assessments and penalties. Ms Vicary explained that the reference to CEMA 1979 contained on the assessments issued to the Appellant provided the legislation by virtue of which HMRC can direct payment of any excise duty. The BGDA provides for how and why the duty becomes payable and the FA provides the Appellant with a right of appeal.

8. We were wholly satisfied that the Amended Statement of Case satisfied the request from the Tribunal that the legislation and burden of proof be particularised. We were also satisfied that HMRC was entitled to refer to the legislation relied upon and that each of the provisions set out in the Amended Statement of Case are relevant to the appeal to explain the how the amounts became payable, the section under which payment can be directed by HMRC and, if the decision is appealed as it was in this case the provisions under which the Appellant is afforded the right to appeal. In those circumstances we refuse the Appellant's application.

Law

9. Section 21(1) of the Betting and Gaming Duties Act 1981 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."*

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

11. 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."*

12. If it appears to HMRC that one or more amusement machines have been provided for play on specified premises 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).

13. 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

14. The right to appeal against an assessment is provided for by virtue of section 13A (2) FA 1994 and section 9 of the same Act provides for an appeal against penalties. In respect of both matters the burden of proof lies with the Appellant.

The substantive appeal

HMRC's case

15. The assessments were issued on the basis that there was a gap in the provision of a licence for a gaming machine. The procedure by which the assessments were issued can be summarised as follows:

- On a specified date a default notice has been sent to the Appellant asking that an amusement machine licence be produced by a further specified date;
- No amusement licence has been produced;
- Pursuant to paragraph 3 of Schedule 4A to the BGDA HMRC have granted default licences for the amusement machines provided for play at the relevant premises and during the specified default period;
- The Appellant has been sent assessments for the amounts it is liable to pay in relation to the default licences granted.

16. We were helpfully provided with a table setting out the grounds upon which the Appellant disputes the assessments as set out in correspondence from the Appellant dated 9 October 2015. We have reproduced that table below:

Machine Reference	**Machine Location**	**Appellant's Contention**
R16369	Lord Raglan	Converted to 5p play machine
R16370	Honky Tonks	Converted to 5p play machine
R16371	The New Inn	Converted to 5p play machine
R16372	Welsha Harp	Converted to 5p play machine
R16373	Kings Head	Converted to 5p play machine
R16374	Tradesman Arms	Converted to 5p play machine
R16375	The Vale	Converted to 5p play machine
R16376	Old Quay House	Converted to 5p play

		machine
R16377	Light House	Converted to 5p play machine
R16378	*Grampion Foods*	*Assessment conceded*
R16379	Fevers	Converted to 5p play machine
R16517	*McLeans Pub Bar*	*Assessment conceded*
R16518	Salt Barge	Converted to 5p play machine
R16519	Crooked Billet	Converted to 5p play machine
R16520	*The Blue Bell*	*Assessment conceded*
R16521	Liverpool Bowling Club	Machine removed, no licence required
R16765	*Liverpool University*	*Assessment conceded*
R16766	Rocky's Club	Converted to 5p play machine
R16767	Tollemarche Arms	Converted to 5p play machine
R18114	The Avenue	Not on a North west Arrow site
R18690	*Golden Eagle*	*Assessment and penalty conceded*
R18802	The Greyhound	Machine not provided by Appellant
R19218	Rhyl Sports & Social Club	Machine not Appellant's property
R19219	The Pesketh Tavern	Machine not on site
R1911/11	***Saltney WMC***	***Assessment withdrawn by HMRC***

Machines converted to 5p machines

17. Ms Vicary set out HMRC's case in respect of the grounds relied upon by the Appellant. As regards the Appellant's contention that on 20 October 2006 14 of the machines had been converted to 5p machines which do not require licenses Ms Vicary submitted that there had been no evidence produced by the Appellant to support this assertion. Ms Vicary highlighted that the specific procedure for converting a machine is set out in HMRC Public Notice 454 and there was no indication that the Appellant had followed the procedure.

18. Ms Vicary confirmed HMRC's position that the machines were not in fact converted to 5p machines. It was submitted that the Appellant's explanations were contradictory and unreliable. Ms Vicary highlighted the bulk handling invitation form completed by Mr Haycock and dated 11 October 2006; the form included the machines now said to have been converted to 5p machines on the list of licences to renew. That form was sent by HMRC to the Appellant on 15 September 2006 for licences due to expire on 19 October 2006. The form was not received by HMRC until 31 October 2006 which resulted in the gap in licence cover from 19 to 30 October 2006. Miss Vicary highlighted the absence on the form of any reference to converting the machines to 5p machines. She also queried why the Appellant would include the relevant machines on the list if they either had been or were to be converted. In response to the explanation given by Mr Haycock during the hearing that the machines were converted for the short period as a trial and reverted back to licensed machines, Miss Vicary noted that the Appellant had dated the bulk handling form 11 October 2006 which is at odds with the explanation by Mr Haycock that the machines were to be converted to 5p machines on or around that time.

The Avenue

19. Two machines were removed from the premises by Merseyside Police on 13 January 2010. On 21 January 2010 Mr Haycock was interviewed and admitted to supplying the machines to The Avenue without licences in force.

20. In addition to the assessment covering the period 31 December 2009 to 13 January 2010, two civil penalties totalling £500 were imposed. HMRC submitted that the Appellant has failed to provide any evidence to support its assertion that The Avenue is *"not a NW Arrow site"* and no reasonable excuse has been provided in respect of the penalties.

21. Miss Vicary noted in response to Mr Haycock's contention that he had not been aware that the machines had been transported to The Avenue that this contradicted the admission made to the Merseyside Police and HMRC officer Heitzman's assurance report which recorded:

"…I previously discussed with Mr Haycock the transfer of licence from The Seven Stiles to The Avenue and he stated that he tried to organise this with Gamestec but it never came to fruition. Informed him that he must apply for a licence 14 days prior to

installation and that it had not been done. He admitted during a telephone call that he had installed the machines to The Avenue and had not applied for the licence."

The Greyhound

22. The assessment and civil penalty issued in respect of The Greyhound arose from a visit by HMRC to the premises whereupon officers found a machine with an expired licence. The Designated Premises Supervisor stated that the machine had been installed shortly after she commenced her role on 13 September 2009. HMRC took this information into account in issuing the assessment and assessed from the later date of 1 October 2009.

23. The Appellant failed to respond to the default notice dated 15 July 2010 and no evidence was provided to support the contention that the machine was not provided by the Appellant. Miss Vicary highlighted the inconsistent and unreliable explanations given by the Appellant which included that the machine was a category D machine that did not require a licence and that the error lay with "Gill of Cheshire Licensing" for the mix up. Miss Vicary noted that during the hearing Mr Haycock had provided yet another explanation stating that the machine was initially a 5p machine which was later upgraded; this explanation is at odds with the grounds of appeal submitted by the Appellant which contended that the machine had not been provided by North West Arrow.

Rhyl Sports & Social Club

24. As regards the Appellant's contention that the machine located at Rhyl Sports & Social Club was not the property of the Appellant but was "invoiced each month under our maintenance agreement as stated on the invoice" HMRC submitted that there was lack of evidence to support this assertion.

25. Miss Vicary highlighted the fact that a licence held by the Appellant for two machines at the premises expired on 3 February 2010. On 10 March 2010 the Appellant applied for a licence to cover two machines for the period 4 February to 9 March 2010. Miss Vicary submitted that the application to renew the licence to cover the gap period is at odds with the Appellant's contention that the machines did not belong to the Appellant.

Penketh Tavern

26. It was the Appellant's case that no machine was located in the premises. HMRC submitted that no evidence was produced by the Appellant to support this assertion which is at odds with the actions of the Appellant in seeking to renew the licence that expired on 3 February 2010 in an application dated 10 March 2010 to cover the period 4 February 2010 to 9 March 2010.

27. Miss Vicary also highlighted that the explanation given by the Mr Haycock at the hearing, namely that the Appellant was pressured into renewing the licence on threat of their pool tables and machines at other sites associated with the landlords would be removed, was wholly unrealistic and unsupported by evidence.

Liverpool Bowling Club

28. The Appellant's case was that the machine at the premises was removed until relicensed. HMRC submitted that no evidence was produced to support this assertion which is at odds with the factual history whereby a licence for a Jackpot Gaming Machine expired on 20 October 2006 and was renewed for a medium prize machine on 31 October 2006.

Evidence

29. We heard oral evidence from HMRC officer Mrs Nicholas and Mrs Heitzman whose witness statements stood as their evidence in chief. We were also provided with a witness statement of officer Melody Hayes who was unavalaible to give evidence. The officers were responsible for issuing the various assessments and penalties relating to different premises. There was no real challenge to the evidence of either officer nor was it put to the witnesses that the assessments were not to best judgement or the penalties incorrectly issued.

30. The Appellant queried why some of the exhibits contained signed and counter-signed documents bearing HMRC office stamp yet others did not. Mrs Nicholas confirmed that the documents produced as part of her evidence would be stamped which was the general practice in her officer. However she could not comment on the exhibits of the other officers who worked from different offices. Mrs Heitzman explained that the documents she had exhibited were printed from copies on HMRC's system and were therefore not signed. She confirmed that the original issued to taxpayers are signed and counter-signed.

31. Mrs Heitzman's evidence that she had met Mr Cyril Geoffrey Bennett was challenged. A letter was produced by the Appellant from Mr Peter Bennett who was too ill to attend the hearing. The letter stated that Mrs Heitzman had met Mr Haycock and Mr Peter Brian Bennett at a meeting on 1 October 2009 and not, as stated in Mrs Heitzman's witness statement, Mr Haycock and Mr Cyril Geoffrey Bennett. Mrs Heitzman could not recall the meeting and explained that she made a contemporaneous note of the visit and relied upon her record as to who had been present.

The Appellant's case

Machines converted to 5p machines

32. Mr Haycock explained that the bulk handling form was completed by him on 11 October 2010 and he could not understand why it had not been received by HMRC until 30 October 2010. He stated that where machines on premises were not doing well he replaced them with 5p machines which do not need licences. The application form requested renewal of the relevant licences but he had agreed with the sites to replace the machines with 5p play machines. Mr Haycock stated that he had not been made aware of the procedure for changing the licences but did not think it was necessary for such a short period in any event. The 5p machines were put into the premises as a trial and due to the lack of success the sites reverted back to machines

requiring licences. Mr Haycock exhibited a list of the relevant premises on a photocopied notepad page which was addressed to The Greenock Accounting Centre and dated 17 October 2006.

The Avenue

33. Mr Haycock explained that the tenant at the premises also ran another site. When the tenant was removed for non-payment of rent he transported the Appellant's machines to the Avenue without the Appellant's knowledge. Mr Haycock accepted that this was a breach but stated it was not caused by the Appellant.

The Greyhound

34. Mr Haycock stated that the owner of the premises, not the Designated Premises Supervisor, had asked for the machine. When Ms Lindsay (the DPS) took over the premises began with a 5p play machine which was only later upgraded. Mr Haycock conceded he could not recall the situation with any clarity but stated that he believed there was confusion on both sides.

Rhyl Sports & Social Club

35. As Mr haycock submitted that the machine located at Rhyl Sports & Social Club was not the property of the Appellant but they took control of licensing the machine for which Rhyl Sports & Social Club was invoiced each month. Mr Haycock drew our attention to copy documents showing invoices to the Club for "Service Contract". Mr Bennett explained that no documentary evidence of the service contract had been produced as it was a verbal contract.

Penketh Tavern

36. Mr Haycock stated that the Appellant was pressured into renewing the licence on threat of their music system and pool tables and machines at other sites being removed if the Appellant did not provide the licence.

Liverpool Bowling Club

37. The Appellant's case was that the machine at the premises was removed until relicensed.

Discussion and decision

38. The Tribunal's jurisdiction in appeals of this kind was succinctly set out by Sir Stephen Oliver QC in *Mithras (Wine Bars) Ltd and The Commissioners for HM Revenue and Customs* [2010] UKUT 115 (TCC):

"The FTT has a quasi-supervisory function when considering whether an assessment was raised to the best of the Respondents' judgment, but it has more than a merely quasi-supervisory jurisdiction when considering the correct amount of the assessment. In deciding the correct amount of the assessment, the FTT has a full

appellate jurisdiction. This has become more apparent as the decisions of the Courts in this field have developed."

39. We found the evidence of HMRC officers Mrs Nicholas and Mrs Heitzman reliable and credible. There was no real challenge to the evidence of either officer as to the fact that the assessments were raised to best judgment or the penalties were incorrectly issued. We accepted the explanations given as to why some exhibits bore signatures and stamps whilst others did not, namely that copies had been produced from HMRC's computer system for the purpose of the hearing and were therefore not original copies and also that practices differed between departments. We did not find that anything turned on this.

40. We were also satisfied that the reliability of Mrs Heitzman's evidence was not undermined by the Appellant's assertion that she had met Mr Peter Brian Bennett rather than Mr Cyril Geoffrey Bennett. The evidence was given on the basis of a contemporaneous note and we had no reason to doubt that the note was reliable. In our view this had no bearing on whether or not the assessments were raised to best judgment and penalties imposed correctly.

41. We found the evidence and explanations given on behalf of the Appellant were inconsistent, contradictory and in our view wholly unreliable.

42. The Tribunal's jurisdiction is limited by legislation such as the BGDA and we have applied the relevant law to the facts of this case. There is no provision under which an amusement machine licence can be backdated. The assessments arose as a result of periods during which the relevant licences expired and had not been renewed.

43. Turning first to the Appellant's contention that 14 of the machines had been converted to 5p machines and therefore did not require licences. The only documentary evidence in support of this assertion was a free standing list of premises dated 17 October 2006 addressed to the Greenock Accounting Centre. When considered in the context of the various contradictory explanations given by the Appellant we were satisfied that the assessment was perfectly proper on the information known to HMRC at the relevant time. In particular we noted that the assertion that the machines had been converted was at odds with the fact that Mr Haycock had included those machines as requiring licence renewal on the bulk handling invitation form dated 11 October 2006. There was no credible explanation as to why the machines would be included if they did not in fact need a licence. The submission by Mr Haycock during the hearing that the machines were converted for a trial period which covered the gap had never before been raised by the Appellant and is inconsistent with the act of including the premises on the list for renewal of licences. On the evidence before us we were wholly satisfied that HMRC had considered all relevant information and that the assessment was properly raised to best judgment.

44. We found that HMRC had considered all of the information provided in respect of the remaining premises. As regards The Avenue Mr Haycock's assertion that he had not been aware that the machines had been transported to The Avenue was inconsistent with the admission made to the Merseyside Police and HMRC officer Heitzman's assurance report. We were satisfied, and there was no challenge to the reliability of the officer's note nor any suggestion that HMRC had acted perversely or in bad faith. Inconsistent explanations were also given in respect of The Greyhound and we were satisfied that having considered all of the information HMRC had issued assessments to best judgment and the penalties were correct.

45. As regards Rhyl Sports & Social Club HMRC considered the explanation by the Appellant that the machine belonged to the Club but the licence was renewed by the Appellant. Given the absence of any evidence in support and the unreliable nature of the assertions made by the Appellant we were wholly satisfied that HMRC had issued the assessment to best judgment taking into account all relevant information. We reached the same conclusion in respect of Penketh Tavern and Liverpool Bowling Club; HMRC considered the explanations proffered and the contradictory nature of those explanations. Taken together with the lack of evidence in support we concluded that HMRC had acted to best judgment in issuing the assessments.

46. In conclusion it was abundantly clear that HMRC had considered all relevant information and disregarded irrelevant considerations in reaching its decisions. There was no suggestion by the Appellant that HMRC had acted perversely or in bad faith nor in our view could it be said (and the Appellant did not suggest) that the assessments were not made to best judgment. There was also no suggestion that the penalties were incorrectly imposed and we were satisfied that they were properly issued in accordance with statute and, the Appellant's explanations having been rejected, that there was no reasonable excuse. The Appellant has failed to discharge the burden of proof in respect of both the assessments and penalties. For the sake of clarity we note that the assessments in respect of each of the machines at the various premises are upheld save for that which was withdrawn by HMRC which related to Saltney WMC (R1911/11) which as we understand it reduces the total amount appealed (including penalties) to £4,570.

47. The appeal is dismissed.

48. 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.

JENNIFER DEAN
TRIBUNAL JUDGE

RELEASE DATE: 1 SEPTEMBER 2016