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Case Numbers: TC08632

FIRST-TIER TRIBUNAL
TAX CHAMBER

Leeds Employment Tribunal

Appeal references: TC/2020/03733/03792/03794/03795/03791

Section 83G (6) VATA 1994 - application for permission to appeal out of time – appeals extremely (in excess of 8 years) late – no good reason for delay – whether other special circumstances justifying grant of permission, including whether Appellants being treated unfairly by HMRC – no – application refused

Heard on: 21 October 2022
Judgment date: 07 November 2022

Before

TRIBUNAL JUDGE MARK BALDWIN

Between

YORK BURTON LANE CLUB AND INSTITUTE LIMITED
DALE NIGEL POLLARD
THE LOWTHER (YORK) LIMITED
LIAM FRANCIS FAGAN AND MOIRA FAGAN
MICHAEL JOHNSON

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellants: Mr Dale Pollard of Ashcroft Pollard & Co. Ltd. (on his own behalf as Appellant in person in TC/2020/03792 and as representative of the Appellants in the other applications)

For the Respondents: Mr Philip Mackley and Miss R Grainger litigators of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This decision is concerned with five separate applications for permission under section 83G (6) of the Value Added Tax Act 1994 ("VATA") to bring appeals out of time. Although the applications are separate, they all arise out of the same circumstances and are, for reasons which will become clear, very closely connected.

2. The Appellants were represented by Mr Dale Pollard, who is also one of the Appellants. Mr Pollard called evidence from Mr Ian Spencer ("Mr Spencer"). Mr Spencer's witness statement had been delivered to an old HMRC mailbox used for "Rank litigation" (a term I will shortly explain) and was not supplied to me until the start of the hearing. Mr Mackley, who represented HMRC, confirmed that he was not prejudiced by this; indeed he already had a copy. At times Mr Spencer's evidence morphed into advocacy, but never in a way where the distinction was obscured, and he made a helpful contribution to these proceedings. I foind him to be a straightforward and credible witness. Having given his evidence, Mr Spencer assisted Mr Pollard in presenting his arguments. Mr Pollard also provided what might be regarded as evidence (without having provided a witness statement or being sworn) on one point: he explained the steps he took (or, perhaps more accurately, failed to take) in response to the protective assessments against which the Appellants now seek permission to appeal out of time.

3. Each of the appeals arises out of the long-running litigation between HMRC and the Rank Group, in respect of the application of the European principle of fiscal neutrality to the VAT treatment of gaming machines in the period between 1 November 1998 and 5 December 2005.

4. In order to appreciate some of the points made in this application, it is necessary to have some understanding of the history of that litigation and the satellite litigation it inevitably gave rise to. With some trepidation, given its duration and complexity, it is to that litigation that I now turn.

THE "RANK LITIGATION"

5. The procedural history of the Rank claims has been long and tortuous, involving decisions of the VAT and Duties Tribunal, the High Court, the First-Tier Tribunal, the Upper Tribunal, the Supreme Court and the Court of Justice of the EU. Inevitably, at different points in this saga different parties appeared to be in the ascendant, and HMRC's approach to dealing with the many consequential claims for repayment of VAT they received from traders changed with their perception of where the advantage lay at any particular time.

6. In February 2005 the Court of Justice of the EU gave its judgment in Cases C-453/02 and C-462/02 *Finanzamt Gladbeck v Linneweber* and *Finanzamt Herne-West v Akritidis* ('*Linneweber'*). *Linneweber* considered the European principle of fiscal neutrality as it applied to VAT, specifically looking at the different tax treatment that had been applied to identical gaming machines in Germany. In response to *Linneweber*, HMRC issued Business Brief 23/05, where they noted that that "There have also been suggestions that, because certain machines now in use [in the UK] fall outside the definition of a taxable gaming machine, UK law breaches the European Community principle of fiscal neutrality." HMRC rejected that view.

7. The following year HMRC issued Business Brief 20/06 in which they indicated that they were aware that, following *Linneweber,* many businesses operating gaming machines had claimed that they had over-declared VAT on takings from their machines in the period prior to 6 December 2005 (when the definition of a gaming machine was amended). They repeated their view that UK VAT law did not breach EU law, but went on to comment:

> "If you nevertheless consider that your gaming machine takings have been treated differently from the takings of other identical or substantially similar

> machines, and that you are entitled to a refund of VAT, HMRC will consider your claim.
>
> However, as HMRC do not accept that the tax treatment of gaming machines was contrary to EC law, claims will only be considered if they are supported by evidence that:
>
> •your machines are identical or substantially the same as those that you are comparing them with:
>
> •these machines are treated differently for VAT purposes; and
>
> •this has caused distortion of competition for your business.
>
> Claims received without this evidence will be rejected. Businesses that have adjusted their VAT returns because of the *Linneweber* decision should reconsider these adjustments as they will be scrutinised and assessments made where necessary with interest and penalties added as appropriate."

8. Battle was joined on the EU law issue between HMRC and Rank Group. Following HMRC's defeat in the High Court in *HMRC v Rank Group*, [2009] EWHC (Ch) 1244, they issued Revenue and Customs Brief 11/10 ("Brief 11/10"), which advised that HMRC would pay any valid claims submitted by businesses in respect of the net amount of VAT paid on gaming machine takings during the period to 6 December 2005. The brief also made clear that protective assessments would be issued under section 80 (4A) VATA to allow HMRC to recover these amounts if they were successful at a later stage in the litigation. Claims were paid on this basis starting in 2010 and 2011.

9. In 2014 HMRC won their appeal in the Court of Appeal against their High Court loss that led to Brief 11/10 and they were also successful in a different strand of litigation relating to fixed odds betting terminals. As a result there were at that point no adverse decisions against HMRC in respect of VAT on takings from gaming machines fixed odds betting terminals in the period to 6 December 2005. Following on from this, HMRC issued Revenue and Customs Brief 1/2014, in which they indicated that they would be recovering the amounts previously paid out, as they had said they would in Brief 11/10.

10. In 2016 HMRC tried to have appeals against their decisions on original claims submitted by taxpayers who had not appealed their protective assessment (which accompanied the repayments referred to in [8]) struck out. Mr Spenser says this was on the basis that the original appeals had been settled by payment of the claims and that new appeals against the protective assessments should have been made. The issue was considered by the First-Tier Tribunal (Judge Sinfield), which (in 2017) released its decision in three cases heard together, *Ashington & Ellington Social Club and Institute Limited v HMRC* (TC/2016/03259), *Ashstead Village Club v HMRC* (LON/2007/0052) and *Darfield Road Working Men's Club and Institute Limited v HMRC* (MAN/2006/0874). Ashstead and Darfield had appealed against HMRC's rejection in 2006 of their original claims for repayment of VAT overpaid on gaming machine takings. Subsequently in 2010/11 HMRC repaid the VAT claimed and issued protective assessments. Ashington had made a similar repayment claim in 2006 but it had not been formally refused, and no appeal had been lodged against any HMRC decision. HMRC had repaid VAT to it in 2013 and issued a protective assessment. None of the three had appealed in time against the protective assessment raised on them, and so these cases concerned applications by all three clubs under section 83G (6) VATA to bring appeals out of time in relation to their protective assessments as well as HMRC's application to strike out the appeals by Ashtead and Barfield against HMRC's decision on their original claims. The FTT did not grant Ashington permission to make a late appeal against its protective assessment, but it refused HMRC's

application to strike out the appeals of Darfield and Ashington and allowed them to amend their earlier appeals to include an appeal against their protective assessment.

11. On 15 April 2020, the Upper Tribunal released its decision on the appeals by HMRC in the Rank and fixed odds betting terminals cases. In both cases, the taxpayer argued that UK legalisation breached the principle of fiscal neutrality because taxed supplies were sufficiently similar to exempt supplies. The Upper Tribunal rejected HMRC's appeals.

12. On 26 June 2020 HMRC issued Revenue and Customs Brief 5/2020 ("Brief 5/2020") in which they flew the white flag, accepting that "[t]his decision brings an end to these 2 strands of the gaming machines litigation" and indicated that they would now pay claims by taxpayers "with appeals claiming that HMRC treating their gaming machine income as standard rated is a breach of fiscal neutrality, where the appeals are currently stood behind" either of these cases. It was, of course, too late by then to make a fresh claim, because of the "four year cap" in section 80 (4) VATA. HMRC described the claims they were prepared to settle as follows:

> "You will only be paid if your claim is properly evidenced.
>
> Claims will not be considered unless they:
>
> - have already been made within the relevant deadline
> - are appealed within the appeal deadline
>
> You cannot make new claims at this stage."

13. Brief 5/2020 makes it clear that HMRC will only settle claims which can be pursued against them. Payments will not be made to those who have not made a claim or who have not appealed in time against a refusal of their claim. This is the position the Appellants find themselves in. Their original claims were settled with protective assessments being issued when the payments were made by HMRC. In 2014 they repaid the money HMRC had paid them. Now they wish to claim that money back following HMRC's declaration of surrender in Brief 5/2020, but find themselves unable to do so because they did not appeal the protective assessments made on them when their original claims were settled. They are now out of time to appeal against those protective assessments, unless they are granted permission to appeal late, and that is what this application is concerned with.

14. The Appellants do not say that the Tribunal should exercise its discretion to admit their appeals out of time just because the Rank litigation has been determined in favour of taxpayers, although for completeness I address that issue at [61] – [69] below. Their particular complaint, and the reason why they say the Tribunal should exercise its discretion to allow their appeals out of time, is that, five years after the decision in *Ashington/Ashstead/Darfield*, HMRC are allowing taxpayers, who appealed the refusal of an original claim but did not appeal their protective assessment (like the taxpayers in *Ashstead* and *Darfield*), to amend their original appeal to include an appeal against their protective assessment, which the Appellants say equates to appealing out of time against a protective assessment, but are not allowing taxpayers who have no original appeal (like the Appellants and the taxpayer in *Ashington*) to appeal their protective assessment out of time. Given that these matters are for the Tribunal, what the Appellants are actually complaining about is that HMRC do not object to taxpayers amending an existing notice of appeal and in consequence this is allowed by the Tribunal. They say that this approach is replicated in "hundreds" of cases and amounts to "HMRC … not treating all taxpayers in the same way". In this decision I refer to this argument as the "discrimination ground".

15. During the course of the hearing, I put it to Mr Pollard and Mr Mackley that this application is not really about access to this tribunal at all (in the sense that neither party really

wants to litigate the merits of any of these claims), but rather it is a proxy battle for the benefit of Brief 5/2020. If the Appellants can start an appeal, they can meet the conditions HMRC have set for their repayment claims to be admitted. Neither Mr Pollard nor Mr Mackley took issue with this suggestion. That notwithstanding, I must decide these applications (as I told Mr Mackley and Mr Pollard I would) on the basis that they are what they purport to be, applications for permission to appeal late which will be pursued if granted.

THE PRESENT CASES

16. I mentioned earlier that, although separate, all these applications arise out of the same circumstances (by which I mean that they are spawned by the Rank litigation and HMRC's dealings with the Appellants' claims derived from overpaying VAT on gaming machine takings) and are very closely connected. That connection is Mr Pollard. The Appellants are either Mr Pollard himself (in addition to being an accountant, Mr Pollard is the owner, but not the day-to-day operator/manager, of a number of public houses which house gaming machines) or clients of his accountancy practice. The businesses concerned are either public houses or, in one case a working men's club, in or around York.

17. Although the fact patterns in all these cases and the issues they give rise to are very similar, because they are separate appeals, I have set out in appendices to this decision the detailed timeline in each case. In broad terms, however, the shape of each case is the same, and it runs as follows:

(1) In 2006 a claim was submitted in relation to overpaid output tax in respect of gaming machine takings for VAT periods up to 6 December 2005. No other information was provided on the claim.

(2) Nothing happened for some years, at which point Mr Pollard contacted HMRC. He subsequently provided a detailed breakdown of output tax declared in each accounting period.

(3) HMRC wrote stating that, for a valid claim to be lodged, it must be quantified and state the method of calculation. The additional correspondence sent in to quantify and breakdown the amounts claimed was too late and subject to capping rules.

(4) Subsequently Mr Pollard (with Mr Spencer's help) wrote disputing HMRC's view and referring to other similar cases where claims had been allowed

(5) Before these issues could be resolved, HMRC wrote confirming repayment of the VAT claimed, plus interest. HMRC's letter also confirmed that, in view of the ongoing litigation, HMRC was also going to issue a Notice of Assessment under Section 80 (4A) VATA (the "protective assessment"). The letter set out the recipient's appeal rights, confirming that the recipient had 30 days to request a review or appeal to the Tribunal. No appeal or review request was made within this 30 day timescale.

(6) In 2014, HMRC issued a demand for repayment of the VAT and interest covered by the protective assessment. The monies claimed were repaid.

(7) In 2020, Mr Pollard sent a letter to HMRC requesting a repayment for VAT periods up to 5 December 2005 and HMRC replied confirming that they did not hold a valid appeal as required by Brief 5/2020.

(8) Finally, the Appellant appealed to this Tribunal against the protective assessment and requested permission to appeal outside the statutory time limits.

MR SPENCER'S EVIDENCE

18. Mr Spencer is a Director of Ian Spencer & Associates Limited. He is a VAT consultant and has been heavily involved in the issue of VAT and gaming machines since 2006. Mr

Spencer was approached by Mr Pollard in 2010/11 asking for help in obtaining repayments of VAT overstated on gaming machine income where HMRC were refusing to make repayments. Mr Spencer said that his help for Mr Pollard had been to explain to him how to help his clients reclaim overpaid VAT from HMRC. He never knew who Mr Pollard was representing and was never involved in dealings with clients nor did he help Mr Pollard with the appeals process.

19. Mr Spencer said that, after considering the information provided by Mr Pollard, what became apparent was that when Mr Pollard had submitted protective claims in 2006, HMRC never sought quantification of those claims, nor did they seek to agree a timescale in which those claims could be quantified. At his suggestion, Mr Pollard wrote to HMRC noting that the claims had not been quantified and, as no timescale for quantification had been agreed, the period to do so remained open. In addition, Mr Pollard was to send the quantification as required.

20. Mr Spencer was instrumental in providing Mr Pollard with a redacted copy of a letter from HMRC which Mr Pollard was able to use to seek to move HMRC from their position that, because a valid, properly quantified claim had not been received in time, the claims made by the Appellants were too late and subject to the capping rules. HMRC accepted this and repaid money to Mr Pollard and his clients as claimed. These payments were accompanied by protective assessments. At no point did HMRC issue any letters rejecting the original claim as they had done to thousands of other taxpayers soon after their initial quantified claims had been submitted.

21. Turning to HMRC's approach to these applications, Mr Spencer says that HMRC are behaving inconsistently. In particular, he says that, if a claimant received an appealable decision after making an initial claim and submitted a timely appeal to HMRC, they will now allow that taxpayer to submit an appeal against their protective assessment by amending their original appeal. This is essentially the approach endorsed by the Tribunal in *Ashstead/Darfield*. Although the *Ashstead/Ashington/Darfield* litigation was more than 5 years ago, HMRC are still allowing taxpayers in the position of Ashstead/Darfield to amend their original appeals.

22. On the other hand, where HMRC did not originally issue a decision to reject the claims, which is the case here "together with hundreds of other taxpayers of which [Mr Spencer is] aware/acting for", there was no initial decision from HMRC to reject the claim against which anyone could have appealed.

23. In other words, the constituency of taxpayers who did not appeal against their protective assessments can be divided into two, those who had an earlier appealable decision, which they appealed and can now amend to allow an appeal against the protective assessment to "piggyback" on the original appeal, and those who have no original decision, who are no longer in time to appeal against their protective assessment (unless they can successfully seek permission to appeal late) and have no existing appeal on which an appeal against their protective assessment can now "piggyback".

24. Mr Spencer says in his witness statement that "it seems clear to me, from my dealings with hundreds of taxpayers with claims, appeals, protective assessment and no appeals, that HMRC are not treating all taxpayers in the same way, i.e. they allow some taxpayers to submit late appeals against protective assessments…whilst rejecting other taxpayers' appeals against protective assessments on the basis there is no original appeal, the lack of which is because of HMRC's error in failing to issue an appealable decision, and it now being more than 30 days after the date of the protective assessment."

25. Mr Spencer describes HMRC's not issuing an appealable decision against the original claim as an "error". I pause to observe that it will not always be the case that the lack of an original appealable decision is down to HMRC's fault. In the case of the Appellants, the lack

of an original appealable decision may have as much, if not more, to do with Mr Pollard allowing matters to drift for three years or longer as it does to HMRC taking time up with a dispute over the validity of the claim and the operation of the capping rules before finally meeting the claim and issuing a protective assessment. Taking York Burton Lane Club and Institute Limited as an example, Mr Pollard first made a protective VAT claim on 11 September 2006. HMRC asked for further details on 19 September 2006, but Mr Pollard had no further contact with them until 6 May 2010. The dispute over whether proper claims had been submitted and the capping rules began in November 2010 and had not been resolved by the time the reclaims were paid and a protective assessment was issued in January 2012. I find it hard to criticise HMRC for not having issued an earlier rejection of the claim when Mr Pollard had nothing to do with them for 3 years and 8 months and consideration of the 2006 claims only began in earnest in May 2010, by which time HMRC's approach to these claims had changed (or was shortly about to change) from rejection to acceptance, as explained in [8] above. Mr Spencer's suggestion in his witness statement that HMRC should have proactively sought clarification and agreed a timetable for doing so seems to me to make HMRC responsible for taxpayers' claims and to be quite wrong in principle. In any event, for the reasons set out in [77] below, I do not consider that, even if HMRC were somehow at fault for not issuing an earlier rejection of the original claim, this would be at all relevant to my decision.

26. In the course of the hearing, I asked Mr Mackley whether the Appellants' summary of HMRC's position (that no objection would be taken to taxpayers with a live appeal against an earlier rejection of their claim amending their appeal so as to include an appeal against their protective assessment, but completely fresh applications to appeal out of time against protective assessments would be objected to) was accurate, and he confirmed that this is the case.

27. Cross-examined by Mr Mackley, Mr Spencer confirmed that it was an administrative or other similar error on Mr Pollard's part not to appeal the protective assessment, but that was the case for many other people too. The "consensus on the ground" when HMRC made the repayments in 2010/11 was that "it was all over" and HMRC would honour the ultimate outcome of the litigation regardless of the terms of the assessment letter.

BRINGING AN APPEAL

28. Section 83G VATA provides materially as follows:

> "(1) An appeal under section 83 is to be made to the tribunal before –
>
> (a) the end of the period of 30 days beginning with –
>
> (i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates … …
>
> (6) An appeal may be made after the end of the period specified in subsection (1) … if the tribunal gives permission to do so.".

29. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ('the FTT Rules') provides, so far as material:

> "(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
>
> (2) Dealing with a case fairly and justly includes—
>
> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;
>
> (b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it -

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction."

30. Rule 5 of the FTT Rules states:

"(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure. …

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may by direction –

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;

(b) …."

31. Rule 20 of the FTT Rules provides:

"(1) A person making or notifying an appeal to the Tribunal under any enactment must start proceedings by sending or delivering a notice of appeal to the Tribunal. …

(4) If the notice of appeal is provided after the end of any period specified in an enactment referred to in paragraph (1) but the enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal –

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal."

BRINGING AN APPEAL OUT OF TIME

32. The Appellants are clearly seeking permission to launch their appeals long after the expiry of the 30 day period in section 83G (1) VATA, but they can still launch their appeals "if the tribunal gives permission to do so"; section 83G (6). How should the tribunal go about deciding whether to give permission?

33. There was no discussion of the authorities before me and what follows is my analysis having considered the authorities referred to in the parties' submissions.

34. I take as my starting point the decision of Morgan J in *Data Select Limited v Commissioners for Revenue & Customs,* [2012] STC 2195, where he said this (at [34] to [37]):

"[34] … Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions:

(1) what is the purpose of the time limit?

(2) how long was the delay?

(3) is there a good explanation for the delay?

(4) what will be the consequences for the parties of an extension of time? And

(5) what will be the consequences for the parties of a refusal to extend time?

The court or tribunal then makes its decision in the light of the answers to those questions. …

[36] … Some tribunals have also applied the helpful general guidance given by Lord Drummond Young in *Advocate General for Scotland v General Comrs for Aberdeen City* [2005] CSOH 135 at [23] - [24], [2006] STC 1218 at [23] - [24] which is in line with what I have said above.

[37] In my judgment, the approach of considering the overriding objective and all the circumstances of the case, including the matters listed in CPR r 3.9, is the correct approach to adopt in relation to an application to extend time pursuant to s 83G(6) of VATA. The general comments in the above cases will also be found helpful in many other cases. Some of the above cases stress the importance of finality in litigation. Those remarks are of particular relevance where the application concerns an intended appeal against a judicial decision. The particular comments about finality in litigation are not directly applicable where the application concerns an intended appeal against a determination by HMRC, where there has been no judicial decision as to the position. None the less, those comments stress the desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision."

35. When Morgan J made that comment, the list of matters in rule 3.9 of the Civil Procedure Rules ("CPRs") to which he was referring read as follows:

"(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including –

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant preaction protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

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

(i) the effect which the granting of relief would have on each party."

36. Subsequently, rule 3.9 has been amended, with a material change to its substance. The new version was introduced following recommendations made by Sir Rupert Jackson that there should be a tougher and less forgiving approach to non-compliance with rules and sanctions. Rule 3.9 now reads as follows:

"(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider

> all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders."

37. Although the CPRs do not apply to the Tribunals, in *HMRC v McCarthy & Stone (Developments) Limited,* [2014] UKUT 196 (TCC), the Upper Tribunal (Judge Sinfield) commented that tribunals should not adopt a different, more relaxed, approach to compliance with rules, directions and orders than the courts which are subject to the CPRs. This approach was endorsed by the Supreme Court in *BPP Holdings Ltd v HMRC*, [2017] UKSC 55.

38. At this point we can see how new rule 3.9 of the CPRs is starting to affect the tribunals' approach to compliance with their procedural rules and bringing their approach into line with that of the courts. In that light, we should pause to consider an important development in the courts' thinking on relief from sanctions and extensions of time in connection with their procedural rules. This is the decision of the Court of Appeal in *Denton and others v TH White Limited and others* [2014] EWCA Civ 906. In *Denton*, the Court of Appeal was considering the application of the later version of CPR rule 3.9 to three separate cases in which relief from sanctions was being sought in connection with failures to comply with various rules of court. The Court took the opportunity to "restate" the principles applicable to such applications as follows (at [24]):

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]"."

39. In respect of the "third stage" identified above, the Court said (at [32]) that the two factors identified at (a) and (b) in rule 3.9(1) "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered." In *Denton* the Court of Appeal was considering how rule 3.9 should be applied following a line of cases, starting with *Mitchell v News Group Newspapers Ltd*, [2013] EWCA Civ 1537, which set out guidance on this question. Those cases, and indeed the guidance in *Mitchell* itself, had attracted criticism for imposing disproportionate penalties on parties for breaches which had little practical effect on the course of litigation. *Denton* might be seen as an exercise in rebalancing or righting the ship.

40. One comment the Court of Appeal made in relation to the "third stage" is of particular relevance in this case. At [31] and [32] in their joint judgement, the Master of the Rolls and Vos LJ observed:

> "31. The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in *Mitchell*: see para 37. Rule 3.9(1) requires that, in every case, the court will consider "all the circumstances of the case, so as to enable it to deal justly with the application". We regard this as the third stage.
>
> 32. We can see that the use of the phrase "paramount importance" in para 36 of Mitchell has encouraged the idea that the factors other than factors (a) and (b) are of little weight. On the other hand, at para 37 the court merely said that

> the other circumstances should be given "less weight" than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule."

41. The Upper Tribunal considered whether the change in the text of rule 3.9 of the CPRs and this "new" approach to relief from sanctions for failure to comply with the rules of court had any impact on applications for permissions to appeal to the FTT outside the relevant statutory time limit in *William Martland v HMRC*, [2018] UKUT 178 (TCC), and observed at [43]:

> "In its previous form, the "checklist" of items in CPR rule 3.9 can be seen to bear a number of similarities to the questions identified in Aberdeen and Data Select; to that extent, it is easy to regard them as little more than an aide memoire to help the judge to consider "all relevant factors" (and indeed, the list was preceded by the general injunction to "consider all the circumstances"). The question that naturally arises is whether the changes to CPR rule 3.9 and the evolving approach to applications for relief from sanctions under that rule also apply to applications for permissions to appeal to the FTT outside the relevant statutory time limit. We consider that they do. Whether considering an application which is made directly under rule 3.9 (or under the FTT Rules, which the Supreme Court in *BPP* clearly considered analogous) or an application to notify an appeal to the FTT outside the statutory time limit, it is clear that the judge will be exercising a judicial discretion. The consequences of the judge's decision in agreeing (or refusing) to admit a late appeal are often no different in practical terms from the consequences of allowing (or refusing) to grant relief from sanctions – especially where the sanction in question is the striking out of an appeal (or, as in *BPP*, the barring of a party from further participation in it). The clear message emerging from the cases – particularised in Denton and similar cases and implicitly endorsed in *BPP* – is that in exercising judicial discretions generally, particular importance is to be given to the need for "litigation to be conducted efficiently and at proportionate cost", and "to enforce compliance with rules, practice directions and orders". We see no reason why the principles embodied in this message should not apply to applications to admit late appeals just as much as to applications for relief from sanctions, though of course this does not detract from the general injunction which continues to appear in CPR rule 3.9 to "consider all the circumstances of the case".

42. The Upper Tribunal went on to give the following guidance to the FTT when considering applications for permission to appeal out of time:

> "44. When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in *Denton*:
>
> (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.

(2) The reason (or reasons) why the default occurred should be established.

(3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.

45. That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

46. In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal. …. It is clear that if an applicant's appeal is hopeless in any event, then it would not be in the interests of justice for permission to be granted so that the FTT's time is then wasted on an appeal which is doomed to fail. However, that is rarely the case. More often, the appeal will have some merit. Where that is the case, it is important that the FTT at least considers in outline the arguments which the applicant wishes to put forward and the respondents' reply to them. This is not so that it can carry out a detailed evaluation of the case, but so that it can form a general impression of its strength or weakness to weigh in the balance. To that limited extent, an applicant should be afforded the opportunity to persuade the FTT that the merits of the appeal are on the face of it overwhelmingly in his/her favour and the respondents the corresponding opportunity to point out the weakness of the applicant's case. In considering this point, the FTT should be very wary of taking into account evidence which is in dispute and should not do so unless there are exceptional circumstances."

43. The approach outlined by the Upper Tribunal in *Martland* was adopted by the (differently constituted) Upper Tribunal in *HMRC v Muhammed Hafeez Katib*, [2019] UKUT 189 (TCC). Of particular note for this application is that, in the context of considering a delay of (on any basis) no more than 24 months, the Upper Tribunal observed:

"16. Mr Magee accepted, quite rightly, that the FTT should apply a "strict approach" to compliance with rules (including statutory time limits for bringing appeals) just as the courts do in analogous situations. However, he also rightly emphasised that, even applying a "strict approach", the exercise of judicial discretion must include the possibility of making allowances in exceptional circumstances. In Mr Magee's submission, the FTT had not failed to apply binding guidance on the "strict approach" or on the importance of statutory time limits (not least since it referred to the parties' submissions on *BPP Holdings* and *McCarthy & Stone* at [22] and [24(2)]). Rather, he argued that the FTT had applied that approach but had concluded that, given the extraordinary conduct of Mr Bridger, it would not be just to refuse Mr Katib permission to make a late appeal.

17. We have, however, concluded that the FTT did make an error of law in failing to acknowledge or give proper force to the position that, as a matter of

> principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion. We accept Mr Magee's point that the FTT referred to both *BPP Holdings* and *McCarthy & Stone* in the Decision. Paragraph 27 (1) of the decision (cited above) shows that the FTT seemed to have the point in mind. However, instead of acknowledging the position, the tribunal went on to distinguish the BPP Holdings case on its facts. Differences in fact do not negate the principle, and it is not possible to detect that the tribunal thereafter gave proper weight to it in parts of the decision which followed."

44. *HMRC v Websons (8) Limited*, [2020] UKUT 154 (TCC), concerned an application to bring a late appeal in relation to a review decision of HMRC dated 21 December 2011. The appeal was lodged on 9 August 2018. The appellant in that case was an amusement arcade operator and the issue between it and HMRC was the VAT liability of gaming machine takings in the light of the *Rank* litigation. The main issue considered by the Upper Tribunal was whether the review decision had been notified to the appellant. That is not an issue in this case, but the Upper Tribunal, having observed that it was common ground that the principles to be adopted in deciding whether to admit a late appeal were those set out in *Martland*, went on to comment (at [45] and [49]) on the importance of observing statutory time limits, as follows:

> "[45] The need to give particular importance to the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected was emphasised by the Upper Tribunal in *HMRC v Hafeez Katib* [2019] UKUT 189 (TCC) where it found at [17] that the FTT made an error of law in that case "in failing to…give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion".
>
> [49] In our view, it is apparent from these authorities that the weight to be placed by the tribunal on the need to give particular importance to the need for litigation to be conducted efficiently and at proportionate cost is not to be diminished simply because, in the case of mass litigation, the appeal could be conveniently heard with other cases or because the addition of the claim would not affect the trial timetable for any lead case."

45. What I draw from these cases is that the approach I should take in deciding whether to give the Appellants permission to appeal out of time is the following:

(1) I should first establish the length of the delay. If it was very short then I am unlikely to need to spend much time on the second and third stages. In all cases, all three steps need to be taken, but it can very likely be concluded quite readily that a short delay is unlikely to prejudice anyone and can be excused, despite the general need for time limits to be respected.

(2) Then I should consider the reason (or reasons) why the default occurred. In *Denton* (at [29]) the Master of the Rolls and Vos LJ observed that this step is "particularly important where the breach is serious or significant" and (at [30]) "It would be inappropriate to produce an encyclopaedia of good and bad reasons for a failure to comply with rules, practice directions or court orders. Para 41 of *Mitchell* gives some examples, but they are no more than examples."

(3) I can then move on to evaluate "all the circumstances of the case". This will take into account the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission. That in turn will include any obvious strength or weakness of the applicant's case. In carrying out this exercise I must give particular weight to the need for litigation to be conducted efficiently and at

proportionate cost, and for time limits to be respected. I consider that this is particularly the case given that the time limit we are concerned with is contained in primary legislation, section 83G VATA. But I must also bear in mind that the need to consider "all the circumstances of the case" admits of the possibility of making allowances in exceptional circumstances; it does not follow automatically from there being a serious or significant breach for which there is no good reason that the application will automatically fail.

It will be readily apparent that this summary is little more than the "three stage" approach in *Martland* modestly augmented by observations from the other judgments and decisions I have considered.

HMRC'S SUBMISSIONS

46. HMRC agree that the approach to be taken is the "three step" approach set out in *Martland*.

47. As far as the length of the delay is concerned, they say that in all five cases the delay is "serious and significant".

48. As far as the reason for the delay is concerned, HMRC note that the Appellants have advanced the argument that "The sole objection of HMRC to making payment of the claimed amount is that the Appellant had no original appeal. This is because HMRC did not issue a decision that could be appealed against". To this HMRC reply that on numerous occasions and in various correspondence over the previous 10 years, HMRC has explained to the Appellants and their accountant the appeal rights in respect of a protective repayment claim. In particular, the notices of protective assessment set out the Appellants' rights of appeal (including to the tribunal) and set out the 30 day appeal period.

49. They say that the Appellant and their accountants have failed to provide a reasonable excuse for why they have continually missed opportunities to submit an appeal within the deadlines outlined by HMRC. They refer to *Christine Perrin v HMRC* [2018] UKUT 156 (TCC), which is a case on reasonable excuse, as indicating that there is no basis on which the Appellants could have reasonably believed an appeal had been ongoing for the previous 8 years, being lodged in 2012, when it is considered that in 2014 payment was enforced by HMRC.

50. Turning to the third stage, HMRC point to the need to enforce compliance with time limits and also the need to achieve finality, or, as Morgan J put it in *Data Select* (at [37]), the desirability of "not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled". HMRC say that the considerable length of the delay is particularly relevant in the present matter as it leads to HMRC potentially being unfairly prejudiced by the lateness of this appeal. This is because some of the decisions relate to VAT periods that are up to 17 years in the past. They say that, as a government body bound by data protection law, the majority of documentation relating to this period will have been destroyed. Mr Mackley and Miss Grainger were not particularly specific when pressed about exactly what information HMRC would now need in order to deal with any late appeal that they had not already gathered from the Appellants, reviewed and been satisfied with many years ago when they settled the Appellants' repayment claims.

51. If the Appellants' application is allowed, HMRC say they would be prejudiced as they will have to divert resources to defend an appeal which they were entitled to consider closed, especially given the significant length of the delay. Other taxpayers will be prejudiced as HMRC's resources, which would otherwise have been used in respect of those who have made appeals in accordance with statutory time limits, will be diverted to consider the Appellants'

appeal. HMRC should not normally be required to defend appeals after such an excessive gap between the expiration of the time limit and the appeal. Such appeals are normally more intensive to defend and otherwise create issues in obtaining appropriate evidence in meeting HMRC's burden of proof.

52. HMRC acknowledge that, should the application be denied, the Appellants will be prevented from challenging the amounts in dispute, but they say that neither that nor any financial difficulty that might give rise to are sufficient to warrant granting permission for the appeal to be brought out of time, when balanced against the factors set out above. HMRC say that a detailed evaluation of the merits of the case should not be carried out. Relying on Judge Demack's definition of a "completed claim" in *The University of Liverpool* (MAN/96/728) they say that the Appellants' cases are weak as they were settled by being paid in full in 2011.

53. HMRC did not engage with the discrimination ground in any great detail in their skeleton argument and their case focussed around the "three stage" *Martland* test without that additional gloss. They did, however, refer to *Ashington/Ashstead/Darfield*, and noted that, on a broadly similar fact pattern, Ashington was refused permission to make a late appeal against a protective assessment even though their appeal was "only" 3 years late. In argument, Mr Mackley observed simply that there were differences between Ashstead/Darfield and Ashington and differences (not always obviously significant ones) can lead to different outcomes. Sometimes this benefits taxpayers and sometimes HMRC. A technical difference is not necessarily an unfairness.

THE APPELLANTS' SUBMISSIONS

54. Mr Pollard accepted that there was a substantial time period between the making of the protective assessments and the Appellants seeking to appeal them.

55. Mr Pollard found it difficult to explain why no appeal had been lodged against the protective assessment within the 30 day period. He simply treated the protective assessment as part of the original application for repayment. He said that, at no time did the Appellants walk away from that process and he simply regarded the repayment as a part of that. He did not perceive a need to appeal against the protective assessment.

56. The Appellants' fundamental complaint (the "discrimination ground") is that HMRC are operating a "double standard", allowing some taxpayers effectively to appeal late, but not others. The Appellants simply want to be treated equally with other taxpayers, by now being allowed to bring an appeal late.

57. The Appellants also take issue with HMRC's claim (which they described as "spurious") about the difficulties they would encounter in accessing evidence/information to deal with claims if late appeals were allowed. In their view, HMRC would never have been able to check claims submitted (or gather the required evidence to do so) for themselves. They would always have needed to rely on the integrity of the taxpayer submitting the claim. VAT returns are not sufficient to enable HMRC to validate a claim (all they reveal is how much output tax has been accounted for). All the detailed information needed to investigate a claim can only come from the taxpayer. This information was, of course, provided as part of the quantification exercise before the VAT repayments were made. That information was supplied to HMRC and it was, presumably, validated by them before they made the VAT repayments; they would not have made those repayments if they were not happy with them. Mr Spencer commented that, as a taxpayer, he would be appalled if HMRC had paid out large amounts of public money to taxpayers in 2010/11 without first being satisfied that their claims were valid.

DISCUSSION

58. Turning first to the length of the delay, this is by any measure serious and significant. The statutory period for launching an appeal is 30 days from the relevant decision (here the notice of protective assessment), whereas none of the Appellants sought to launch their appeals until more than eight years after that date; indeed in the Fagan and Lowther applications the delay was nearly 9 years and in Mr Pollard's own case it was nearly 10. Mr Pollard did not seek to downplay the seriousness or significance of the breach, and I consider he was right to take that course.

59. Turning to the reason for the breach, as I mentioned earlier, Mr Pollard found it very difficult to articulate why no appeal had been started within the statutory period. In *Ashtead* the taxpayer freely admitted that the reason was an administrative error on the part of (as it happens) Mr Spencer's firm, which was dealing with that appeal. The impression I collected from the evidence of both Mr Spencer and Mr Pollard is that the reason here may have been more to do with a (seemingly widely held) view that the money in "Rank cases" would follow the eventual outcome. As a result of this, I suspect (but cannot be sure) that no one really gave a great deal of thought to the statement contained in the protective assessment that, if taxpayers disagreed with it, they had 30 days to appeal or seek a review. When HMRC sought to enforce the assessment, the Appellants paid the money demanded and did not do anything to seek to protect their position at that point, even though the Rank litigation was continuing. There is, in my view, no remotely satisfactory explanation for the Appellants' failure to appeal within the 30 day deadline or to try to obtain permission to do so out of time when HMRC enforced the assessment in 2014. In passing, I have not taken up HMRC's suggestion that I should decide whether the Appellants failure would amount to a "reasonable excuse" as such term is understood in cases such as *Christine Perrin v HMRC* [2018] UKUT 156 (TCC). Given that "reasonable excuse" is not in terms a relevant expression here, I consider that I should answer the question whether the Appellants have a good or satisfactory explanation for their failure without the "baggage" of cases which are addressing a particular statutory provision.

60. Having decided that the Appellants' failure is both very serious and unjustified, like Sisyphus, they are now faced with the task of rolling a heavy boulder up a steep hill if they are to prevail. As *Denton* makes clear, the position they find themselves in does not mean that the Tribunal will not give them permission to appeal out of time, but they need to work hard (particularly in the light of the more recent Upper Tribunal cases which stress the very significant weight to be given to lengthy failures) before it will do so.

61. In paragraphs [62] – [69] below I have addressed whether the Tribunal should admit the Appellants' appeals late without regard to the discrimination ground, instead focusing on the more usual factors. Although the Appellants have not suggested that, absent the discrimination ground, they should be allowed to appeal late, I have addressed this issue for three reasons. First, if the Tribunal would allow the Appellants to appeal late in any event, it should do so and not compel the Appellants to argue the discrimination ground unnecessarily. Secondly, HMRC's objection to the grant of permission focuses primarily on issues other than the discrimination ground and so I should address them. Finally, it is not possible to evaluate the discrimination ground or to operate the "third stage" of the *Martland* analysis without considering all the relevant circumstances.

62. One very important factor in the Appellants' favour is that the Rank litigation, the issue of principle which separated HMRC and many taxpayers (including the Appellants) over 15 years, has now been decided in favour of taxpayers. There is, of course, a second aspect to each of the Appellants' cases. Not only must they win (a task Rank has already performed for them) on the point of principle (that gaming machine takings should always be seen as exempt because otherwise UK VAT law would be in breach of the EU concept of fiscal neutrality), but

they must also be able to quantify their own particular claim and justify it in any proceedings. Again, the repayments made by HMRC from 2010/11 onwards would indicate that the Appellants have a strong case here. Like Mr Spencer, I would be surprised and disappointed if HMRC had made payments to taxpayers in 2010/11 without validating their claims.

63. I should add that I do not find Judge Demack's definition of a "completed claim" in *The University of Liverpool* (MAN/96/728) at all helpful in determining the strength of the Appellants' position, to the extent it is appropriate for me to try to do so at all, In any event, I certainly do not agree with HMRC that their position would be "weak".

64. I have (I hope) not fallen into the trap of trying to carry out a detailed evaluation of the Appellants' cases, but it seems to me that their appeals, were I to allow them to bring them, would have a very strong chance of succeeding.

65. We turn next to the issue of "staleness" of evidence. Here, like Mr Pollard and Mr Spencer, I am sceptical of HMRC's statements that they would find it difficult, given the passage of time, to evaluate (and if necessary defend) any claims the Appellants brought. I accept Mr Pollard's explanation that there is not a great deal of information that HMRC would need to do this and what they need would inevitably have to come from the Appellants (because the information is detailed information about the gaming machines each Appellant operated and the way they ran their business), this information has already been supplied to HMRC and more importantly it has been evaluated by them and used as the basis on which to make repayments in 2010/11.

66. As to HMRC's point that they would be prejudiced if these applications were allowed, as they would have to divert resources to defend appeals which they were entitled to consider closed, especially given the significant length of the delay, I accept that HMRC would need to commit some resource to dealing with these appeals, but the prejudice is not great because HMRC is dealing with many other cases with similar or identical issues and (as discussed above) the point of principle has been resolved and the secondary issues of detail in the case of each of the Appellants were largely (if not completely) addressed in 2010/11.

67. I should pause here to observe that I have not given any weight to the suggestion made by Mr Spencer that, if these appeals are allowed to proceed, there will in fact be no litigation and the Appellants' claims will simply be settled as indicated in Brief 5/2020. If I decided these applications on the basis that this is what would happen, the need to address the points discussed in [65] and [66] would fall away completely. However, as I indicated (at [15] above) I would, I have determined these applications for what they purport to be, applications for permission to appeal late which will be pursued if granted.

68. At this point, therefore, we are faced with Appellants who have made an excoriable failure in not bringing an appeal on time, for which failure there is no remotely adequate explanation, but who have what appears to be a compelling case, which HMRC would be put to some inconvenience, but, in my judgment, no great or insuperable burden, in evaluating and defending. Is that sufficient?

69. In my judgment, the answer to that question is no. I start by reminding myself that there is nothing controversial or novel in the idea that there is more to prevailing in litigation than simply having a good claim, and that a claim must be brought in time and properly prosecuted. Outside the tax sphere, the Limitation Act 1963 makes it clear that it is not enough to have a good cause of action; proceedings to enforce it must be brought in time. The *Mitchell/Denton* line of cases, touched on above, indicate that, not only must the claim be brought in time, it must be properly and efficiently prosecuted. Similarly, returning to the world of VAT, the "four year cap" (in section 80 (4) VATA) makes it clear that it is not enough to have a good claim against HMRC; that claim must be brought within four years of (put broadly) the event

that gives rise to the claim. This is, of course, not a case which engages the four year cap, but I consider that the existence of the "four year cap" is something to which I should pay due regard when deciding whether the time delay here, if unexcused, can be balanced by other factors when deciding whether to give the Appellants permission to appeal late. If the "four year cap" was in point and the Appellants had waited until 2020 to make a claim in relation to a relevant event that occurred in 2010/11 or even 2014, they would be way out of time and there is no provision in VATA allowing HMRC or any court or tribunal to extend the four year period. I am also mindful that the core 30 day time period for commencing an appeal is contained in primary legislation; Parliament's starting point is that 30 days is long enough to bring an appeal. I consider that, if I were to give permission for these appeals to proceed, so long after the 30 day period expired and without there being any justification for the inordinate delay, I would be "failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected [is] a matter of particular importance to the exercise of [my] discretion" (*HMRC v Muhammed Hafeez Katib*, [2019] UKUT 189 (TCC) cited at [43] above).

70. Finally, we come to the discrimination ground, the Appellants' submission that HMRC are behaving inconsistently by dividing taxpayers who did not appeal their protective assessments into two groups. Neither group, they accept, has covered itself in glory and they have both made the same crucial failing, but their treatment is radically different. As we have seen, the first group comprises taxpayers who received an appealable decision after making an initial claim and submitted a timely appeal in relation to that decision, but did not do so in relation to their protective assessment when it was issued. The second group is made up of taxpayers (like the Appellants) who, for whatever reason, never had an appealable decision before the protective assessment. HMRC will not object to the first group effectively bringing a late appeal against their protective assessment (even now nearly 5 years after the decision in *Ashington/Ashstead/Darfield)* by amending their original appeal, but they do object to taxpayers in the second group bringing a late appeal. Is that an unjustifiable distinction such that the Tribunal should exercise its discretion to allow the Appellants to bring their appeals out of time in order to ensure that both groups are dealt with equally?

71. It seems to me to be self-evident that dealing with cases, including exercising discretions (such as to allow a late appeal), justly (as required by rule 2 of the FTT Rules) requires that taxpayers in a similar (or materially similar) position are dealt with in the same way and that there is no discrimination or unjustifiable differentiation in their treatment. Mr Mackley observed that sometimes small differences can lead to disproportionately different outcomes. As an observation on life, that cannot be faulted, but it seems to me that dealing justly means only producing different outcomes where there is a real difference in position that justifies this, so that taxpayers in materially similar positions enjoy the same (or materially the same) treatment. That, of course, begs the question whether these two groups of taxpayers are in the same (or materially the same) position. To answer this question, we need to understand why the outcome in *Ashington* was different from that in *Ashstead/Darfield.*

72. In *Ashington/Ashstead/Darfield* Judge Sinfield indicated that he would approach the question of whether to allow a late appeal using the three-stage approach from *Denton* (*Martland* had yet to be decided by the Upper Tribunal), which he summarised (at [24]) as follows:

> "I should address the application in three stages. The first stage is to identify and assess the seriousness and significance of the failure to comply with the time limit. If the breach is neither serious nor significant then I do not need to spend much time on the second and third stages. The second stage is to consider the reason for the failure to comply. The third stage is to consider all

> the circumstances of the case, bearing in mind the overriding objective of the FTT Rules."

73. The delay in that case was some three and a half years, in relation to which he commented (at [25)]):

> "In my opinion, a delay of three years and five months in complying with a 30 day time limit can only be described as very serious. I do not understand either party in this case to suggest that the failure to comply with the time limit was other than serious and significant."

74. Turning to the reason for the delay, in *Ashington* this was described (at [26]) as

> "Mr Spencer, Ashington's representative, frankly admitted in his witness statement that no appeal was made against the protective assessment issued to Ashington in January 2013 because of an administrative error on his part. He acknowledged that he had failed to recognise that Ashington's situation was different from the many other clubs that he represented in that Ashington had not had an initial rejection of its claim and, therefore, had not submitted any earlier appeal. While such an error may be understandable when Mr Spencer was dealing with many (I believe, hundreds) of appeals, it does not seem to me to constitute a reasonable excuse for the delay."

75. Turning to *Ashstead/Barfield*, Judge Sinfield commented (at [29] and [30]):

> "I consider that Ashtead and Darfield are in a different position to Ashington. They both have existing appeals against the initial refusals of their claims which have never been withdrawn. Their mistake was in failing to recognise that repayments were effectively a concession by HMRC that the Appellants were entitled to succeed in their original appeals and the protective assessments were new appealable events that required separate appeals. Although the letters that formed the protective assessments contained wording to alert the Appellants to the need to appeal, I consider that they also contained mixed messages that had the potential to confuse. …
>
> I consider that the Appellants could have reasonably gained the impression that they had an option to continue their existing appeals and those would embrace the later protective assessments."

76. The difference between the outcomes in *Ashington* on the one hand and *Ashstead/Barfield* on the other is that, at the second stage of the *Denton/Martland* analysis, the taxpayers in *Ashstead/Barfield* had a good explanation for their failure, whereas the taxpayer in *Ashington* did not. There was a material difference in position and therefore a very different outcome. That explains why HMRC respond differently to applications by taxpayers in the two groups identified in [70] to appeal protective assessments late or to amend an existing appeal to include the protective assessment.

77. This also explains why the answer to the question, whether it is anyone's (and, if so, whose) fault that the taxpayer did not have an earlier appealable decision, is irrelevant. Mr Spencer suggested that the reason why the Appellants cannot effectively bring a late appeal is because HMRC failed to give them an earlier appealable decision and that should justify my giving them permission to appeal late, almost as if an earlier appealable decision were some kind of ticket for a late appeal, of which the Appellants have been unfairly denied. As I indicated earlier, I do not accept that the reason the Appellants did not have an appealable decision before HMRC raised their protective assessments is a failing to be laid at HMRC's door. But that does not matter. The differentiation between the two groups, as Judge Sinfield explained, lies in the fact that the members of one were (or at least could have been) confused by HMRC's "mixed messages" whereas the members of the other (who received a single,

simpler message) could not. The resulting treatment of the members of the first group is a departure from the norm (that compliance with time limits is expected) and is explained by that group having been prejudiced (potentially confused) by HMRC and that prejudice needing to be compensated for. The members of the second group (of which the Appellants are members) have not been prejudiced (potentially confused) by HMRC and so have no need of a relaxation of the strict approach to compliance with time limits. As they have not been prejudiced and have no need of such a relaxation, there is no reason to offer it to them, and by the same token there is no need to investigate why they have not been prejudiced. No outcome of any such investigation could ever justify them being offered what for them would be an unnecessary relaxation of the strict approach to compliance with time limits. The approach taken by Judge Sinfield in *Ashington/Ashstead/Darfield* levels rather than distorts the playing field.

78. Mr Spencer criticised HMRC for continuing to follow this distinction long (5 years) after the *Ashington/Ashstead/Darfield* decision, particularly as Judge Sinfield gave Ashstead and Barfield only 14 days to amend their existing notices of appeal. I do not read too much into the time period Judge Sinfield allowed; he was simply making an order in the context of a case before him, and requiring steps to be taken quickly if they were to be taken at all in such a context does not seem to me to be at all remarkable. I do not extrapolate from the imposition of a timing requirement in that case that other taxpayers who want to take a similar approach should do so with a degree of expedition. There is no basis on which the Tribunal could impose such a general requirement. Given the Tribunal's criticism of their letters and the uncertainty and almost inevitable further challenge that doing so would give rise to, I can understand why HMRC have not tried to limit the period over which they will adopt this approach. In the light of how this position has arisen and for the reasons set out in [77], I do not consider that the continuing more accommodating approach taken to taxpayers with an earlier appeal is unfair to the Appellants.

79. For these reasons I do not consider that HMRC's approach as outlined in [70] amounts to unjustly treating taxpayers in materially similar positions in different ways, such that the Tribunal should exercise its discretion to allow the Appellants to bring their appeals out of time in order to bring about a just outcome.

DISPOSITION

80. In summary:

(1) The Appellants have committed a serious and significant failure in waiting more than eight years (rather than no more than 30 days) before appealing their protective assessments.

(2) They have offered no reasonable explanation for this failure.

(3) If their appeals were admitted, they would appear to have a very strong chance of succeeding. If they chose to defend any such appeals, HMRC would be put to some inconvenience in doing so, but they would not be materially (if at all) prejudiced.

(4) That notwithstanding, the Appellants' disregard of the time period for commencing an appeal prescribed by Parliament is so serious and significant that in principle their appeals should not be admitted.

(5) There is nothing in the discrimination ground that would affect this conclusion.

81. For the reasons set out above, I have concluded that the Appellants should not be granted permission to make a late appeal and, accordingly, their appeals should not be admitted.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

82. 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.

MARK BALDWIN
TRIBUNAL JUDGE

Release date: 07th NOVEMBER 2022

York Burton Lane Club and Institute Limited - TC/2020/03733

On 11 September 2006, the Appellant's accountants (Ashcroft Pollard & Co) submitted a "protective" claim for overpaid output tax in respect of gaming machine takings for VAT periods up to December 2005. No other information was provided on the claim.

On 19 September 2006, HMRC wrote back and requested full details to quantify the claim, including the VAT periods, Gaming Machine details and the amounts.

On 2 November 2006, the Appellant wrote to advise of a new secretary for the club, but no reference was made to the protective claim letter or HMRC's reply.

On 6 May 2010, having had no contact in over 3 years, HMRC Officer McStravick received a phone call from Mr Dale Pollard (from the Appellant's accountants). He was seeking information on a number of claims. Officer McStravick confirmed that any valid claim would be processed by 31 March 2011. No comment was made on any specific case as it was a general query and Mr Pollard advised he would send further info to support these claims.

On 30 July 2010, the Appellant's accountants wrote to HMRC, referring to the phone call of 6 May 2010, and provided a detailed breakdown of output tax declared within each accounting period. This information was provided over 3 years after it had been requested.

On 13 August 2010, the letter of 30 July 2010 was linked to the Appellant's record. It was only at this stage that Officer McStravick was able to note any specific tax record with the phone call of 6 May 2010.

On 18 October 2010, the Appellant's accountants provided an amended figure and further spreadsheets confirming a different amount claimed to that stated in their letter of 30 July 2010.

On 9 November 2010, HMRC wrote to the Appellant and their accountants stating that for a valid claim to be lodged, it must be quantified and state the method of calculation. The additional correspondence sent in to quantify and breakdown the amounts claimed was too late and subject to capping rules.

On 23 November 2010, HMRC spoke to Mr Pollard about this case (and 3 other cases) to confirm the contents of the letter dated 9 November 2010. He stated that he would lodge an appeal with the Tribunal.

On 8 December 2010, the Appellant's accountants requested that HMRC reconsider their decision of 9 November 2010.

On 22 December 2010, HMRC responded to the Appellant's accountants stating that their opinion had not changed and, as there was no right of appeal against this decision, the Appellant may instead make a complaint.

On 11 May 2011, the Appellant's accountants wrote to HMRC's Appeals Unit to complain about the outcome of this case (and 3 others). They asked for HMRC to review the decision before deciding whether they would request a Judicial Review.

On 14 June 2011, HMRC replied to the complaint, confirming that the rejection of the claim was the correct outcome for this case

On 9 September 2011, the Appellant's accountants wrote disputing HMRC's view and referring to other similar cases where claims had been allowed.

On 1 December 2011, Mr Pollard rang HMRC to discuss the repayment claim. HMRC advised that at that stage no Rank (*Linneweber*) claims were being repaid at present.

On 8 December 2011, HMRC rang Mr Pollard and confirmed that the Appellant's claim would be repaid, as it had not formally been rejected earlier in the process. Later the same day, HMRC received further information to substantiate the original claim dated 11 September 2006.

On 26 January 2012, HMRC wrote to the Appellant and their accountants confirming repayment of the amount of £7,816.00 VAT, plus interest of £1,304.66. The letter also confirmed that, in view of the ongoing litigation, it was also going to issue a Notice of Assessment under Section 80(4A) of the VAT Act 1994. The letter contained full appeal rights, confirming that the Appellant had 30 days to request a review or appeal to the Tribunal. No appeal or review request was received within this 30 day timescale.

On 9 April 2014, HMRC issued a demand for payment of £9,666.62 in respect of the protective assessment, which included the VAT and interest.

On 8 May 2014, the Appellant's accountants wrote to advise that as Rank PLC had permission to appeal to the Supreme Court, their client felt it was appropriate to delay payment until a final decision had been made.

On 22 May 2014, HMRC acknowledged the letter of 8 May 2014 and advised it was being forwarded to the relevant team for a reply to be issued.

On 10 September 2014, HMRC issued a full reply to the letter of 8 May 2014, advising that following HMRC's win in 'Rank' at the Upper Tribunal and Court of Appeal, the protective assessments were now due and payable.

On 1 October 2014, the Appellant made full payment of £9,666.62 to clear the protective assessment of £9,120.00 and the £546.62 interest charge.

On 24 June 2016, HM Courts & Tribunal Service acknowledged an appeal from the Appellant against periods outside of the current matter. However, the Notice of Appeal contained documents relating to the periods prior to 6 December 2005 which relate to the current appeal under TC/2020/03733. This included a letter dated 14 March 2016 specifically referring to the pre 6 December 2005 periods.

On 1 July 2016, the Tribunal listed appeal TC/2016/03274 for a hearing on 7 September 2016.

On 19 August 2016, the Appellant's accountants wrote to the Tribunal requesting that the hearing be deferred to await the outcome of the "RANK Group PLC – FOBT" appeal. Only pre 6 December 2005 periods related to that appeal, post 6 December 2005 periods were

litigated separately.

On 24 August 2016, HMRC emailed the Tribunal to confirm it objected to the deferment of the hearing.

On 25 August 2016, the Appellant's accountants responded, maintaining that the matter should be stayed and referring to the litigation which has been on-going since '2007'. Again, only the pre 6 December 2005 periods were being litigated at that time.

On 30 August 2016, the Tribunal confirmed that the Judge had refused to postpone the hearing.

On 31 August 2016, the Appellant's accountants unconditionally withdrew the appeal TC/2016/03274.

On 30 June 2020, the Appellant's accountants sent a letter to HMRC requesting a repayment for VAT periods up to 5 December 2005, per Brief 5/2020.

On 8 July 2020, HMRC replied by email confirming that they do not hold a valid appeal per the Brief 5/2020.

On 12 October 2020, the Appellant appealed to the Tribunal against the decision dated 26 January 2012. The Appellant also requested permission to appeal outside of the statutory time limits, the appeal being made more than 8 years late.

The Lowther (York) Ltd – TC/2020/03794

On 11 September 2006, the Appellant's accountants (Ashcroft Pollard & Co) submitted a "protective" claim for overpaid output tax in respect of gaming machine takings for VAT periods up to December 2005. No other information was provided on the claim.

On 18 September 2006, HMRC wrote back and requested full details to quantify the claim, including the VAT periods, Gaming Machine details and the amounts.

On 6 May 2010, having had no contact in over 3 years, HMRC Officer McStravick received a phone call from Mr Dale Pollard (from the Appellant's accountants). He was seeking information on a number of claims. Officer McStravick confirmed that any valid claim would be processed by 31 March 2011. No comment was made on any specific case as it was a general query and Mr Pollard advised he would send further info to support these claims.

On 29 July 2010, the Appellant's accountants wrote to HMRC, referring to the phone call of 6 May 2010, and provided a detailed breakdown of output tax declared within each accounting period. This information was provided over 3 years after it had been requested.

On 30 July 2010, the Appellant's accountants sent an amended claim as only 2 Gaming Machines had been included, instead of 3, in the letter of 29 July 2010.

On 13 August 2010, the letters of 29 & 30 July 2010 were linked to the Appellant's record. It was only at this stage that Officer McStravick was able to note any specific tax record from the phone call of 6 May 2010 at point 4 above.

On 9 November 2010, HMRC wrote to the Appellant and their accountants stating that for a valid claim to be lodged, it must be quantified and state the method of calculation. The additional correspondence sent in to quantify and breakdown the amounts claimed was too late and subject to capping rules.

On 8 December 2010, the Appellant's accountants requested that HMRC reconsider their decision of 9 November 2010.

On 22 December 2010, HMRC responded to the Appellant's accountants stating that their opinion had not changed and, as there was no right of appeal against this decision, the Appellant may instead make a complaint.

On 11 May 2011, the Appellant's accountants wrote to HMRC's Appeals Unit to complain about the outcome of this case (and 3 others). They asked for HMRC to review the decision before deciding if they would request a Judicial Review.

On 26 May 2011, HMRC acknowledged the complaint letter and advised that it had been passed to a dedicated complaint officer to review.

On 14 June 2011, HMRC replied to the complaint, confirming that the rejection of the claim was the correct outcome for this case.

On 9 September 2011, the Appellant's accountants wrote disputing HMRC's view and referring to other similar cases where claims had been allowed.

On 9 November 2011, after a phone call with the HMRC, the Appellant's accountants sent a fax submitting further information to substantiate the original claim dated 11 September 2006

On 25 November 2011, HMRC wrote to the Appellant and their accountants confirming repayment of the amount of £14,274.00 VAT, plus interest of £2,373.69. The letter also confirmed that, in view of the ongoing litigation, it had raised a Notice of Assessment under Section 80(4A) of the VAT Act 1994. The letter contained full appeal rights, confirming that the Appellant had 30 days to request a review or appeal to the Tribunal. No appeal or review request was received within this 30 day timescale.

On 10 February 2012, HMRC received notification from the Tribunal with regards to an appeal made by the Appellant (TC/2012/01903). This was against VAT periods outside of the current matter, and it was late. There was no appeal against the periods up to December 2005.

On 26 March 2014, HMRC issued a demand for payment of £16,647.00 in respect of the protective assessment, which included the VAT and interest.

On 8 May 2014, the Appellant's accountants wrote to advise that as Rank PLC had permission to appeal to the Supreme Court, their client felt it was appropriate to delay payment until a final decision had been made.

On 21 May 2014, HMRC acknowledged the letter of 8 May 2014 and advised it was being forwarded to the relevant team for a reply to be issued.

On 2 September 2014, HMRC issued a full reply to the letter of 8 May 2014, advising that following HMRC's win in 'Rank' at the Upper Tribunal and Court of Appeal, the protective assessments were now due and payable.

On 6 October 2014, the Appellant made full payment of £16,647.00 to clear the protective assessment in full.

On 30 June 2020, the Appellant's accountants emailed a letter requesting a repayment for VAT on Gaming Machine takings.

On 15 July 2020, HMRC replied by email confirming that they do not hold a valid appeal per the Brief 5/2020.

On 6 October 2020, the Appellant appealed to the Tribunal against the decision dated 25 November 2011. The Appellant also requested permission to appeal outside of the statutory time limits, the appeal being made more than 8 years late.

On 11 September 2006, the Appellants' accountants (Ashcroft Pollard & Co) submitted a "protective" claim for overpaid output tax in respect of gaming machine takings for VAT periods up to December 2005. No other information was provided on the claim<

On 18 September 2006, HMRC wrote back and requested full details to quantify the claim, including the VAT periods, Gaming Machine details and the amounts.

On 6 May 2010, having had no contact in over 3 years, HMRC Officer McStravick received a phone call from Mr Dale Pollard (from the Appellants' accountants). He was seeking information on a number of claims and Officer McStravick confirmed that any valid claim would be processed by 31 March 2011. No comment was made on any specific case as it was a general query and Mr Pollard advised he would send further info to support these claims.

On 29 July 2010, the Appellants' accountants wrote to HMRC, referring to the phone call of 6 May 2010, and provided a detailed breakdown of output tax declared within each accounting period. This information was provided over 3 years after it had been requested.

On 30 July 2010, the Appellants' accountants sent a further letter clarifying information in the letter of 29 July 2010.

On 13 August 2010, the letters of 29 and 30 July 2010 were linked to the Appellants' record. It was only at this stage that Officer McStravick was able to note any specific tax record from the phone call of 6 May 2010.

On 15 October 2010, following a telephone call on 24 September 2010, the Appellants' accountants provided an amended figure and further spreadsheets confirming a different amount claimed to that stated in their letter of 30 July 2010.

On 5 November 2010, HMRC wrote to the Appellants and their accountants stating that for a valid claim to be lodged, it must be quantified and state the method of calculation. The additional correspondence sent in to quantify and breakdown the amounts claimed was too late and subject to capping rules.

On 8 December 2010, the Appellants' accountants requested that HMRC reconsider their decision of 9 November 2010.

On 22 December 2010, HMRC responded to the Appellants' accountants stating that their opinion had not changed and, as there was no right of appeal against this decision, the Appellant's may instead make a complaint.

On 11 May 2011, the Appellants' accountants wrote to HMRC's Appeals Unit to complain about the outcome of this case (and 3 others). They asked for HMRC to review the decision before deciding if they would request a Judicial Review.

On 26 May 2011, HMRC acknowledged the complaint letter and advised that it had been

passed to a dedicated complaint officer to review.

On 14 June 2011, HMRC replied to the complaint, confirming that the rejection of the claim was the correct outcome for this case.

On 9 September 2011, the Appellants' accountants wrote disputing HMRC's view, and referring to other similar cases where claims had been allowed.

On 3 November 2011, HMRC wrote to the Appellants and their accountants confirming that the claim made in the letter dated 9 September 2011 would be repaid.

On 24 November 2011, HMRC wrote to the Appellants and their accountants confirming repayment of the amount of £6,997.00 VAT, plus interest of £1,147.58. The letter also confirmed that, in view of the ongoing litigation, it was also going to issue a Notice of Assessment under Section 80(4A) of the VAT Act 1994. The letter contained full appeal rights, confirming that the Appellants had 30 days to request a review or appeal to the Tribunal. No appeal or review request was received within this 30 day timescale.

On 4 February 2012, HMRC received notification from the Tribunal with regards to an appeal made by the Appellants (TC/2012/01883). This was against VAT periods outside of the current matter, and it was late. There was no appeal against the periods up to December 2005.

On 5 June 2014, HMRC issued a demand for payment of £8,592.19 in respect of the protective assessment, which included the VAT and interest. This was repaid shortly afterwards. 20.

On 30 June 2020, the Appellants' accountants sent a letter requesting a repayment for VAT periods up to 5 December 2005, per Brief 5/2020.

On 8 July 2020, HMRC replied by email confirming that they did not hold a valid appeal per Brief 5/2020.

On 12 October 2020, the Appellants appealed to the Tribunal against the decision dated 24 November 2011. The Appellants also requested permission to appeal outside of the statutory time limits, the appeal being made more than 8 years late.

Dale Nigel Pollard – TC/2020/03792

On 11 July 2006, the Appellant's accountants (Ashcroft Pollard & Co) submitted a "protective" claim for overpaid output tax in respect of gaming machine takings for VAT periods up to December 2005. Only basic totals for each pub were supplied, no breakdown of machine types, etc, was included with the claim.

On 26 July 2006, HMRC wrote back and requested full details to quantify the claim, including the VAT periods, gaming machine details and the amounts.

On 6 May 2010, having had no contact in over 3 years, HMRC Officer McStravick received a phone call from the Appellant (in his role as an accountant and director of the Appellant's accountants). He was seeking information on a number of claims and Officer McStravick confirmed that any valid claim would be processed by 31 March 2011. No comment was made on any specific case as it was a general query and the Appellant advised he would send further info to support these claims.

Following this phone call, the Appellant wrote to HMRC with more details in support of the protective claim, providing a detailed breakdown of output tax declared within each accounting period. This information was provided more than 3 years after it had been requested, however it still did not disclose the type of gaming machines as requested in HMRC's letter of 26 July 2006.

On 7 July 2010, HMRC wrote a standard holding letter to the Appellant's accountants explaining that claims lodged prior to 16 March 2011 would be considered, based on the criteria laid down in the published guidance, by the 31st March 2011. This was quickly followed by a second letter dated 9 July 2010 correcting the 'claims lodged' date from 16 March 2011 to 16 March 2010.

On 29 July 2010, the Appellant provided amended figures to correct the previous claim amount sent on 6 May 2010.

On 13 August 2010, the letter of 29 July 2010 was linked to the Appellant's record. It was only at this stage that Officer McStravick was able to note any specific tax record with the phone call of 6 May 2010 at point 4 above.

On 15 October 2010, the Appellant provided further amended figures to confirm a different amount claimed to that stated in their letter of 29 July 2010.

On 2 December 2010, HMRC wrote to the Appellant confirming repayment of the amount of £52,146.00 VAT, plus interest of £8,563.00. The letter also confirmed that, in view of the ongoing litigation, it was also a Notice of Assessment under Section 80(4A) of the VAT Act 1994. The letter contained full appeal rights, confirming that the Appellant had 30 days to request a review or appeal to the Tribunal. No appeal or review request was received within this 30 day timescale.

On 14 March 2014, HMRC issued a demand for payment of £60,709.00 in respect of the protective assessment, which included the VAT and interest.

On 8 May 2014, the Appellant's accountants wrote to advise that as Rank PLC had permission to appeal to the Supreme Court, they felt it was appropriate to delay payment until a final decision had been made.

On 21 May 2014, HMRC acknowledged the letter of 8 May 2014 and advised it was being forwarded to the relevant team for a reply to be issued.

On 19 August 2014, HMRC issued a full reply to the letter of 8 May 2014, advising that following HMRC's win in 'Rank' at the Upper Tribunal and Court of Appeal, the protective assessments were now due and payable.

On 3 October 2014, the Appellant rang HMRC's Debt Management department and agreed a Time To Pay (TTP) arrangement for the protective assessment and interest. It is HMRC policy to only agree TTP for debts that are not in dispute or under appeal, whether with HMRC or the Tribunal.

On 7 October 2014, HMRC issued a letter confirming this arrangement.

On 29 June 2020, the Appellant emailed a letter requesting a repayment for VAT on gaming machine takings.

On 8 July 2020, HMRC replied by email confirming that they did not hold a valid appeal per Brief 5/2020.

On 20 October 2020, the Appellant appealed to the Tribunal against the decision dated 2 December 2010. The Appellant also requested permission to appeal outside of the statutory time limits, the appeal being made more than 9 years late.

Michael Edwin Johnson – TC/2020/03791

On 26 September 2006, the Appellant's accountants (Ashcroft Pollard & Co) submitted a "protective claim" for overpaid output tax in respect of Gaming Machine takings for periods up to December 2005. No other information was provided on the claim.

On 17 October 2006, HMRC wrote back and requested full details to quantify the claim, including the VAT periods, Gaming Machine details and the amounts.

On 27 December 2006, HMRC received a 'Request for Transfer of a Registration Number' from the Appellant. This was to remove Mrs Johnson from the VAT registration, and for Mr Michael Johnson to carry on as a sole trader

On 6 May 2010, having had no contact about the protective claim in over 3 years, Officer McStravick received a phone call from Mr Dale Pollard (from the Appellant's accountants). He was seeking information on a number of claims and Officer McStravick confirmed that any valid claim would be processed by 31 March 2011. No comment was made on any specific case as it was a general query, and Mr Pollard advised he would send further info to support these claims.

On 30 July 2010, the Appellant's accountants wrote to HMRC, referring to the phone call of 6 May 2010, and provided a detailed breakdown of output tax declared within each accounting period. This information was provided nearly 4 years after it had been requested.

On 13 August 2010, the letter of 30 July 2010 was linked to the Appellant's record. It was only at this stage that Officer McStravick was able to note any specific tax record from the phone call of 6 May 2010.

On 19 October 2010, the Appellant's accountants provided an amended figure, and further spreadsheets to confirming a different amount claimed to that stated in their letter of 30 July 2010

On 9 November 2010, HMRC wrote to the Appellant and their accountants stating that for a valid claim to be lodged, it must be quantified and state the method of calculation. The additional correspondence sent in to quantify and breakdown the amounts claimed was too late and subject to capping rules.

On 8 December 2010, the Appellant's accountants requested that HMRC reconsider their decision of 5 November 2010.

On 22 December 2010, HMRC responded to the Appellant's accountants stating that their opinion had not changed and as there was no right of appeal against this decision, the Appellant may instead, make a complaint.

On 11 May 2011, the Appellant's accountants wrote to HMRC's Appeals Unit to complain about the outcome of this case (and 3 others). They asked for HMRC to review the decision before deciding if they would request a Judicial Review.

On 14 June 2011, HMRC replied to the complaint, confirming that the rejection of the claim was the correct outcome for this case.

On 9 September 2011, the Appellant's accountants wrote disputing HMRC's view, and referring to other similar cases where claims had been allowed.

On 3 November 2011, HMRC wrote to the Appellant to confirm their claim would be repaid for periods 10/03 to 12/05.

On 24 November 2011, HMRC wrote to the Appellant confirming payment of the amount of £3,611.00 VAT, plus interest of £592.64. The letter also confirmed that, in view of the ongoing litigation, they were also going to issue a Notice of Assessment under Section 80(4A) of the VAT Act 1994. The letter contained full appeal rights, confirming that the Appellant had 30 days to request a review or appeal to the Tribunal. No appeal or review request was received within this 30 day timescale.

On 12 February 2015, HMRC issued a demand for payment in respect of the protective assessment, which included both the VAT and interest. The full amount was repaid to HMRC shortly afterwards.

On 30 June 2020, the Appellant's accountants sent a letter requesting a repayment for VAT periods up to 5 December 2005, per Brief 5/2020.

On 8 July 2020, HMRC replied by email confirming that they do not hold a valid appeal per Brief 5/2020.

On 8 October 2020, the Appellant appealed to the Tribunal against the decision dated 24 November 2011. The Appellant also requested permission to appeal outside of the statutory time limits, the appeal being made 3,241 days (nearly 9 years) late