[2014] UKUT 0075 (TCC)

Appeal number: FTC/08-11/2013

VAT – Application for permission to appeal out of time; whether in the exercise of its discretion, the First-tier Tribunal erred in law. The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (as amended) Rule 20, VATA 1994 s 83

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

(1) JOHN AND ELAINE GRAHAM
trading as Xs AND Os AMUSEMENTS;
(2) X AND Os PAISLEY CROSS LIMITED,
(3) BATHGATE LEIURE LIMITED,
and
(4) KIRKERN LIMITED **APPELLANTS**

- and -

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

TRIBUNAL: JUDGE J GORDON REID QC FCIArb
JUDGE JULIAN GHOSH, QC

Sitting in public at George House, Edinburgh on 15 January 2014

Philip Simpson instructed by Anderson Strathern LLP, Edinburgh for the Appellant,

Sean Smith QC, instructed by the office of the Advocate General for the Respondents

DECISION

Introduction

1 These are appeals against four decisions of the First-tier Tribunal (FTT) dated 16 October 2012, rejecting the appellants' applications to be permitted to bring their statutory appeals out of time, and granting the respondents' (HMRC) applications to strike out the appeals. The general background is historic repayment claims in the light of the long-running and continuing litigation between *The Rank Group PLC* and HMRC in relation to the VAT treatment of income generated from gaming and similar machines. Although four decisions were issued, they are all in substantially the same terms. The applications before the FTT were heard together. The appeals to the Upper Tribunal rely on the same global grounds and the appellants do not attempt to make any discrete point in relation to any particular appeal. We proceed on the basis and discuss the appeals, as the skeleton arguments do, under reference to the Kirkern Decision (the Decision).

2 The appeal to this Tribunal was heard at George House, Edinburgh on 15 January 2014. Philip Simpson advocate appeared on behalf of all appellants on the instructions of Anderson Strathern, LLP. Sean Smith QC appeared on behalf of the respondents (HMRC) on the instructions of the Office of the Advocate General. Both parties produced Notes of Argument. A bundle of documents and a bundle of authorities were also produced.

History and Procedure

3 The appellants Kirkern made voluntary disclosures in 2006, by which they, in effect, claimed repayment of VAT alleged to have been overpaid on income from gaming machines. HMRC did not accept the claim. The appellants did not seek a review or reconsideration and made no statutory appeal to the FTT. Nothing further was done until 2010 when the appellants' accountant wrote to HMRC. HMRC again rejected the claim by letter dated 18 October 2010. On or about 25 November 2010, Kirkern lodged an appeal with the FTT seeking permission to bring the appeal out of time. The FTT narrates the history in more detail in paragraphs 24-44.

Legislative Background

4 An appeal against a disputed decision of HMRC must be made by way of Notice of Appeal served at the appropriate Tribunal Centre before the expiry of 30 days after the date of the document containing the disputed decision.[1] Rule 20(4) provides that a tribunal may extend the time within which a person is required to comply with the time limit to bring an appeal, where the notice of appeal includes a request for an extension of time and the reason why the notice of appeal was not provided in time.

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[1] Tribunal Procedure (First-tier) (Tax Chamber) Rules 2009 (as amended), Rule 20 and VATA 1994 s83G

The Notices of Appeal

5 The notices are dated 25 November 2010 (two), and 5 April 2011 (two) and the grounds advanced for an extension of time were that (1) the appellants had sufficiently good prospects of success, and that refusal to entertain it would inflict real and practical loss to the appellants, (2) the Tribunal should apply the overriding objective to deal with cases fairly and justly and should apply the criteria in CPR r3.9(1) (an English procedural provision not directly applicable in Scotland, and (3) HMRC would not be prejudiced. The notices do not address any of the criteria in CPR r3.9(1). In particular no explanation is offered for the lateness of the Notices of Appeal.

The FTT Decision

6 The substantive hearing took place on 13 October 2011 and 4 September 2012. A continued hearing fixed for April 2012 had to be postponed due to the illness of the appellants' then representative. In the course of these hearings, the FTT made a number of procedural decisions, which included allowing some late documents and statements on behalf of the appellants.[2]

7 In their written submissions to the FTT, the appellants invited the Tribunal to balance the appellants' culpability in delaying their Notices of Appeal and the prejudice to HMRC in terms of public interest in good administration and legal certainty against the loss of and injury which would be caused if the application were refused. These submissions also proceeded on the view that *Rank* would likely win the appeal then currently before the Court of Appeal. In the event, HMRC were successful in the Court of Appeal [2013] EWCA Civ. 1289 (30 October 2013). Permission to appeal to the Supreme Court of the United Kingdom has been sought by *Rank plc*. A decision on that application is expected within five or six weeks. On 9 January 2014 this Tribunal refused the appellants' application to sist the appeal to the Upper Tribunal pending the outcome of that application.

8 The FTT plainly approached the question they had to decide as involving an exercise of their discretion taking various factors into account.[3] In summary, they considered (1) the merits of the appellants' appeal noting that it appeared *to have some substance*[4], (2) the appellants' conduct, noting that they took *no action to advance their own cause*, and referred to their *lack of proper care* and their *failure to deal with their business correspondence effectively;*[5] the Tribunal generally took an adverse view of the appellants' conduct and characterised the explanation for not appealing timeously as *unreasonable*[6], (3)

[2] Paragraph 15

[3] See for examples paragraphs 47, 56, 58, 62, and 64, 67 and 71

[4] Paragraph 48

[5] Paragraphs 15 page 5 top, 50-52, 62, 67

[6] Paragraph 68

the need for legal certainty and the public interest, and (4) the question of prejudice[7].

9 Having reviewed the history, and considered various factors, the Tribunal concluded, following the guidance contained in *inter alia HMRC Petitioners* [2005] SLT 1061, [2006] STC 1218, that in the exercise of their discretion the result of the balancing exercise was that it fell in favour of HMRC.[8]

Arguments on appeal to the Upper Tribunal

10 The thrust of Mr Simpson's arguments on behalf of the appellants was (1) when the matter was before the FTT it looked as if the appellants had a good claim; the question was therefore whether they should lose that claim; (2) there was no prejudice to HMRC; there would be no flood of additional claims as a result of allowing this appeal, (3) the appellants relied on professional advice and were not personally culpable, (4) it was unclear whether if this appeal is refused, the appellants would have a good alternative claim against their accountant, (5) the FTT refused an application for oral evidence and then criticised the appellants for not leading such evidence, (6) the FTT confused prejudice with loss, (7) the FTT criticises the appellants but does not say what more they should have done, (8) the FTT erred in fact in relation to the basis of the accountant's advice to the appellants and overlooked certain evidence, and (9) the FTT did not consider the extent to which the *Rank* litigation supported the appellants' claims.

11 The appellants submitted that the Upper Tribunal should grant the application or remit to the FTT for further facts to be found.

12 Mr Smith submitted that the FTT did not err in the exercise of its discretion. In particular (1) it considered the merits of the appellants' claims, (2) it weighed the various considerations in a manner which could not be described as perverse, (3) it was of the view that HMRC would suffer prejudice if the application were granted, (4) the FTT found the appellants to be personally culpable and explained why, (5) the argument about the liability of the appellants' accountant is irrelevant and in any event, probably wrong, (6) the criticism in relation to oral evidence is misconceived; (7) the criticism of the findings of fact in relation to the basis of the accountant's advice to the appellants misunderstands the FTT's findings, and (8) there is no basis for a remit as the Tribunal's findings are clear.

Discussion

13 In order to succeed, the appellants must demonstrate that in making its decision the FTT erred on a point of law.[9] Mr Simpson made no criticism of the FTT's overall approach to the exercise of its discretion. The FTT's general approach is consistent with *Aberdeen City,* above, at paragraphs 22-24, *Data Select Ltd v HMRC* [2012]

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[7] Paragraph 70

[8] Paragraph 60-62, 71

[9] Tribunals Courts and Enforcement Act 2007 ss11(1) and 12(1)

UKUT 187 (TCC) at paragraphs 34-37 and *O'Flaherty v HMRC* [2012] UKUT 161 (TCC) at paragraphs 26-31, 35-38.

14 Mr Simpson also accepted that (i) HMRC did not mislead the appellants in any way; the failure to bring the statutory appeals timeously was not attributable to any act or omission on the part of HMRC, (ii) the FTT took into account (a) the appellants' prospects of success ie the merits of the appeals, (b) the question of prejudice and the public interest, and (c) the appellants conduct, and that these were all relevant factors to consider in the exercise of the FTT's discretion.

15 Any attack on these matters [(a), (b), (c)], properly analysed, is simply an assertion that the FTT attached too much or too little weight to these matters and therefore reached the wrong decision. The question of what weight to attach to a relevant factor in the exercise of a statutory discretion is pre-eminently within the province of the decision maker exercising the discretion. It is not relevant to consider whether another FTT or we, as the Upper Tribunal, might or would have attached different weight or importance to these factors. It was not argued and we do not think it could be argued that the FTT's assessment was perverse, irrational or wholly unreasonable. Accordingly, this aspect of the challenge to the FTT's decision does not establish any error on a point of law on the part of the FTT and must therefore fail.

16 On the question of prejudice, in particular, the appellants submitted that no evidence had been lost. However, this was not put in issue before the FTT and thus, no factual findings were made on the topic. HMRC do not concede that no evidence has been lost. They simply do not know. Even if it were correct that no evidence has been lost, the appellants cannot complain that the availability of evidence to support the merits of the appeals vitiates the FTT's decision as they were not asked to consider the point.

17 The appellants have also complained that the FTT refused to allow the appellants' officers to give oral evidence and then criticised the appellants for not leading such evidence. The underlying circumstances, as explained to us at the appeal, were that the appellants, on the advice of the representative then acting for them, did not seek to lead the evidence of their own officers until they had closed their case (leading only the evidence of their accountant[10]), and heard the closing submissions on behalf of HMRC which commented on the inadequacy of the evidence (oral and documentary) already led.[11] The FTT, at that stage, allowed written statements of the appellants' officers to be received.[12]

18 We consider that this complaint has no substance. The decision whether to allow oral evidence was a procedural decision within the FTT's decision, which should rarely be interfered with. The circumstances disclosed to us amply justify its

[10] FTT Decision paragraph 11

[11] See FTT Decision paragraph 43

[12] FTT Decision paragraph 5 page 5 and paragraph 63

decision. The refusal to allow such evidence was not an error of law. Furthermore, the FTT was entitled to comment on the lack of evidence, to attach such weight as it thought fit to the written statements allowed to be received late and to conclude that HMRC would be prejudiced if oral evidence were to be allowed at the late stage in proceedings when the matter came to be considered.[13] It noted that the appellants did not give evidence *when appropriate*. The appellants had ample opportunity to consider what evidence they needed to lead to support their case or deflect any criticism that might reasonably be anticipated and to lead such evidence at the appropriate time.

19 If there were to be any complaints about the late admission of *ex parte* statements and the refusal to allow oral evidence, it might have come from HMRC who might have argued with some justification that they would or might be prejudiced as they were denied the opportunity of cross-examining the appellants' officers. Had the decision been to refuse to admit the written statements *and* further oral evidence, such a decision, given the stage the proceedings had reached, would have been difficult to challenge on appeal.

20 In any event, Mr Simpson explained that the only purpose in leading such evidence would have been to establish as fact that the appellants relied on their accountant's advice. It seems to us, for what it may be worth, that the FTT was well aware that the appellants had an accountant acting for them and that they relied on the accountant. Paragraph 11 of the appellants' skeleton argument proceeds on the assumption that such reliance has been established. At the end of paragraph 62, the FTT refers to a *misdirected reassurance from their accountant.* At the end of paragraph 67, the FTT records the appellants' understanding from their accountant as to how their claims stood, but criticises them for not seeking *positive confirmation* that their claim was *still in progress.* It is plain that the finding of fact postulated would have made no difference to the FTT's decision.

21 Mr Simpson argued that the FTT misunderstood the notion of *prejudice.* We disagree. Time bar provisions are created for a reason. They provide finality and certainty. The exercise of discretion to extend a time limit is the exception rather than the rule. There is prejudice to the government in having to meet large, unexpected claims. The government needs to plan its income and expenditure. Large unforeseen claims are disruptive of a government's budget. Time bar provisions satisfy the need for a degree of legal certainty which should not be lightly overridden. A good reason to do so is usually required. The FTT did not identify a good reason. The FTT dealt adequately with these matters at paragraphs 69 and 70 of its Decision.

22 In the appellants' skeleton argument, it was submitted that the FTT misunderstood an aspect of Mr O'Hara's evidence. While we were not entirely clear whether Mr Simpson was pressing this point, we record that we disagree with it. The argument was that, contrary to the evidence, the FTT found that Mr O'Hara's advice

[13] FTT Decision paragraph 63

in 2006/7 was based on a publication by a trade association,[14] the true position being that the advice was based upon a conversation with a VAT specialist. We do not see how the source of Mr O'Hara's advice matters. According to the FTT, the quality of the appellants' evidence was *very poor.*[15] The FTT identified two conversations with the VAT specialist, one at an early stage[16] and one at a later stage.[17] The FTT noted that Mr O'Hara had no recollection of when his conversation with the VAT specialist took place[18]. The evidence of the advice given by Mr O'Hara seems to have been meagre. The FTT made no finding that the appellants were advised that they need not do anything more to preserve their claims. In the light of all that, and the very poor quality of the evidence, we cannot interfere with the FTT's assessment of what prompted Mr O'Hara to give the advice in question.

23 Finally, in relation to Mr O'Hara, Mr Simpson submitted that it was unclear whether the appellants would have a remedy against him. Given the FTT's findings of fact, we find this a little surprising. However, the FTT did not conclude that such a remedy was bound to be available and did not base its decision to any extent on the availability of such a remedy when exercising its discretion. We were informed that the FTT was not addressed by the appellants on the question of availability of remedy against the accountant.

24 The FTT was also criticised for failing to specify what the appellants should have done instead of relying on their accountant's advice. However, insofar as we understand this criticism and so far as it might be relevant, it is not well founded. It is plain from paragraph 67 of the FTT's decision that the FTT considered that the appellants should have sought positive confirmation from the accountant that the claim was *still in progress.* Insofar as relevant, there was no such failure on the part of the FTT.

25 In summary, it has not been shown that, in the exercise of its discretion, the FTT took into account the irrelevant, failed to take into account the relevant, acted irrationally, perversely or unreasonably or in a disproportionate manner. It applied the correct test and there was no procedural impropriety. No question of infringing the appellants' legitimate expectations arises. Accordingly, we have not been persuaded the FTT erred on a point of law, and the appeal must be dismissed. It is therefore unnecessary to consider the various possibilities (remit to tribunal, additional evidence or full re-hearing) which would have arisen had the appeal been allowed.

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[14] FTT Decision paragraph 31

[15] FTT Decision paragraph 63

[16] FTT Decision paragraph 42

[17] FTT Decision paragraph 44

[18] FTT Decision paragraph 41

Disposal

26 The appeal is dismissed.

J GORDON REID QC FCIArb
UPPER TRIBUNAL JUDGE

JULIAN GHOSH QC
UPPER TRIBUNAL JUDGE

RELEASE DATE: 17 February 2014