TC02435

Appeal number: TC/2012/00190

VAT - Application by the Appellant for an extension of time to appeal – balancing of the various factors – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

WILBY WORKING MENS CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE LADY JUDITH MITTING
MR MICHAEL ATKINSON

Sitting in public in Northampton on Tuesday 13 November 2012

Mr R J Vann, Accountant for the Appellant

Mr Ridley, officer of HMRC, for the Respondents

DECISION

1. In its Notice of Appeal dated 28 November 2011, the Wilby Working Mens Club ("the Club") applied for an extension of time in which to lodge the Appeal, the decision appealed against being dated 14 January 2008. By Notice dated 4 September 2012, the Respondents opposed this application and themselves applied for the appeal to be struck out. Both applications were before us on 13 November 2012.

2. We heard no oral evidence, the Club's case being put by its Chartered Accountant, Mr RJ Vann, who had acted for the Club throughout. Mr Ridley represented the Respondents. The facts were not in dispute and we find them to be as follows:

The Facts

3. The Club is a not for profit, non commercial members' club, owned and run by its members. Financially, its aim is to break even at the end of each accounting year. Occasional years, it runs into a revenue deficit and equally, in occasional years, it shows a small revenue profit, unlikely to be more than £4,000. This surplus would be applied to maintaining the fabric of its building.

4. Following the ECJ decision in *Finanzamtgladbeck v Linneweber* (c-453/02), the Club believed it had over paid output tax on gaming machine income which it maintained should properly have been treated as exempt. It sought to recover the overpaid output tax by way of a Voluntary Disclosure dated 21 August 2006, covering periods 1 July 2003 to 30 November 2005 and in the sum of £9,474.

5. By letter dated 5 September 2006, the Respondents sought further information for the claim, raising a number of questions. The Club responded in an extremely detailed five page letter dated 6 November 2006. We specifically raised with Mr Ridley whether this letter answered all the queries which had been raised or whether there was anything still outstanding from the Club in support of its claim. Mr Ridley answered that he was not the case officer and had not been briefed on this point but was not aware of anything further being needed. We take from this, and for the purposes of this decision we find, that the Club had been totally cooperative in providing the evidence in support of its claim and had done all that was asked of it to verify it.

6. By letter dated 13 February 2007, the Respondents rejected the claim and advised that the Club could apply for a reconsideration. By letter dated 16 August 2007, the Club did apply for a reconsideration asking if, additionally, it could be taken into account that the Club was small, had only two gaming machines on the income of which a great deal of tax had been paid which could have been put to better use by the Club.

7. By letter dated 14 January 2008, the claim was again rejected. The Respondents reiterated their view that the income from the machines had been rightly treated by the

Club as standard rated and it was a misconception that it should have been exempt. The letter concluded by advising the Club that the Respondents had made a similar decision in regard to a claim by the *Rank Group PLC*, and that this decision had been appealed to the VAT & Duties Tribunal. The letter went on to advise the Club of its right to appeal to the Tribunal and advised that an appeal should be made within 21 days and should be accompanied by an application that the appeal be stood over behind the Rank Group appeal.

8. The Club did not lodge an appeal with the Tribunal and in fact did nothing in response to the letter of 14 January 2008. Mr Vann told us that the Club had made a deliberate decision not to appeal, the decision being based on the assumption and belief (which he now accepted had been wrong) that to appeal would have incurred a vast amount of funds, considerably beyond the means of the Club. Mr Vann accepted that he had misunderstood the system of merely lodging an appeal to be stood over behind the Rank case and had assumed, and so advised his client, that the Club would have to instruct lawyers of the same level as those in the Rank case to argue the Club's case, including all its European dimensions.

9. By letter dated 13 October 2010, the Club, by this time aware that Rank had succeeded in its appeal before the Tribunal, enclosed a copy of its original Voluntary Disclosure, asking again for repayment. Mr Vann explained to us that this was not a fresh claim (which would by now have been out of time by virtue of the capping provisions) but a reinstatement of the original.

10. By letter dated 4 November 2010, the Respondents advised that this claim had already been rejected and had not been appealed and was therefore considered to be closed. Reference was made to Business Brief 11/10 which had been issued on 16 March 2010. The Brief contained the Respondents' reaction to the Rank litigation and stated that

> "claims that had previously been rejected (for whatever reason) and which are not under appeal will not be considered. No new claims for the repayment of VAT paid for the period between 1 November 1998 and 5 December 2005 can be made. The aim is to process all existing claims ….. by 31 March 2011".

11. By letter dated 5 August 2011, the Club replied to this letter pointing out that the effect of the Tribunal decision in Rank was to support the voluntary disclosure as representing the correct tax treatment of the supply and it was therefore unnecessary to appeal. Secondly, it was pointed out that the Business Brief post dated the claim and was not therefore applicable. The Respondents replied on 3 November, repeating that the claim had already been rejected, was not under appeal and was therefore closed and would not be reconsidered.

12. The Notice of Appeal was received on 3 December 2011.

The Club's case

13. Mr Vann, other than taking us through the chronology, added little to what he had set out in the correspondence referred to in the preceding paragraphs. He maintained, and this was accepted by Mr Ridley, that the Respondents had paid out on a number of similar claims and it was unfair and discriminatory not to be meeting the Club's claim. Mr Ridley, had no knowledge of the claims which had been met and the reasons why but both parties seemed to agree with our suggestion that the claims may have been those which had been appealed. Mr Vann also pointed to certain delays by the Respondents in replying to correspondence.

The Tribunal's approach to the Applications

14. Under Rule 20(4) of the 2009 Tribunal Procedure Rules, an appellant may apply for an extension of time in which to lodge his Notice of Appeal. The Tribunal is thus given the power to extend the time within which an appeal may be brought and in exercising the discretion involved in that power we have to give effect to the overriding objective in Rule 2 (1) of the Rules to deal with cases fairly and justly.

15. In exercising our discretion, we take our approach from that set out by Judge John Walters QC in paragraph 68 of the case of *Former North Wiltshire District Council v HMRC* (TC/00/714).

"68. In our judgment, the crucial balancing exercise which we must carry out in order to exercise our discretion in a fair and just disposal of the application is between, on the one hand, our assessment of the Appellant's culpability in the delaying to lodge their notice of appeal and the prejudice to HMRC in terms of the public interest in good administration and legal certainty, and, on the other hand the loss and injury which would be suffered by the Appellant if an extension of time is refused. We consider that the criteria in CRP 3.9(1), which are relevant to this case, are effectively addressed in this balancing exercise."

Conclusions

16. The approach of the Tribunal is in effect a balancing exercise in which we have to identify the various and relevant factors to which we should give weight and, of some importance, the weight to be attached to these factors.

17. In favour of allowing an extension would be the fact that, given our reasoning in paragraph 5, the Club's claim had been fully evidenced and required no more investigation by the Respondents. The Club had cooperated fully and their response of 6 November 2006 was factually full and well argued. This is a small non profit making Club and the financial impact of "losing" the repayment would be significant. These are all factors which would be favourable to the Club.

18. We were not called upon to make a detailed analysis of merit. We expressly asked Mr Ridley if the claim would be repaid as other similar ones were being, if we allowed the extension. He, for perfectly proper reasons, would not commit to repayment but he readily accepted that given the current status of the Rank litigation,

this would be a claim to which consideration for repayment would be given. For our purposes, all we need say is that the claim quite clearly is not without merit – again a factor which would be favourable to the Club.

19. In considering prejudice to the Respondents, if an extension were to be given, we were in some difficulty. We tried to press Mr Ridley who told us he had not been briefed on the question of prejudice. Quite clearly it is always in the public interest and in the interests of good administration that there should be legal and financial certainty. This need will inevitably, and it does here, weigh against an Appellant in an application to extend time. However, whether there is any specific prejudice, unique to this case, we do not know. Given that we were told of none and we have made a finding that the claim has been verified, we find that there would be no additional prejudice to the Respondents if we were to allow the extension.

20. All the above factors, which to a greater or lesser extent would appear to favour an extension of time, must be weighed against the length of the delay and the culpability of the Club in that delay. The decision letter was dated 14 January 2008 and the appeal was only received on 3 December 2011 – delay of just short of four years. Nothing at all was done for two and half years until the claim was resubmitted in October 2010. Throughout this period it cannot be overlooked that the Club was being professionally advised. As Mr Vann now accepts, his belief that the mere lodging of the appeal would inevitably lead to incurring much greater expense was incorrect. Whilst we accept that this was why an appeal was not lodged, it cannot excuse it. Any delay by the Respondents in answering the correspondence was of no more than a matter of a very few months and cannot begin to justify the Club's delay. It also should be noted that the Respondents went out of their way to point the club in the direction of lodging an appeal. The rejection letter of 14 January 2008 not only advised the Club of its right to appeal but told it how to do it, including to ask for the stand over.

21. It is our conclusion, having weighed all the factors above mentioned that whilst there are clearly some factors weighing in favour of granting the extension these are by far outweighed by the pure length of the delay and the discerned culpability of the Club for the delay in initiating the appeal.

22. For the reasons given above, we therefore refuse the Club's application for an extension of time in which to lodge its appeal and we grant the Respondents' application that the appeal be struck out.

23. 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.

LADY JUDITH MITTING
TRIBUNAL JUDGE

RELEASE DATE: 17 December 2012