[2013] UKFTT 055 (TC)

TC02475

Appeal number: TC/2011/08286

VAT - application by the Appellant for an extension of time to appeal against a decision by HMRC - cross application by HMRC to strike out the appeal - significant delay by Appellant in lodging appeal - application refused and appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROSARY CONSERVATIVE CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL S CONNELL
MICHAEL ATKINSON

Sitting in public at Phoenix House Rushton Avenue Bradford on 24 September 2012

The Appellant did not attend and was not represented

Mr. Bernard Healy, Officer of HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an application by Rosary Conservative Club ('the Appellant'), to the Tribunal for permission to appeal out of time against a decision by HMRC dated 17 February 2007 to deny a VAT recovery claim in respect of gaming machines operated by the Appellant. There is also a cross application by HMRC to strike out the appeal. The Appellant lodged its Notice of Appeal with the Tribunal on 10 October 2011.

2. On 21 November 2011 the Tribunal directed that unless the Appellant or the HMRC object within 14 days of the date of those directions then the appeal would be stayed and all time-limits extended until 60 days after the European Court of Justice released its decision on the referrals, C – 259/10 and C – 260/10, arising from the *Rank Group Plc* appeals. The Tribunal further directed that any party may apply at any time for the directions to the amended, suspended or set aside.

3. HMRC applied by a Notice on 12 April 2012 to strike out the appeal as having been made out of time, stating their opposition to the Appellant's request for an extension of time to serve its Notice of Appeal.

4. At the hearing the Appellant did not attend and was not represented. We were satisfied that the Appellant's agent, Mr. Ian Spencer had been notified of the date of the hearing and that in the event of the Appellant not attending and not being represented the Tribunal may decide the matter in its absence.

5. For the reasons set out below the Tribunal's decision is to refuse to extend the time for service of the Appellant's Notice of Appeal and to strike out the appeal. The Tribunal also makes the directions, which follow.

Background

6. On 17 August 2006 the Appellant submitted an unquantified voluntary disclosure to recover VAT, which it had paid in respect of gaming machine income. Mr. A Wicks the secretary of the Appellant club, in a letter to HMRC wrote 'it has been brought to my attention that we are entitled to claim back VAT on our gaming machines'.

7. The background to the law at the time, which prompted the Appellant's claim for a refund of VAT was that prior to 6 December 2005, the takings of gaming machines as defined in Group 4 of Schedule 9 to the VAT act 1994 were liable to VAT at the standard rate of 17.5% because they were excluded from the exemption for betting and gaming which Group 4 provided. The then current definition of 'gaming machine' covered those

machines where the element of chance in the game was provided by "means of the machine," which were taxable for VAT purposes, whereas games of chance played on machines where the result is determined by other means, were VAT exempt. Some machines were configured so that the random number generator, which determines the outcome of the game, was sited outside the machine and consequently those machines fell outside the definition of a 'taxable gaming machine'. Other machines had been developed to take advantage of section 16 of the Lotteries and Amusements Act 1976 or section 21 of the Gaming act 1968 i.e. that provide small prize gaming, and fixed odds betting terminals (FOBT's), which were respectively subject to Amusement Machine Licence duty and General Betting Duty, but VAT exempt. The decision in *Linnewebber*, decided that Article 13B (f) of Sixth Council Directive (EEC) 77/388 (on the harmonisation of the laws of member states relating to turnover taxes - common system of value added tax: uniform basis of assessment), precluded national legislation which provided that the operation of all games of chance and gaming machines was exempt from VAT where it had been carried out in licensed public casinos, while the operation of the same activity by traders other than those running casinos did not enjoy the same exemption. The suggestion was that UK law breached the European Community principle of fiscal neutrality because of the different VAT treatment of similar machines. The revised definition of a gaming machine announced in the 2004 pre-budget report which came into force on 6 December 2005 changed the definition of gaming machine so as to provide that FOBT's and section 16/21 machines were defined as gaming machines and also created greater certainty by confirming that, where the element of chance in the game is provided, is not relevant. The likelihood remained however, that HMRC would receive many claims for VAT refunds for the period prior to 5 December 2005.

8. On 6 September 2006 HMRC replied to the Appellant asking for information in support of the claim, 'if possible by 4 October 2006'. The information requested by HMRC related to the number and category of machines operated, the types of games offered by the machines, the location, size and pattern of stake and prize payouts and information on how many of the machines use a random number generator and where the random number generator was located. HMRC said that once they had received the Appellant's response the matter would be referred to 'Policy' for consideration.

9. Some explanation of the arguments raised in the *Rank* case is necessary to understand the context of HMRC's response. Rank Group Plc, during the period October 2002 to December 2005 operated slot machines covered by sections 31 and 34 of the Gaming Act 1968. Income from these machines was taxable under UK domestic law as income from a "gaming machine." Rank claimed that similar machines operated by its competitors were exempt from VAT, in particular machines operated under section 16 of the Lotteries and Amusements Act 1976 and section 21 of the Gaming Act 1968 and also FOBT's which were both similar and in competition with the taxable machines. Rank said this was a

breach of the principle of fiscal neutrality, which precludes treating supplies, which are similar, and in competition with each other, differently for VAT purposes. The Tribunal's provisional view at the first stage of Rank's appeal was that there was a prima facie breach of the principle of fiscal neutrality. HMRC argued that the differences between the regulatory regimes covering the allegedly similar machines prevented them from being similar for the purposes of the principle of fiscal neutrality. Dealing with factors alleged by HMRC to show that the supplies were not similar, the Tribunal held that differences in respect of the maximum stake, maximum winnings and gain rules applying to, on the one hand Rank's machines and on the other hand exempt machines were not relevant. The Tribunal reasoned that it could be taken from the ECJ's election not to answer this point in the *Linnewebber* case, that it must not have considered these to be relevant, but rather considered that the supplies were, despite any differences in these respects "the operation of the same activity". Norris J upheld the Tribunal's judgment in June 2009. Following an appeal by HMRC, the Court of Appeal and the Upper Tier Tax Tribunal decided that they required input from the ECJ to decide the outcome of the case. It was estimated at the time, that the ECJ decision was unlikely to be delivered until mid 2012. This was the reason the Tribunal issued directions to the effect that the Appellant's appeal be stayed until 60 days after the *Rank Group Plc* case is finally resolved.

10. In November 2011 the ECJ confirmed that Rank had overpaid VAT on supplies of gaming machines and mechanised cash bingo. The ECJ held that a breach of fiscal neutrality had occurred because of the differential VAT treatment of certain gaming machines and forms of bingo. The United Kingdom had sought to argue that there could be no breach of fiscal neutrality unless the differing VAT treatment of the supplies affected competition. However, the ECJ held that as long as the supplies were identical or similar from the viewpoint of the player, competition did not have to be separately proved. Following the decision. HMRC issued its Business Brief 39/11 on 6 December 2011. HMRC have now accepted that Rank's supplies of bingo are exempt, but consider that the ECJ decision, 'does not provide a final determination of the domestic mitigation,' with regard to gaming machines.

11. The Appellant appears to have replied to HMRC on the 19 September 2006. The Tribunal was not provided a copy of the Appellant's letter of reply and therefore it is not known whether the Appellant provided any of the information requested by HMRC in their earlier letter.

12. On 13 and February 2007 HMRC issued what was described in their records as a 'standard policy rejection letter'. The records also stated, 'case closed unless further evidence is received,' which suggested that the Appellant had not provided all the information earlier requested.

13. In their letter HMRC clarified their position as follows:

> 'Following the European Court of Justice decision. (Edith Linnewebber: C– 453/02), many businesses that operate gaming machines claim that they over - declared VAT on the takings from these machines for the period prior to 6 December 2005. Business brief 20/06 has now been issued re-stating that HMRC do not accept that the U.K.'s tax treatment of gaming machines breached fiscal neutrality, i.e. that the liability of similar machines has not been different when situated in different locations.
>
> Most claims are based on a mistaken understanding that the takings from identical or similar machines to those operated by you were exempt from VAT prior to 6 December 2005. However, business brief 15/06 advised that HMRC always considered that these machines fell within the existing definition of gaming machine and therefore the takings were standard rated
>
> Your letter claims that your machines were similar to the machines considered to be exempt prior to 6 December 2005; however, you have failed to produce evidence to support this claim, for example, why is there a similarity – are they operated in the same way, are the games offered the same, are the chances of winning the same and are prizes etc the same. As a consequence I write to advise you that your claim has been rejected the full.
>
> Before you consider your next course of action I would refer you to Business Briefs 23/05 and 15/06 (copy enclosed) which give advice as to the definition of Gaming Machines and Fixed Odds Betting Terminals prior to and post 6 December 2005. You should note from these documents that the main difference between the two is that the standard rated gaming machine has a Random Number Generator (RMG) attached to each individual machine (regardless of whether this is inside or outside the machine) and that Fixed Odds Betting Terminals (machines that were exempt prior to 6 December 2005 but standard rated since) are controlled by RNGs situated in a remote location that control a large quantity of machines as opposed to individual machines.
>
> A machine with a RNG attached (regardless of whether it is inside or outside the machine) has always fallen within the definition of Gaming Machine and HMRC have always considered them to fall within Group 4 of Schedule 9 of the VAT act 1994 and therefore subject to VAT at the standard rate. This position has not altered in any way. As such VAT should always have been brought to account on the takings from this type of machine, and any business that has not done so will be required to do so in the appropriate manner.
>
> However, if you do have a fixed odds betting terminals or machine of this type then HMRC will consider any evidence as per business brief 20/06, you may have in support of a claim for a refund of VAT, which was incorrectly declared on this income prior to 6 December 2005. Since 6 December 2005, income from the fixed odds betting terminals is also standard rated. If this is the case, please write to us before 24 March 2007 and this information will be taken into consideration. If we do not hear from you by 24 March 2007 we will issue and that you have no wish to pursue your claim and no further action will be taken in relation to your voluntary disclosure.

> In all other cases, if you wish to appeal against this decision, please contact the VAT appeals and reconsideration's team where the evidence to support your request will be examined. Any comments should be addressed to the VAT Appeals and Reconsideration's Team (address given). This team will review all the facts of the case of a large of the outcome. Please note that there are strict time limits. As for reconsideration and appeals you must lodge your appeal within 30 days of the date of the decision. Please refer to paragraph 28.5 of Notice 700, The VAT Guide for further details. If you are unclear of any point raised by this letter please do not hesitate to contact the National Advice Service on 0845 010 9000'.

The decision letter did not inform the Appellant that it had the right to appeal to an independent VAT Tribunal.

14. The Appellant did not respond to or request a review of HMRC's decision letter and the time limit for a review of HMRC's decision expired 30 days from the date of the decision letter, that is on 16th of March 2007.

15. HMRC's Business Brief 11/10, which was issued in March 2010 stated that HMRC would process "all existing claims were satisfactory evidence has been provided by 31st of March 2011." Business Brief 11/10 said that:

> "HMRC's aim is to consider all claims lodged prior to 16 March 2010 with the aim of making repayment, where appropriate, based on the criteria laid down in the Brief by 31 March 2011. ……We would appreciate your continued patience in this matter…

HMRC also said in the Brief that it will:

> 'not consider any previous claims that have been rejected (for whatever reason) and which are not now under appeal. ……No new claims for the repayment of VAT for the period between 1 November 1998 and 5 December 2005 can be made.'

16. On 10 October 2011 the Appellant, through its agent Mr. Spencer lodged a Notice of Appeal with the Tribunal Service together with a copy of HMRC's letter dated 17th of February 2007 which had rejected the Appellant's claim for a refund of VAT. The notice of appeal was significantly out of time. The reasons provided as to why the appeal was made late were given as follows:

> 'whilst noting that (the Appellant) has a right of appeal, HMRC failed to follow their own internal guidance and direct the Appellant to make an appeal to the Tribunal, instead of which they noted that an appeal could be sent to their own internal Appeals and Reconsiderations team. The Appellant assumed this would be 'a fait accompli' given that the person to whom the appeal will be addressed would in effect be the person that made the initial decision to reject the claim'

17. The Appellant stated its grounds of appeal as follows:

> ‘the Appellant operated gaming machines similar, if not identical to other gaming machines used by other persons in the area, where the gaming machines operated by these other persons were not subject to VAT. The Appellant contends this is a breach of the principle of fiscal neutrality and as such it should not have been expected to declare VAT on its own gaming machine income. The Appellant submitted a claim for repayment of overstated VAT, which was rejected by HMRC without any clear explanation of what my clients rights of appeal were and to whom they should direct that appeal - in clear breach of HMRC's internal guidance.

18. HMRC says that at all relevant times there was a time limit for the making of an appeal of 30 days from the making of its decision on 17 January 2007. Prior to the inclusion of s 83G in the VATA 1994, the time for appealing was set out in Rule 4 of the Value Added Tax Tribunal rules 1986 (SI 1986/590). Under that rule, a notice of appeal was required, generally, to be served on the Tribunal before the expiration of 30 days after the date of the document containing the disputed decision. From 1 April 2009, a similar 30-day period applies, depending on whether or not there has been a review, but under s 83G (6) an appeal may be made late if the Tribunal gives permission. In the exercise of that discretion, the Tribunal must give effect to the overriding objective in rule 2(1) of the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009, to deal with cases fairly and justly. For that purpose it is necessary for the Appellant to show good reason why the Tribunal should exercise its discretion to allow an appeal to be made outside the time limit.

19. The exercise of the Tribunal's discretion is material, as it gives to the Tribunal, jurisdiction that it would not otherwise have. This involves a balancing exercise having regard to the respective interests of the parties. Material factors must be considered including whether the Appellant has a prima facie case. Furthermore, having regard to the correlation between the overriding objective with the corresponding objective in rule 1.1 of the Civil Procedure Rules (CPR), in the exercise of its discretion the Tribunal may have regard to the list of factors set out in CPR or 3.9 (1) to be considered by the court when exercising discretion to extend any time limit. So far as is material in this case those factors are:

    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. ……..
    f. whether the failure was caused by the party or as legal representative
    g. …….
    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.

20. Mr. Healy for HMRC said that it is not in the interests of Administration of justice to admit the appeal. The original refusal of the claim was made in February 2007 but it was not until over four and are half years later that the appeal was lodged. In the notice of appeal, the Appellant submits as a reason for the appeal being made late that it had not been advised of its right to submit an appeal to an independent Tribunal and the procedure for doing so. The appeal notice refers to HMRC's own internal guidance, and HMRC's manual (which recognises taxpayers as customers and that HMRC customers should be given proper guidance). Mr. Healy said however that it is not incumbent upon HMRC to advise an Appellant on how to go about appealing to the Tribunal.

21. The notice of appeal was treated by HMRC as a 'protective claim' presumably on the basis that HMRC was at the time awaiting a ruling in respect of the *Rank Group* case. However, the Appellants made no mention of the *Rank* case either in the notice of appeal, or correspondence with HMRC. What was required, was the provision by the Appellant of the information requested by HMRC, including a schedule of output tax in respect of which it sought a refund for the three years up to 5 December 2005. Clearly, the Appellant should have responded to HMRC's letter of 6 September 2006, and should have requested a review of HMRC's decision has set out in their letter of 13th every 2007.

22. During the 2009, HMRC had issued Business Briefs 63/08 and 40/09 which set out HMRC's view on the decisions of the VAT Tribunal and its position generally with regard to claims for refunds of VAT. Business Brief 11/10 was issued in March 2010. By then the Appellant was already significantly outside the time-limit within which to bring an appeal and therefore there appears, to have been a conscious decision not to follow up its initial claim of August 2006, either by a request for a review by HMRC or by way of appeal to the Tribunal.

23. The Appellant must show good cause for the delay in lodging its appeal and the Tribunal must consider whether extending time would be prejudicial to the interests of good administration and legal certainty. The merits of the proposed appeal, so far as they can be ascertained are unclear. The Appellant did not attend the hearing and was not represented. Therefore the Tribunal was not given the opportunity of evaluating the strength or otherwise of the Appellant's case.

24. The burden of showing why the Tribunal should exercise its discretion to permit a late appeal falls on the Appellant. From the facts of the case it is clear that the failure to lodge or pursue an appeal was entirely intentional on the part of the Appellant, following rejection of its claim by HMRC. The Appellant had the opportunity of requesting a

review of HMRC decision or lodging an appeal with the Tribunal in February/March 2007, but either chose not to do so, or was very dilatory in deciding to do so.

25. Quite apart from the fact that no reasons have been given for the delay in initiating the appeal, and taking into account all the circumstances of the application, the Tribunal concludes that any potential loss to the Appellant in being prevented from pursuing its claim is outweighed by the difficulties inherent in the lateness of the appeal, the potential prejudice to HMRC in having to reopen their examination of the Appellant's claim and the fact that the Appellant, even at this stage, has not quantified its claim or provided the information initially requested by HMRC in support of the claim.

26. 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.

MICHAEL S CONNELL

TRIBUNAL JUDGE

RELEASE DATE: 10 January 2013