TC02850

Appeal number: TC/2012/03908

Value added tax - application by Appellant for an extension of time to appeal - cross application by HMRC to strike out appeal - omission by HMRC to offer a reconsideration - delay by Appellant in lodging appeal - whether reasonable excuse - no - application refused and appeal struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

NEW LODGE ESTATE WORKING MENS CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE MICHAEL CONNELL

Sitting in public at Phoenix House, Rushton Avenue, Bradford on 23 January 2013

Mr. Ian Spencer for the Appellant

Ms. Pat Roberts Officer of HM Revenue and Customs, for the Respondents

DECISION

1. This is an application to the Tribunal by New Lodge Working Men's Club ('the Appellant') for permission to appeal out of time against a decision by HMRC dated 15 January 2007 to deny a VAT recovery claim made on 22 September 2006 of £19,219 in respect of gaming machines operated by the Appellant.

2. HMRC make a cross application under Rule 8 of the Tribunal Procedure (First tier Tribunal)(Tax Chamber) Rules 2009 ("the Rules") to strike out the Appellant's appeal as having been made out of time under s 83G Value Added Tax Act 1994 ("VATA 1994"). The Appellant lodged its Notice of Appeal with the Tribunal on 08 March 2012.

Background

3. The background to this application is that Prior to 6 December 2005 takings from gaming machines as defined in Group 4 of Schedule 9 to the VAT act 1994 were liable to VAT at the standard rate because they were excluded from the exemption for betting and gaming which Group 4, provided whereas other types of machines were not. 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, which provided that small prize gaming, and fixed odds betting terminals (FOBT's) were respectively subject to Amusement Machine Licence duty and General Betting Duty, but VAT exempt.

4. The decision of the European Court ("the ECJ") in *Finanzamt Gladbeck v Linneweber* (C-453/02) decided that Article 13B (f) of Sixth Council Directive (EEC) 77/388 precluded German legislation which provided that the operation of games of chance and gaming machines was exempt from VAT where it was carried out in licensed public casinos, while the operation of the same activity by traders other than those running casinos did not enjoy a similar exemption.

5. The decision in *Linneweber* suggested that UK law also breached the principle of fiscal neutrality because of the different VAT treatment of similar machines. A revised definition of 'gaming machine' was therefore announced and came into force on 6 December 2005 This changed the definition of gaming machine so as to provide that FOBT's and section 16/21 machines were gaming machines.

6. On 22 September 2006 the Appellant submitted a voluntary disclosure to recover overstated VAT paid in respect of gaming machine income for a three year period ending 4 December 2005. Mr. Graville Hardy, the club secretary lodged form

VAT 652 with HMRC via the club accountants Messrs Harris & Co claiming repayment of £19,219.

7. On 11 October 2006 HMRC replied to the Appellant asking for information regarding the claim and why the club considered that the decision in *Linneweber* supported their claim. 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, 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.

8. The Appellant provided the information requested in so far as relevant and within its knowledge, in letters to HMRC dated 30 October 2006 and 30 December 2006. Mr. Hardy said that the change in the law was an implicit admission that the previous rules were unfair to those clubs which operated jackpot and pub machines (as opposed to fixed odds betting terminals and section 16 and section 21 machines).

9. On 15 January 2007 HMRC replied to the Appellant stating:

> 'The position of this department is that in order to ensure that all gaming machine takings are treated equally; all machines are now liable to VAT. My understanding of your claim is that you are seeking for all gaming machine takings to have no VAT chargeable; in fact the opposite will apply. The claim relies on the *Linneweber* ruling; however, this department believes that no claim arises as a result of this.
>
> The case of the *Linneweber* considered the European principle of fiscal neutrality as it applies to VAT, specifically looking at the different tax treatment that had been applied to identical gaming machines in Germany solely on the basis that the machines were situated in different locations. The UK has not applied different VAT liabilities to identical gaming machines and HMRC do not accept that the U.K.'s tax treatment of gaming machines breached the principal and fiscal neutrality.
>
> Therefore, for the reasons given above, I have refused the claim. You have the right to appeal to an independent VAT tribunal.'

10. The Appellant did not respond to HMRC's 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 14th of February 2007.

11. 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.'

And 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…'

And also that:

> 'HMRC 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.'

12. Nothing further happened with regard to the Appellants claim until 17 February 2011, when Mr. Hardy wrote to HMRC saying:

> 'We refer to our letter dated 30 December 2006, and our claim in respect of the VAT ruling on gaming machine income. The claim incorporated the *Linneweber* ruling, which we believe has been accepted, and VAT repayments have had to be undertaken. We would be grateful if you let us know the current situation in relation to our case'

13. HMRC replied on 3 March 2011 saying :

> '…..As explained in Revenue and Customs Brief 11/10, claims that have 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.
>
> Your claim has already been rejected and was not appealed. Consequently the submitted claim for £19,219 in respect of periods 09/03 - 12/05 is considered closed and will not be reconsidered.
>
> You can still make an application to the tribunal and ask if they will accept a late notice of appeal'

14. On 7 November 2011 the Appellants agent Ian Spencer and Associates Ltd wrote to HMRC saying that HMRC's letter of 15 January 2007 was flawed and prejudicial to the Appellants interests because:

(1) HMRC did not provide details of where any appeal to an independent VAT tribunal might be sent, and the time limits for submitting such an appeal.

(2) HMRC's letter failed to mention the Appellant's right to request a review or reconsideration of the decision. It was the Appellants understanding that HMRC's own internal guidance required the decision maker to notify a taxpayer of its right to request a reconsideration. The right to request a reconsideration in any event remained open, and if on undertaking such a reconsideration the decision was to reject the claim the Appellant would then be able to submit an appeal to the Tribunal.

15. HMRC responded offering to conduct a review of the decision, which was undertaken and notified to the Appellant on 23 December 2011, upholding the decision to refuse the claim. The reviewing officer added in his letter, that prior to the implementation of Tribunal reform on one April 2009, HMRC was not under any legal obligation to offer taxpayers a reconsideration or to inform them of the right of

appeal when issuing a decision letter. Further, the version of 'Notice 700 The VAT guide', extant at the time of the decision, contained ample guidance on the appeal procedure and would have been more accessible to taxpayers in general than HMRC internal guidance. However, HMRC had in this instance informed the Appellant of its right to appeal but no such appeal was made.

16. In a further exchange of correspondence between the Appellants agent and HMRC, the agent suggested that the 30 day period within which an appeal should be lodged was from the conclusion of the review rather than the date of the decision.

17. HMRC responded that for appealable decisions made prior to 1 April 2009, the time limit for serving notice of appeal was 30 days, as set out in rule 4(1) VAT Tribunal Rules 1986, and that should the taxpayer request a reconsideration of the decision within the 30 day period, rule 4(2) allowed the Commissioners to extend the appeal period to a date 21 days from the date of a further letter confirming the disputed decision. If the request for reconsideration was made after the 30 day period, the Commissioners would still undertake a reconsideration, has had been done in this case, but would not be able to extend the 30 day appeal period. If the taxpayer were to subsequently appeal against the decision they would have to apply to the Tribunal for an extension of time to serve an appeal.

18. On 8 March 2012 the Appellant, through its agent lodged a Notice of Appeal with the Tribunal of HMRC's decision of 15 January 2007 rejecting the Appellant's claim for a refund of VAT. Because the notice of appeal had not been lodged within the requisite 30 day period, the Appellant requested permission to appeal out of time. The reasons given in support of the late appeal were that:

> 'HMRC's original decision issued in January 2007 failed to advise the Appellant of its right to have the decision reconsidered which was in contradiction of how other taxpayers were treated. This was prejudicial to the Appellants interests The Appellant requested a reconsideration and HMRC obliged on 12 January 2012 but mistakenly advised that any appeal, would be late as it would be made more than 30 days after the date of the original decision. The Appellant had sought clarity from HMRC as it was its view that the 30 day period was from the date of reconsideration or review'

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

> 'The Commissioner's decision to reject the Appellants claim is in contradiction of the EC principle of fiscal neutrality and subsequent established case law. The Appellants gaming machines were similar if not identical to the VAT exempt gaming machines operated elsewhere. As such HMRC are in breach of the fiscal neutrality principle and repayment should be made.'

The Appellants case

20. Mr. Spencer for the Appellant said that the club is a not for profit private members club run by volunteers and a committee, with a paid steward. Mr. Hardy the

club secretary was hoping to attend the hearing, but had been hospitalised and was still recuperating. It was his recollection that the club had not received HMRC's decision letter of 15 January 2007 but he would not be able to swear on oath to that effect. Mr. Spencer said it was noteworthy that Mr. Hardy's letter of 17 February 2011 made no reference to HMRC's decision letter and instead referred to his earlier letter dated 30 December 2006, which indicated that the decision letter not been received. Mr. Spencer produced to the tribunal, a number of letters which had been sent by HMRC to other Appellants for whom he acted as agent, on the same issue which had been wrongly addressed. He submitted that the decision letter had in fact never reached the Appellant. The VAT reclaim was a substantial sum, and it was inherently improbable that the Appellant would not have responded to the decision of 15 January 2007 rejecting the claim.

21. Mr. Spencer said that the Appellant had not chased up its letter of 30 December 2006 for a number of reasons. The Club was not staffed by professionals and relied on updates issued by trade associations, Deloitte's, information provided by Dransfield novelty company, which supplied the gaming machines and generally as part of a larger affiliation of working men's clubs was simply ‘awaiting events’.

22. Mr. Spencer also referred to a number of other cases where again he was acting as agent for clubs in similar appeals and that in many of those cases HMRC had afforded the opportunity of a review of the decision and allowed the club to quantify its claim out of time. He said this was plainly unfair to the Appellant. HMRC's had not adhered to its own internal guidance which recognises taxpayers as customers and that those customers should be given proper guidance.

23. Finally, Mr. Spencer referred to the case of *Potters Bar Golf Club* [2012] TC 02346, where the First-tier Tribunal decided in ‘similar circumstances to this case’ that allowing the taxpayers appeal out of time would cause no serious prejudice to HMRC and HMRC's strike out application cases was refused.

The Respondents case

24. Mrs. Roberts for HMRC said that at all relevant times there was a time limit for the making of an appeal which was 30 days from the making of HMRC’s decision on 15 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.

25. Ms. Roberts for HMRC said that it would not be in the interests of administration of justice to admit the appeal. The original refusal of the claim was made in January 2007 but it was not until March 2011 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 request a review and that it had not been given details of the procedure for appealing to the Tribunal. Ms Roberts said that it is

not incumbent upon HMRC to advise an Appellant on how to go about appealing to the Tribunal.

26. During the 2009 – 2010, HMRC issued Business Briefs 63/08 and 40/09, which set out HMRC's view on the decisions of the VAT Tribunal, and HMRC's position generally with regard to claims for refunds of VAT. Business Brief 11/10 (referred to above), was issued in March 2010. By then, the Appellant was already significantly outside the time-limit within which to bring an appeal but there was another year's delay before the Appellant eventually lodged its appeal. There appeared to have been a conscious decision not to follow up the initial claim of September 2006, either by a request for a review by HMRC or by way of appeal to the Tribunal.

27. To allow an application to bring an appeal four years out of time would be unfair and expose the administration of justice to criticism from other claimants who have similarly failed to comply with time limits for making claims, and who have not been granted an extension of time to bring an appeal. It is necessary to apply clear consistent and objective criteria in assessing the validity of claims

Conclusions

28. 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.

29. The exercise of the Tribunal's discretion 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 (the CPRs), in the exercise of its discretion the Tribunal may have regard to the list of factors set out in the CPR's considered by the courts 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.

30. With regard to its substantive appeal, the Appellant may well have a prima facie case and appears to have quantified its claim. Therefore, whether there is any real prejudice to HMRC in having to reopen their examination of the Appellant's claim is questionable. However the Appellant must show good cause for the delay in lodging its appeal. The balancing exercise to be undertaken by the Tribunal requires it to weigh the assumed potential loss to the Appellant of being prevented from pursuing its claim, against the need for good administration, finality, legal certainty, respect for the general time limit for bringing an appeal; the discerned prejudice to HMRC in having to reopen their examination of the Appellant's claim; the Appellant's dilatoriness in initiating its appeal and the length of delay.

31. The burden of showing why the Tribunal should exercise its discretion to permit a late appeal falls on the Appellant.

32. The Appellant had the opportunity of requesting a review of HMRC decision or lodging an appeal with the Tribunal in January 2007, but either chose not to do so, or was very dilatory in deciding to do so. It is not clear whether the Appellant thought that HMRC was taking a long time in dealing with the claim or simply awaiting events. However neither reason would constitute a reasonable excuse. The Appellant failed to prosecute the appeal with reasonable diligence.

33. Even if the Appellant did not receive HMRC's decision letter of 15 January 2007, (and there is no record of the letter having been returned to HMRC undelivered), there is still no explanation as to why the Appellant did not chase up a response to its letters of 30 October and 30 December 2006. A total lack of attention to the claim for a period of over four years cannot be regarded as reasonably prudent conduct. No adequate reasons have been given for the inordinate delay in initiating the appeal.

34. HMRC's letter in January 2007 did not offer a reconsideration, while other decision letters by HMRC to other appellants sometimes did. Nonetheless, the letter explained that the claim had been rejected and the appellant had the option of querying the decision or appealing to the Tribunal, both of which they were in fact invited to do. Instead, they did neither and a reasonable assumption is that they accepted the decision. It cannot be suggested that because the Appellant had only been given the option of appealing or querying the decision, but not the option of reconsideration, this somehow led them to accept a decision, which they disagreed with. There was no obligation on HMRC to offer a reconsideration, but in any event the omission to do so did not have any material effect on the matter.

35. For the reasons set out above the Tribunal makes the following directions.

Directions

(1) The Appellant's application for an extension of time in which to appeal against the decision of HMRC contained in HMRC's letter dated 15 January 2007 is refused.

(2) The appeal is struck out pursuant to rule 8(2) of the Rules. In consequence the Tribunal does not have jurisdiction to entertain the appeal, (rule 8(2) (a) of the Rules).

36. 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 CONNELL
TRIBUNAL JUDGE

RELEASE DATE: 27 August 2013