[2017] UKFTT 612 (TC)

TC06048

Appeal numbers: TC/2016/03259
LON/2007/0052
MAN/2006/0874

PROCEDURE – application to make late appeal - application to strike out appeals on ground of delay

FIRST-TIER TRIBUNAL
TAX CHAMBER

BETWEEN

ASHINGTON & ELLINGTON SOCIAL CLUB & INSTITUTE LIMITED
ASHTEAD VILLAGE CLUB
DARFIELD ROAD WORKING MEN'S CLUB & INSTITUTE LIMITED
Appellants

- and –

THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS
Respondents

Tribunal: Judge Greg Sinfield

Sitting in public at Taylor House, Rosebery Avenue, London EC1 on 10 July 2017

Michael Firth, counsel, instructed by Ian Spencer & Associates Limited, for the Appellants

Eric Metcalfe, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Respondents ('HMRC') applied to the First-tier Tribunal ('FTT') for a direction that appeals by the three Appellants, referred to individually as 'Ashington', 'Ashtead' and 'Darfield', be struck out. HMRC submitted that each appeal should be struck out both on the basis of extreme delay and also because there is no reasonable prospect that the appeals could succeed. The Appellants oppose the application. In addition, Ashington applies for permission under section 83G(6) of the VAT Act 1994 ('VATA94') to bring their appeals out of time. Ashtead and Darfield contend that they do not need such permission but, to the extent that they do, make such an application.

2. At the conclusion of the hearing, I stated that would not grant Ashington permission to make a late appeal and refused HMRC's application to strike out the appals of Ashtead and Darfield. I allowed Ashtead and Darfield to amend their notices of appeal and stated that HMRC, if they wish to do, should make a request for Further and Better Particulars of the matters relied on by Ashtead and Darfield in support of those grounds. My reasons are set out below and the directions are at the end of this decision.

Background

3. Each of these appeals concerns a claim for repayment of VAT accounted for by the Appellants on takings from gaming machines which the Appellants contend was not due. In the case of two of the Appellants, Ashtead and Darfield, HMRC rejected the claims and the Appellants appealed to the VAT and Duties Tribunal. Following the judgment of the High Court in *HMRC v Rank Group* [2009] EWHC (Ch) 1244 ('*Rank HC*') dismissing their appeal, HMRC paid the Appellants the amounts claimed with statutory interest and, at the same time, issued protective assessments to recover the tax and interest in the event that HMRC succeeded in subsequent appeals. None of the Appellants appealed the protective assessments. The detailed background in relation to each appeal is as follows.

Ashington

4. In a letter dated 20 July 2006, Ashington gave notice to HMRC of a claim for the recovery of VAT on gaming machine income. HMRC requested further details in relation to the claim in a letter dated 15 August 2006. There does not appear to have been any response to this letter from Ashington. On 8 March 2011, HMRC wrote to Ashington stating that the claim made in the letter dated 20 July 2006 was not valid because it was not quantified and did not state the method of its calculation as required by regulation 37 of the VAT regulations 1995. The letter incorrectly stated that there was no right to appeal against the decision.

5. In a further letter dated 28 August 2012, HMRC repeated their view that the claim made by Ashington was not valid for the reasons previously given but also set out Ashington's right to a review and to appeal to the FTT. Ashington's representative, Ian Spencer and Associates Limited, responded in a letter dated 17 September requesting a review by an officer not previously involved in the matter. HMRC replied by letter dated 16 November to Ashington stating that they could not review any appealable decision made by HMRC before 1 April 2009 but that Ashington still had the right to

apply to the FTT to make a late appeal against HMRC's decision. It is not clear if this letter was ever received by Ashington's adviser as, on 2 January 2013, he wrote to HMRC referring to his letter of 17 September 2012 and asking for an update.

6. On 10 January 2013, HMRC wrote to Ashington and stated that, following *Rank HC*, an amount of £3,720 together with statutory interest of £632.98 had been repaid or credited to Ashington's account in relation to the claim submitted on 17 September 2012. The letter went on to say that, in view of continuing litigation, it was also an assessment under section 80(4A) VATA94 to recover the tax repaid and interest. The letter stated:

> "If HMRC is successful in overturning the earlier decisions, we will expect you to pay the amounts of £3720 and £632.98 charged by the assessment(s), together with interest.
>
> We will not take any action to collect the tax charged by these assessments at this time. If this changes we will write to you and tell you what action we intend to take.
>
> In the event that we do ask you to pay the amounts charged by these assessments, you must do so within 30 days of the letter asking for payment. If you do not, we will raise an additional assessment under section 74 of the VAT Act 1994 charging interest on the unpaid amounts from the date of the repayment to you until the date the amount is repaid to HMRC.
>
> If you do not agree with the assessment(s), you can ask for it/them to be reviewed by an HMRC officer not previously involved in the matter, or appeal to an independent tribunal.
>
> …
>
> If you want to appeal to the tribunal you should send them your appeal within 30 days of the date of this letter."

7. On 26 February 2015, HMRC issued a demand for payment of the tax that had been repaid together with the interest.

8. Ashington submitted a notice of appeal to the FTT on 8 June 2016.

Ashtead

9. Ashtead notified HMRC of its claim in relation to output VAT overpaid on gaming machine takings for the period 1 October 2003 to 5 December 2005 in a letter dated 4 November 2006. The letter included calculations of the VAT claimed. For reasons that were never satisfactorily explained to me, there was another and almost identical letter claiming a repayment which was dated 7 November. This letter was undoubtedly received by HMRC as it bears a date stamp of 8 November. The copy of the earlier letter in the bundle bore no such date stamp. The only material difference between the two letters is that the letter dated 4 November stated Ashtead's correct VAT registration number in the heading whereas the letter of 7 November showed an incorrect number in the heading.

10. On 9 November 2006, following the decision of the European Court of Justice ('ECJ') in Cases C-453/02 and C-462/02 *Finanzamt Gladbeck v Linneweber* and *Finanzamt Herne-West v Akritidis* ('*Linneweber*'), HMRC issued Business Brief 20/06 which stated that, in their view, the tax treatment of gaming machines under UK law was not contrary to EC law. In a letter dated 5 December, Ashtead wrote to HMRC to

ask for a response to their letter of 9 [sic] November submitting a VAT voluntary disclosure to reclaim VAT paid on gaming machine income. HMRC responded by letter dated 13 December rejecting the voluntary disclosure made by letter dated 8 [sic] November and setting out Ashtead's right to a review and to appeal to the VAT and Duties Tribunal. By notice of appeal dated 25 December 2006, Ashtead appealed to the Tribunal.

11. Following the dismissal of HMRC's appeal in *Rank HC*, Ashtead asked for a repayment of the amount of £14,310.51 overpaid VAT claimed on 4 November 2006 in a letter dated 6 December 2010. HMRC subsequently contacted Ashtead by telephone and by letter dated 1 March 2011 to request further copies of the calculations to support the amount of output tax claimed. Ashtead supplied copies of the calculations on 14 March. In a letter dated 31 March, HMRC informed Ashtead that the amount of £14,311 had been repaid or credited to Ashtead's account together with statutory interest of £2,298.89. The letter continued in materially identical terms, save as to amounts, to the letter to Ashington quoted above. However, it also included the following final paragraph:

> "I understand you have appealed to the First-tier Tribunal against the previous decision not to allow this claim. However, in light of this repayment, you may want to reconsider your position in respect of the appeal. If you decide one is no longer necessary, please write to the tribunal and quote your appeal reference number in the correspondence."

12. Ashtead did not request a review or make any appeal to the FTT in relation to the protective assessment. On 28 April 2016, HMRC wrote to Ashtead stating that the appeal which had been notified to the FTT in 2007 was no longer valid as the decision under appeal had been reversed and a protective assessment issued. Ashtead's representative, Ian Spencer and Associates Limited, wrote to HMRC on 9 June objecting to HMRC's view that the 2007 appeal was no longer valid.

Darfield

13. On 28 September 2006, Darfield wrote to HMRC to claim a repayment of £5,919.46 of output VAT overpaid on gaming machine takings in the period 1 July 2003 to 30 June 2004. The letter stated that the claim was made on the basis of the decision of the ECJ in *Linneweber* and included calculations showing how the overpaid VAT had been calculated. By letter dated 17 October, HMRC asked Darfield to provide further details in relation to the claim. Darfield provided some further information but not all the details requested in a letter dated 30 October. HMRC acknowledged receipt of the information, gave an explanation of the applicable law and rejected the claim in a letter dated 10 November. Darfield lodged a notice of appeal with the VAT and Duties Tribunal on 4 December.

14. In a letter dated 23 November 2010, HMRC informed Ashtead that £5,920 had been repaid or credited to its account together with statutory interest of £1,103.62. The letter continued in materially identical terms, save as to amounts, to the letter to Ashington quoted above and included the same final paragraph as in the letter to Ashtead. Darfield did not request a review or make any appeal to the FTT in relation to the protective assessment.

Legislative framework

15. Section 83G VATA94 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."

16. 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."

17. 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) …."

18. Rule 8 of the FTT Rules relates to the striking out of a party's case and provides, so far as material, as follows:

"(3) The Tribunal may strike out the whole or a part of the proceedings if

…

> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding."

19. 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."

20. Regulation 37 of the VAT Regulations 1995 (SI 1995/2518) provides as follows:

> "Any claim under section 80 of the Act shall be made in writing to the Commissioners and shall, by reference to such documentary evidence as is in the possession of the claimant, state the amount of the claim and the method by which that amount was calculated."

The Applications

21. HMRC apply to strike out the appeals pursuant to rule 8(3)(c) of the FTT Rules. HMRC ask the Tribunal to strike out the Appellants' appeals on the grounds that they:

(1) are each more than several years out of time; and

(2) disclose no reasonable prospect of success.

22. Ashington applies for permission to notify its appeal late. Ashtead and Darfield submit that the existing appeals should be regarded as including the subsequent protective assessments because the underlying dispute was the same. In the alternative, they apply to amend their notices of appeal to delete the references to the original decisions refusing their claims and to substitute a reference to the protective assessments. Further in the alternative, Ashtead and Darfield apply for permission to notify appeals against the protective assessments late.

Discussion

23. In relation to the delay by Ashington in appealing the protective assessment and the failure of Ashtead and Darfield to appeal the protective assessments, both parties referred to the comments of Morgan J on how the FTT should approach an application for an extension of time in *Data Select Ltd v HMRC* [2012] UKUT 187 TCC and the decision of the Court of Appeal in *BPP Holdings Ltd v HMRC* [2016] EWCA Civ 121 ('*BPP*'). Since the hearing in this case, the Supreme Court has given judgment in the appeal by HMRC from the Court of Appeal's decision – see [2017] UKSC 55. The Supreme Court dismissed HMRC's appeal and confirmed that the "the cases on time limits and sanctions in the CPR do not apply directly [to the FTT], but the Tribunal should generally follow a similar approach." The Supreme Court approved my comment in *HMRC v McCarthy & Stone (Developments) Ltd* [2014] UKUT 196 (TCC); [2015] STC 973 that the tribunals should not adopt a different, ie more relaxed,

approach to compliance with rules, directions and orders than the courts that are subject to the CPR. That comment had also been endorsed by the Senior President of Tribunals in *BPP* in the Court of Appeal.

24. It is clear from paragraph 23 of the Supreme Court's judgment in *BPP* that the tribunals should pay close regard to the approach of the courts to procedural issues while bearing in mind that the tribunals have different rules from the courts and sometimes require a slightly different approach to a particular procedural issue. The Court of Appeal in *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 WLR 3926 ('*Denton*') provided guidance on how the courts should approach applications under CPR 3.9 for relief from sanctions. I consider that such guidance is relevant in a case such as this but I bear in mind that, as the Senior President noted at [29] of *BPP*, the relevance of the guidance given in the authorities is constrained to how I should apply the overriding objective in the FTT Rules. The Court of Appeal's guidance at [24] to [38] of *Denton* may be summarised 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.

25. Using the three-stage approach recommended by the Court of Appeal in *Denton*, I start by considering the seriousness and significance of the delay by Ashington in notifying its appeal to the FTT. 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.

26. It is not necessary for me to spend much time considering the reason for the failure to comply. 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. It would not have been difficult for Mr Spencer to check that there had not been any earlier appeal. The letter of 10 January 2013 should have prompted him to do so because it referred to the rights of appeal and because, unlike the similar letters to Ashtead and Darfield, contained no reference to any earlier appeal. I conclude that there was no reason, and certainly no good reason, why the notice of appeal was not provided to the FTT within the time limit.

27. The third stage is to consider all the circumstances of the case, bearing in mind the overriding objective of the FTT Rules, which is to deal with cases fairly and justly while also having regard to the need to ensure compliance with the FTT Rules. Mr Firth, who appeared for the Appellants, submitted that the failure by Ashington to lodge a notice of appeal with the FTT until some three years and five months after the expiry of the time limit for appealing caused no prejudice to HMRC whereas the prejudice to Ashington was plain: it would have to repay money already repaid to it by HMRC in circumstances where the Rank litigation may ultimately determine that the claim was

well founded and many other identical claims are finally accepted by HMRC. Even if Ashington had submitted the appeal on time, it would have been held up as the other appeals have been and be in the same position as it is now. Issues such as the effect of the lapse of time on evidence, especially the recollection of witnesses, would be no different to issues that must be faced in the many appeals that are going forward. Mr Metcalfe, who appeared for HMRC, submitted that Ashington's delay in pursuing its claim had been inordinate and inexcusable. He contended that the delay had prejudiced HMRC's ability to contest the claim, particularly in light of the absence of any particulars of the basis of the claim to date, as the longer the period of time between the facts underlying the appeal and the hearing of the appeal, the more difficult it is for the parties to produce evidence in respect of the original period in dispute, especially the ability of witnesses to recollect events from more than a decade ago.

28. It seems to me that refusing to admit Ashington's late appeal would clearly cause it prejudice but that is always likely to be the case unless the grounds of appeal are hopeless and cannot by itself be a reason for allowing a late appeal. I consider that there would be some prejudice to HMRC in allowing Ashington's appeal to proceed in that HMRC would have to deal with a matter, now quite old, which HMRC could have reasonably assumed was not being pursued. I acknowledge that Mr Firth's submissions that the prejudice is not great because HMRC must deal with many other cases with similar or identical issues have some force. Taking all the circumstances of the case into account and bearing in mind the matters described above, including the need for compliance and the efficient conduct of appeals as well as the overriding objective of the FTT Rules, I have concluded that, on balance, the length of the delay, lack of any good reason for it and some prejudice to HMRC mean that Ashington's application to make a late appeal to the FTT should be refused.

29. Mr Metcalfe submitted that Ashtead's and Darfield's failure to pursue their claims by appealing against the protective assessments was similarly inexcusable. I do not agree. 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. The letters stated that HMRC would not take any action to collect the tax charged by the assessments and would write to the Appellants to notify them if that changed and only at that point ask them to pay the amounts charged within 30 days. It might reasonably have appeared to the reader that the Appellants did not need to take any action until notified by HMRC. Indeed, why would persons who had been paid the amount claimed with interest think that they should appeal? HMRC point to the paragraph stating (emphasis supplied):

> "If you want to appeal to the tribunal you should send them your appeal within 30 days *of the date of this letter*."

30. However, that paragraph does not say that the Appellants were required to notify new appeals. Similarly, the reference in the final paragraph to the Appellants' existing appeals only suggests that the Appellants may want to reconsider their position in respect of the appeals and does not make clear that HMRC had conceded them, subject to further developments in the Rank litigation. 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. In fact, for reasons I have discussed, that was not the correct analysis.

31. I consider that the most appropriate and efficient way to rectify the situation is to allow Ashtead and Darfield to amend their notices of appeal so that they are appeals against both the original reasons given for rejecting the claims and the protective assessments issued to give effect to those reasons. If I had not concluded that the original notices of appeal could be amended to allow Ashtead and Darfield to appeal against the protective assessments then I would have allowed them to submit late appeals. I consider that there were good reasons, discussed above, why Ashtead and Darfield did not appeal at the time and there is, in my view, no prejudice to HMRC in these cases because HMRC can never have believed that Ashtead and Darfield had given up their claims or right to appeal.

32. That leaves only the issue of whether to strike out the appeals of Ashtead and Darfield on the ground that they are an abuse of process and have no reasonable prospect of success. Apart from delay, which I have already discussed, the basis of HMRC's application to strike out is that the Appellants have failed to provide the information required by regulation 37 of the VAT Regulations 1995 to support a claim and so must fail. HMRC say that Ashtead has not provided any of the further information requested but acknowledge that Darfield has provided some details concerning its machines in its letter dated 30 October 2006 as to the number of machines and their categories, the size of the stakes, and the percentage pay-out of each machine and also attempted to address the issues of competition and fiscal neutrality. Mr Firth submitted that the application was too early as evidence had not yet been exchanged so HMRC could not say whether the Appellants' case had any reasonable prospect of success at this stage. He pointed out that HMRC had paid the claims which they could not lawfully have done unless they were satisfied that they were materially the same as in *Rank HC*. Further, he contended that if HMRC do not understand the Appellants' cases sufficiently, the correct application is not to strike out but to apply for further and better particulars.

33. I agree with Mr Frith's submissions. It seems to me that, having paid the amounts claimed with interest, HMRC cannot credibly say that the appeals relating to such claims do not have any reasonable prospect of success. If that were so then it must have been so when the amounts claimed were paid. I am sure that HMRC would not have made such payments if they considered that the cases had no reasonable prospect of success. Nothing material has changed save that there has been further litigation and is yet more to come. That litigation is not relied on as showing that these appeals do not have any reasonable prospect of success. I consider that, at this stage of the proceedings, the appropriate action to take if HMRC are unclear about the Appellants' case is not to strike out the appeals but invite HMRC to request further and better particulars.

Disposition and directions

34. For the reasons set out above, I have concluded that Ashington should not be granted permission to make a late appeal and, accordingly, its appeal should not be admitted. I refuse HMRC's application to strike out the appeals of Ashtead and Darfield and grant them permission to amend their notices of appeal to the FTT to include appeals against the protective assessments. Ashtead and Darfield should apply to make such amendments no later than 14 days from the date of release of this decision

and serve a copy of the application and amendments on HMRC. Finally, I direct that, no later than 14 days from the date of receipt of the amended grounds, HMRC, should they wish to do so, shall serve on Ashtead and Darfield a request for Further and Better Particulars of the matters relied on by them in support of those grounds, and copy them to the FTT.

Right to apply for permission to appeal

35. 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 FTT Rules. 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.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 3 AUGUST 2017