



[2021] UKFTT 0333 (TC)

TC08267

VALUE ADDED TAX – 'Fleming' claim - Application to make a late appeal - Application dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2020/03091

BETWEEN

WOODFORD GOLF CLUB

Appellant

-and-

**THE COMMISSIONERS FOR
HER MAJESTY'S REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: JUDGE CHRISTOPHER MCNALL

Sitting in private on 10 September 2021, and considering a bundle (171 pages), submissions from Mr Strum of Strum Limited on behalf of the Appellant (10 June 2021) and submissions by HMRC (15 June 2021).

DECISION

1. This is an application to bring a late appeal. The application is opposed by HMRC.
2. For the reasons set out more fully below, I have decided to refuse the application.
3. The Appellant is a golf club. On 14 July 2020, Mr Steven Strum, who is the Appellant's honorary auditor, filed a Notice of Appeal with the Tribunal. The appeal relates to a claim for overpaid VAT on green fees.
4. The Notice of Appeal is accompanied by a letter of the same date setting out the circumstances. In brief, these are as follows.
5. The Club first wrote to HMRC's Fleming Claim Team in Liverpool on 25 March 2009 making a refund claim for over-declared output tax on green fees for the period 1 January 1990 to 4 December 1996. The letter said 'this is based on the pending appeal of the 'Fleming Case'. The sum involved was about £12,200.
6. It was not until some months later, on 11 August 2009, that the Club received acknowledgment from the 'Fleming Claim Team' at HMRC. HMRC's officer said "I refer to the claim submitted following the House of Lords decisions in the cases of Michael Fleming (t/a Bodycraft) v HMRC and Conde Nast Publications v HMRC. The claim has been received and is currently waiting to be allocated to a caseworker. Unfortunately, due to the substantial number of cases to action no time scale can be given at present as to when this claim will be dealt with and so ask for your patience. You will hear from us as soon as we look into this claim."
7. Despite the impression given by the 11 August letter that the claim may take some time to resolve, it was only a few days later, on 14 August 2009, that a letter was sent to the Club by HMRC Coleraine VAT Office stating that the claim could not be entertained.
8. The letter of 14 August 2009 is an important one. It is in the bundle: page 21. It is prominently headed "VALUE ADDED TAX - CLAIMS FOR REPAYMENT OF VAT". Part 1 is headed "Green fees income (1990/96), Fleming claim for overpayment of output tax - £12,129'. It goes on to say, in clear terms, that the Club's Fleming claim had been rejected. The letter referred to the decision of the CJEU in Canterbury Hockey Club, but stated HMRC's "present view ... that this decision" (i.e, the decision in Canterbury Hockey Club) "does not impact on the situation regarding the VAT liability of the green fee income generated by non-profit-making golf clubs from the provision of sporting facilities to non-members."
9. That letter ended with Part 3 headed 'Right of review and appeal', indicating the rights to ask for review, or to appeal within 30 days.
10. There is no dispute that the 14 August 2009 letter was received at the Club.
11. As Mr Strum accepts 'Unfortunately, this letter was not passed to ourselves for action and no appeal was lodged ... The reason that the Coleraine letter had not been appealed is that once it had been received it was filed without being passed to ourselves and only came to light when searching all documentation to prepare our prospective claim."
12. On the footing that the 'ourselves' refers to Strum Ltd, it was nonetheless procedurally proper for HMRC to write to the Club.
13. In his letter to HMRC dated 10 December 2019, Mr Strum said: "About a year ago" (hence, sometime in 2018) "the Club Secretary had gone in to the Golf Club loft to search for paperwork re further claims. He then found a letter from the Coleraine VAT office dated 14

August 2009. This letter had never been passed to me for action and consequently no appeal had been lodged."

14. Following the decision of the CJEU in *The Bridport and West Dorset Golf Club* (C145/12), [2014] STC 663 (released in December 2013), HMRC accepted that supplies of sporting services made to both members and non-members by non-profit-making members' sports clubs could be treated as exempt from VAT, and legislation was introduced with effect from 1 January 2015 to reflect this change in policy. On 4 May 2016, HMRC issued VAT Information Sheet 01/15 which explained the effect on traders wishing to make a claim following the Bridport decision, and, on that same date, issued Business Brief 10/16 which advised traders to make a claim.

15. On 22 June 2016, the Appellant phoned HMRC's National Advice Service to ask what could be claimed following the Bridport decision. The Appellant was referred to Section 1.4 of VAT Information Sheet 01/15: see the contact centre enquiry record of the call at page 68 of the bundle. Section 1.4 of the VAT Information Sheet (which was available online) said:

"Where a submitted claim has already been rejected by HMRC and the claimant has not appealed, that claim cannot now be resubmitted. Any claims submitted now will be a new claim subject to the 4 year time limit. Rejected claims that were appealed to the First-tier Tribunal however, are still open."

16. Objectively (that is to say, regardless of the fact that Mr Strum did not know at that point of the 14 August 2009 letter) that was the situation which the Club was in. It had submitted a Fleming claim, which had already been rejected, and the Club had not appealed.

17. Mr Strum phoned HMRC on 19 March 2018 'chasing up [the] Fleming claim on green fees'. He was advised that the previous claim had been rejected: see the note at page 70 of the bundle.

18. Letters from the Club to HMRC dated 6 May 2018, 7 November 2018, and 10 December 2019 all went unanswered by HMRC until 25 June 2020. In that letter, HMRC indicated that it would consider a late appeal upon receipt of a reasonable excuse, but did not consider that the circumstances as outlined above amounted to a reasonable excuse.

DISCUSSION

19. Whichever way it is looked at, the appeal is late.

20. HMRC's letter of 25 June 2020 does not contain an appealable decision, but simply repeats what had already been decided back in 2009. So, the Notice of Appeal is not saved by being filed less than 30 days after 25 June 2020.

21. The relevant legal principles for considering applications of this kind are not in dispute. They are set out by the Upper Tribunal in its decision in *Martland v HMRC* [2018] UKUT 0178 (TCC). I am bound by that decision. The starting point is that permission should not be granted unless the Tribunal is satisfied on balance that it should be. In considering that question, I must establish the length of the delay, the reasons for it, and an evaluation of all the circumstances of the case.

22. The delay is a very long one. It is from September 2009 to July 2020: well over a decade.

23. There reasons for the delay are not, looked at objectively, reasonable ones.

24. Although the 11 August 2009 letter was handled appropriately at the Club, the 14 August letter was not handled appropriately at the Club. It is said that it ended up in the loft, and was not retrieved until some time in 2018 (I am working on the basis that this was after 28 March 2018, when Mr Strum advised HMRC that no letter had been received: see page 72 of the

bundle. That is to say, I am working on the footing that Mr Strum did not become personally aware of the 14 August letter until after that call).

25. What happened to the 14 August 2009 letter at the Club's end, and how it came to repose in the Club's loft, remains unclear. But that was all down to the Club. Nothing that HMRC did or said gave rise to that situation. The letter rejected the claim, and the route of appeal was clearly set out in the letter. The Club, for some reason, did nothing about it. It is probably right that things would have been different had that letter been referred when received to Mr Strum. But that did not happen. The Club's mail-handling procedures, and their shortcoming on this occasion, are not a reasonable excuse.

26. I reject the suggestion that the letter of 14 August 2009 is confusing. It contains a clear decision rejecting the claim. It outlines the route of challenge then open to the Club - a review or an appeal. It gives the right timescales.

27. Although it came very shortly after the 11 August 2009 letter, and came from a different office, the most that can (perhaps) be said, given the gist of the 11 August letter, and the fact that it had taken HMRC almost 6 months to write that first letter responding to the claim, is that it was (perhaps) somewhat surprising that the 14 August letter came so hard on the heels of the 11 August letter. But it would be perverse to, in effect, penalise HMRC for acting promptly.

28. Moreover, and reading the letter of 14 August 2009 in its plain meaning, there was no reason to suppose that the promise of a response to the claim contained in the 11 August letter still remained open after 14 August. The claim had been dealt with, and rejected, and HMRC had told the Club those things. How the Club dealt with (or did not deal with) that information subsequently was the Club's business.

29. I reject the argument that, even had the Club appealed in time, it would not have made any difference because (it is argued) all that would have happened is that its claim would have been stayed behind the Bridport case. This proceeds on the counter-factual basis that an appeal was made, when it wasn't. It is also tainted by hindsight. It ignores the critical point that the making of an appeal is an important moment in time.

30. I accept that HMRC did not cover itself with glory when failing to respond to the Appellant's letters of 6 May 2018, 7 November 2018 (sent by recorded delivery, and date stamped in on 14 November 2018), and 10 December 2019 (also sent by recorded delivery, and dated stamped in on 16 December 2019) until June 2020. The delay is unexplained. Of course, in the context of an application all about delay, it fuels a sense of injustice when that extremely significant delay is not counted against HMRC. However, I agree with HMRC that this delay is not relevant for the purposes of this application because the time set running by the 14 August 2009 letter was already long since past, even in May 2018.

31. The Appellant invites me to consider the decision of the First-tier Tribunal (Judge Malachy Cornwell-Kelly and Mr Julian Sims FCA) in *John O'Gaunt Golf Club v HMRC*. That is a reserved decision in appeal TC/2014/04510, but does not have a neutral citation and is not reported on Bailii. It should have been in the bundle prepared by HMRC, but it wasn't, although HMRC made submissions on it. Through my own researches, I have located a copy and read it.

32. There, the Tribunal gave the taxpayer permission to bring a late claim. A Fleming claim had been made by the Club's advisers on 24 March 2009. That claim was rejected by HMRC on 24 August 2009, in a letter sent to the Club's advisers, but not to the Club. There then followed what were described as 'significant fault on both sides': see Paragraph [46]. failures on both sides'.

33. There, the delay was 27 days. That is a tiny fraction of the delay here. It is not really comparable. Moreover, and key to the Tribunal's discussion, is that "there was a basic failure by the Revenue in 2009 in not notifying the taxpayer of the rejection of the claim": see Paragraph [35]. But that is not the case here. The circumstances are materially different. In this present appeal, HMRC did notify the taxpayer of the rejection of the claim. The decision in that case does not bind me, and the differences which I have identified do not compel the same conclusion.

34. Finally, I stand back to evaluate all the circumstances. There is serious and significant delay. There is no good reason for it. Whatever went wrong went wrong at the Club's end, and not at HMRC's. If I refuse the application, the Club loses the right to resurrect a claim for £12,000 made and rejected over a decade over. It is out of that money. The consequences for HMRC are that, in their books, this claim, and the Club's VAT affairs for the claimed period, had already been finalised, years ago. To re-open the claim now would involve re-opening those long-settled calculations.

35. Overall, and looking at the prejudice to both parties occasioned by the refusal or giving of permission, I do not consider it appropriate to extend time.

OUTCOME

36. Hence, and although section 83G(6) of the VAT Act permits me to give permission to extend the 30 day time limit set out in section 83G(1) of the VAT Act, I decline to do so, for the reasons set out above.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

37. 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. An application for permission to appeal 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.

Dr Christopher McNall

TRIBUNAL JUDGE

RELEASE DATE: 14 SEPTEMBER 2021