[2012] UKFTT 206 (TC)

# TC01901

**Appeal number TC/2011/06195**

***VAT - Extension of time to appeal – VAT treatment of gaming machines - 57 months out of time – taxpayer misunderstood HMRC guidance - CPR tests considered – need for legal certainty - no extenuating circumstances present – not in interests of justice to allow time extension - application refused - appeal stuck out.***

**FIRST-TIER TRIBUNAL**
**TAX**

**South Devon Inns Ltd** **Appellant**

**- and -**

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

**TRIBUNAL: Ms Rachel M Short (Judge)**
**Mr William Haarer**

**Sitting in public on 5 January 2012 at The Tribunal Service, Keble House, Southernhay Gardens, Exeter, Devon**

**Mr Mark Eastman and Mr R Staunton of Francis Clark for the Appellant**

**Mr M Priest, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. This concerns an application by HMRC of 25 August 2011 to strike out an appeal made by the Taxpayer, South Devon Inns Ltd on 5 August 2011 as out of time and opposing a request for an extension of time for the Taxpayer to serve its notice of appeal under s 83(g) Value Added Tax Act 1994 ("VATA").

2. Directions were given on 19 August 2011 that this case be stood over pending the European Court of Justice ("ECJ") decision in the *Rank Group Plc* cases C-259/10 & C-260/10. That decision was handed down by the ECJ on 10 November 2011.

3. For the reasons set out below, the Tribunal has concluded that the Taxpayer's application for an extension of time under Rule 20(4) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("Tribunal Rules") should be refused and that therefore the Tribunal has no jurisdiction to consider the appeal which should be struck out under rules 8(2) of the Tribunal Rules. The following Directions are made:

DIRECTIONS

4. The Taxpayer's application for an extension of time to appeal against HMRC's decision of 15 November 2006 is REFUSED.

5. The Taxpayer's appeal is STRUCK OUT pursuant to rule 8(2) (a) of the Tribunal Rules, because the Taxpayer's appeal was made out of time and there is therefore no appeal in respect of which the Tribunal has jurisdiction.

DECISION

**Agreed Facts**

6. The Taxpayer made a "voluntary disclosure" to HMRC in respect of VAT paid relating to gaming machines in its public houses in 12 May 2006.

7. HRMC responded to this voluntary disclosure by a letter of 15 November 2006, rejecting the disclosure, referring to the recent *Finanzamt Gladbeck v Linneweber* case (C-435/02) and their Business Brief of 20/06 concerning the VAT treatment of gaming machines.

8. This letter included a clear statement of the Taxpayer's right to request a "reconsideration" and right to appeal to the Tribunal.

9. No action was taken by the Taxpayer or their advisors (TAB) in respect of this letter until 15 June 2011, when TAB wrote to HMRC asking to "finalise this claim".

10. HMRC responded on 29 June 2011 pointing out that this VAT claim had been rejected by their letter of 15 November 2006 and that no appeal had been received against the decision in that letter.

11. The Taxpayer then made an appeal to this Tribunal on 5 August 2011 requesting a late appeal. That appeal purported to be against HMRC's decision of 29 June 2011, but both parties accepted that this was due to an administrative error on HMRC's part in their letter of 2 August 2011 and that the correct reference should be to HMRC's decision of 15 November 2006.

**Arguments**

12. Mr Priest for HMRC argued that the Taxpayer was obliged to make an appeal within 30 days of the relevant decision, being 30 days from 15 November 2006 in accordance with VATA 1994 s 83G(1)(a)(i).

13. The Taxpayer had not made his appeal until 5 August 2011, 57 months after the original decision.

14. The late appeal could not be admitted unless it was allowed by the Tribunal under Tribunal Rule 20(4) by reference to Rule 2 of the Rules.

15. In HMRC's view the Taxpayer had not advanced any appropriate grounds for allowing a late appeal, their only statement in their written submission being that "*at the time it was felt that the matter would be closed … subsequently, of course, circumstances have changed.*". (Letter from TAB to HMRC on 5 July 2011.)

16. HMRC points out that the onus of proof is on the Taxpayer to demonstrate grounds for allowing an extension of time for making the appeal. (This is on the basis of the decision in *Black Pearl Entertainments Limited [2011] UKFTT 368 TC*.)

17. HMRC referred to a number of recent Tribunal decisions which have considered the grounds on which appeal time limits might be extended, including *North Wiltshire District Council [2010 UK FTT 449]* and *Pen Associates Europe Ltd [2011] UK FTT 554 (TC)*.

18. From these decisions they concluded that in applying Tribunal Rule 2, the CPR tests at 3.9 are relevant and that the Tribunal is obliged to balance the loss to the Taxpayer if the appeal is blocked against the public interest, the need for legal certainty, and any potential prejudice to HMRC in reopening this case.

19. Referring to the CPR tests, HMRC consider that in this case the decision not to appeal was intentional, because the Taxpayer believed that the case was closed. There had been an inordinate delay on the part of the Taxpayer for no good reason.

20. HMRC would be prejudiced if the appeal was allowed at this stage given the lapse of time but mainly because it would allow the Taxpayer to side step the specific time limits which we laid down in the VAT legislation for claims of this kind. (Including the four year cap derived from the *Fleming* litigation.)

21. The Taxpayer's response was that in not allowing this time extension HMRC was putting the Taxpayer in a position where he was subject to an incorrect application of the law by HMRC. Moreover, the language used in HMRC's decision letter of

November 2006 would have suggested to a lay person that the matter was closed and no further action could be taken.

22. On behalf of the Taxpayer Mr Staunton dealt with each of the relevant provision's of the CPR in turn:

23. We set out the provisions of 3.9, so far as they were considered relevant:

(1) 3.9 (a) T*he interest of the administration of justice* - Fiscal neutrality will be served by allowing the appeal.

(2) 3.9 (b) *Prompt application for relief* – The Taxpayer accepts that his application was not made promptly.

(3) 3.9 (c) *Intentional failure to comply* – Counter to HMRC's position, the Taxpayer says that there was no intention to appeal but this was as a result of a false understanding of the likelihood of an appeal to succeed and to this extent the failure was un unintentional.

(4) 3.9 (d) *A good explanation for the failure* – The Taxpayer refers to the "Byzantine" course of the litigation in respect of VAT on gaming machines and HMRC's approach to the legislation as a good explanation for their failure to appeal on time.

(5) 3.9 (e) *Compliance with other rules and directions* – The Taxpayer claims to have complied with all other directions and has a good tax compliance history (HMRC declined to comment on this latter point).

(6) 3.9 (f) *Failure caused by legal representative* – The Taxpayer points to the fact that he had no specialist VAT advice at the time and was relying on his advisers, TBM, who also believed that the matter was closed. In essence the Taxpayer is suggesting that the failure was caused by a lack of legal representation.

(7) 3.9 (g) *The trial date could still be met*.

(8) 3.9 (h) *Impact of failure to comply on both parties* – The Taxpayer estimated that he had suffered an additional estimated VAT cost of a maximum of £30,000 (although this was not quantified in any detail before the Tribunal), if HMRC does note re-pay this, they will have been unjustly enriched.

(9) Secondly, any legal uncertainty has been caused by HMRC's failure to adopt decisions of the UK and EU courts in respect of VAT on gaming machines.

(10) 3.9 (i) *Effect of granting relief* – The taxpayer claimed that if the relief was granted it would be put to the same position as other claimants and no unfair advantage would be achieved. Indeed both HMRC and the Taxpayer would be in the same position as if HMRC had applied the law correctly in the first place.

24. The Taxpayer stressed that the UK and EU courts have consistently decided that HMRC's approach to the VAT treatment of gaming machines is incorrect and that it would be inequitable to leave the Taxpayer in a position where it is acknowledged that he has been wrongly taxed only as a result of his appeal being made out of time.

25. The Taxpayer referred to the *North Wiltshire Authority case* and also *Advanced Medical Solutions Group plc (VTD 19925)*, both decisions in which late appeals had been allowed in respect of VAT claims.

26. Mr Eastman's evidence about the decisions which were made in 2006 was that both he and TAB believed as a result of HMRC's November 2006 letter that the case was closed. Neither he nor TAB were VAT experts and would not have seen the later Business Briefs published by HMRC setting out their changing position concerning these VAT reclaims.

27. It was only when he picked up from the "trade press" that there had been changes in this area that he suggested to TAB that further action should be taken.

## CONCLUSION

28. In essence the Taxpayer is seeking a 57 month time extension for the making of an appeal on the basis that the Taxpayer and his advisers did not properly understand the implications of HMRC's rejection of the claim in November 2006 and that this has left them suffering VAT which, according to subsequent decisions of the UK and EU courts, should not properly have been charged.

29. Should the Tribunal's discretion under Rule 2(1) of the Tribunal Rules "to deal with cases fairly and justly" be applied in the Taxpayer's favour in these circumstances? We have concluded that it should not.

30. Dealing with the relevance of the CPR as an initial point, we are following the reasoning in the *Wiltshire Council* case, that while we are not bound to consider these rules, they can form part of the balancing exercise which is required under Rule 2. We have therefore taken account of the Taxpayers' detailed responses to the CPR criteria.

31. Considering each of these criteria, we have concluded that while the "Byzantine" nature of the interpretation of VAT law in this area might have weighed in the Taxpayer's favour, the length of time which he has taken to appeal and his failure to obtain specific VAT advice militate against his position and suggest that his failure to comply was "intentional".

32. Equally, as set out in more detail below, the effect of granting the relief would put HMRC in the disadvantageous position of being unable to determine with certainty the tax position of this, or other taxpayers in the same situation.

33. In the terms of the CPR, we have concluded that overall that it is not in the interest of the administration of justice to grant this extension to the time limit for making an appeal.

34. We have considered the authorities referred to, in particular the detailed analysis in the *Wiltshire Council* decision, but have concluded that there are a number of distinguishing features in that case, particularly the misleading correspondence from

HMRC which the judge considered an important mitigant in the taxpayer's failure in that case.

35. There is no suggestion here, aside from the error in HMRC's 2 August 2011 letter, (referred to at 11 above) that HMRC has done anything to mislead or confuse the Taxpayer and thereby contributed to the Taxpayer's failure to make an appeal in time.

36. In this regard we do not consider that the Taxpayer's claim to not be a VAT expert and to have misunderstood HMRC's November 2006 letter weighs in the Taxpayer's favour: given the amount of VAT outstanding it would not be unreasonable to expect the Taxpayer to have obtained some technical VAT advice beyond that available from TAB.

37. The remaining question therefore is whether, taking account of subsequent court decisions, there is some overriding principle of justice which we should apply here to prevent the Taxpayer from being "wrongly" taxed. We do not think we can call on any such principle.

38. As has been made clear in a number of authorities in the higher courts, procedures and time limits are there not simply to act as a way of reducing the number of potential claimants, but also to provide certainty to claimants and defendants alike. Were we to allow this appeal we would be suggesting that any taxpayer who, for any past period, has suffered a disadvantageous tax treatment compared with current law, would be able to make a claim against HMRC and override any specific time limits for making appeals.

39. Behind the Taxpayer's argument is an implicit assumption that there is always a correct or incorrect way of applying the law. We do not see the application of tax, or indeed any other legislation, in such black and white terms. The understanding and application of the law is subject to evolution and change over time and one of the reasons for imposing time limits on claims is in recognition of this fact.

40. To this extent we refer to the statements of Lord Wool C J in *Taylor vs. Lawrence* [2002] EWCA Civ 90, which was referred to in the *Wiltshire* decision;

> "*There are cases where the certainty of justice prevails over the possibility of truth….. For a policy of closure to be compatible with justice, it must be attended with safeguards…..so the law exceptionally allows appeals out of time….. But these are exceptions to a general rule of high importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved"*

41. We do not consider that such extreme circumstances exist in this case and we are mindful of potentially opening the floodgates in respect of out of time appeals.

42. In this respect we also note that unlike in the *Wiltshire Council* case, HMRC does not, as far as we are aware, have any other open periods in respect of the Taxpayer

and therefore there is some force in the argument that HMRC wishes to "close its books" on this matter.

43. Finally, in considering the merits of the Taxpayer's case we have taken account of the very lengthy period of delay: much greater than in any of the other cases which were cited before us.

44. Mr Eastman referred before us to his difficulty in remembering the details of the decisions made in 2006, underlining that there are real practical as well as principle issues with allowing an appeal after such an extended period of time.

45. For these reasons we do not consider that it would be in the interest of justice to allow an extension to the time limits for the making of this appeal.

46. We would note that the Taxpayer was not able to provide anything other than an estimate of the VAT overpaid to substantiate the strength of any potential claim should this appeal have been allowed to proceed. In particular the Taxpayer did not provide specific detail of the VAT periods to which the appeal related. For this reason we have not considered the relative strength or otherwise of the Taxpayer's potential case, in coming to this decision.

47. 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.

**RACHEL M SHORT**

**TRIBUNAL JUDGE**
**RELEASE DATE: 14 February 2012**