Neutral Citation: [2023] UKFTT 714 (TC)

Case Number: TC 08904

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/12179

VAT – whether appealable decision – whether late appeal and if so whether the appeal should be permitted – whether an abuse of process

Heard on: 2 May 2023
Judgment date: 14 August 2023

Before

TRIBUNAL JUDGE HOWARD WATKINSON
DEREK ROBERTSON

Between

LITTLE LEVER WORKING MENS CLUB

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr. Jacky Buchsbaum of Wilds Ltd

For the Respondents: Ms. Harry Jones, of HMRC Solicitors Office and Legal Services

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video. The documents to which we were referred were a bundle of documents running to 124 pps., HMRC's Notice of Objection of 5 pps., a skeleton argument from each party, and further submissions from the Appellant dated 3.5.23, 24.5.23 and 30.6.23, and from HMRC dated 26.6.23.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. This appeal concerns an assessment to VAT notified to the Appellant on 17.11.11 under s.80(4A) of the Value Added Tax Act 1994 ("VATA") in the sum of £17,572 which arises out of the *Rank Litigation* in relation to gaming machines.

4. In *York Burton Lane Club and Institute Ltd v HMRC* [2022] UKFTT 406 (TC) Judge Baldwin set out the essential history of the *Rank Litigation*, which we gratefully adopt.

> *"The "Rank Litigation"*
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> *5. The procedural history of the Rank claims has been long and tortuous, involving decisions of the VAT and Duties Tribunal, the High Court, the First-Tier Tribunal, the Upper Tribunal, the Supreme Court and the Court of Justice of the EU. Inevitably, at different points in this saga different parties appeared to be in the ascendant, and HMRC's approach to dealing with the many consequential claims for repayment of VAT they received from traders changed with their perception of where the advantage lay at any particular time.*
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> *6. In February 2005 the Court of Justice of the EU gave its judgment in Cases C-453/02 and C-462/02 Finanzamt Gladbeck v Linneweber and Finanzamt Herne-West v Akritidis ('Linneweber'). Linneweber considered the European principle of fiscal neutrality as it applied to VAT, specifically looking at the different tax treatment that had been applied to identical gaming machines in Germany. In response to Linneweber, HMRC issued Business Brief 23/05, where they noted that that "There have also been suggestions that, because certain machines now in use [in the UK] fall outside the definition of a taxable gaming machine, UK law breaches the European Community principle of fiscal neutrality." HMRC rejected that view.*
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> *7. The following year HMRC issued Business Brief 20/06 in which they indicated that they were aware that, following Linneweber, many businesses operating gaming machines had claimed that they had over-declared VAT on takings from their machines in the period prior to 6 December 2005 (when the definition of a gaming machine was amended). They repeated their view that UK VAT law did not breach EU law, but went on to comment:*
>
> > *"If you nevertheless consider that your gaming machine takings have been treated differently from the takings of other identical or substantially similar machines, and that you are entitled to a refund of VAT, HMRC will consider your claim.*

However, as HMRC do not accept that the tax treatment of gaming machines was contrary to EC law, claims will only be considered if they are supported by evidence that:

•your machines are identical or substantially the same as those that you are comparing them with:

•these machines are treated differently for VAT purposes; and

•this has caused distortion of competition for your business.

Claims received without this evidence will be rejected. Businesses that have adjusted their VAT returns because of the Linneweber decision should reconsider these adjustments as they will be scrutinised and assessments made where necessary with interest and penalties added as appropriate."

8. Battle was joined on the EU law issue between HMRC and Rank Group. Following HMRC's defeat in the High Court in HMRC v Rank Group, [2009] EWHC (Ch) 1244, they issued Revenue and Customs Brief 11/10 ("Brief 11/10"), which advised that HMRC would pay any valid claims submitted by businesses in respect of the net amount of VAT paid on gaming machine takings during the period to 6 December 2005. The brief also made clear that protective assessments would be issued under section 80 (4A) VATA to allow HMRC to recover these amounts if they were successful at a later stage in the litigation. Claims were paid on this basis starting in 2010 and 2011.

9. In 2014 HMRC won their appeal in the Court of Appeal against their High Court loss that led to Brief 11/10 and they were also successful in a different strand of litigation relating to fixed odds betting terminals. As a result there were at that point no adverse decisions against HMRC in respect of VAT on takings from gaming machines fixed odds betting terminals in the period to 6 December 2005. Following on from this, HMRC issued Revenue and Customs Brief 1/2014, in which they indicated that they would be recovering the amounts previously paid out, as they had said they would in Brief 11/10.

10. In 2016 HMRC tried to have appeals against their decisions on original claims submitted by taxpayers who had not appealed their protective assessment (which accompanied the repayments referred to in [8]) struck out. …. The issue was considered by the First-Tier Tribunal (Judge Sinfield), which (in 2017) released its decision in three cases heard together, Ashington & Ellington Social Club and Institute Limited v HMRC (TC/2016/03259), Ashstead Village Club v HMRC (LON/2007/0052) and Darfield Road Working Men's Club and Institute Limited v HMRC (MAN/2006/0874). Ashstead and Darfield had appealed against HMRC's rejection in 2006 of their original claims for repayment of VAT overpaid on gaming machine takings. Subsequently in 2010/11 HMRC repaid the VAT claimed and issued protective assessments. Ashington had made a similar repayment claim in 2006 but it had not been formally refused, and no appeal had been lodged against any HMRC decision. HMRC had repaid VAT to it in 2013 and issued a protective assessment. None of the three had appealed in time against the protective assessment raised on them, and so these cases concerned applications by all three clubs under section 83G (6) VATA to bring appeals out of time in relation to their protective

assessments as well as HMRC's application to strike out the appeals by Ashtead and Barfield against HMRC's decision on their original claims. The FTT did not grant Ashington permission to make a late appeal against its protective assessment, but it refused HMRC's application to strike out the appeals of Darfield and Ashington and allowed them to amend their earlier appeals to include an appeal against their protective assessment.

11. On 15 April 2020, the Upper Tribunal released its decision on the appeals by HMRC in the Rank and fixed odds betting terminals cases. In both cases, the taxpayer argued that UK legalisation breached the principle of fiscal neutrality because taxed supplies were sufficiently similar to exempt supplies. The Upper Tribunal rejected HMRC's appeals.

12. On 26 June 2020 HMRC issued Revenue and Customs Brief 5/2020 ("Brief 5/2020") in which they flew the white flag, accepting that "[t]his decision brings an end to these 2 strands of the gaming machines litigation" and indicated that they would now pay claims by taxpayers "with appeals claiming that HMRC treating their gaming machine income as standard rated is a breach of fiscal neutrality, where the appeals are currently stood behind" either of these cases. It was, of course, too late by then to make a fresh claim, because of the "four year cap" in section 80 (4) VATA. HMRC described the claims they were prepared to settle as follows:

> *"You will only be paid if your claim is properly evidenced.*
>
> *Claims will not be considered unless they:*
>
> - *have already been made within the relevant deadline*
> - *are appealed within the appeal deadline*
>
> *You cannot make new claims at this stage."*

13. Brief 5/2020 makes it clear that HMRC will only settle claims which can be pursued against them. Payments will not be made to those who have not made a claim or who have not appealed in time against a refusal of their claim. This is the position the Appellants find themselves in. Their original claims were settled with protective assessments being issued when the payments were made by HMRC. In 2014 they repaid the money HMRC had paid them. Now they wish to claim that money back following HMRC's declaration of surrender in Brief 5/2020, but find themselves unable to do so because they did not appeal the protective assessments made on them when their original claims were settled. They are now out of time to appeal against those protective assessments, unless they are granted permission to appeal late, and that is what this application is concerned with."

5. The material chronology of this case is set out below.

6. On 27.7.06 the Appellant made a claim for overpaid output VAT based on the *Rank Litigation*. On 17.11.11 HMRC notified the Appellant that £17,572 had been credited to its account in line with the High Court's judgment in *HMRC v The Rank Group* [2009] EWHC (Ch) 1244. In the same letter HMRC notified the Appellant that it had appealed that judgment to the Court of Appeal and that HMRC had raised an assessment in the sum of £17,572 under

s.80(4) VATA in relation to the tax to be considered by the Court of Appeal. The letter stated that if the Court of Appeal overturned the earlier decisions HMRC would expect the Appellant to pay the sum charged by the assessment, plus interest. The letter noted that HMRC would not take any action to collect the tax charged by the assessment until judgment had been provided. The letter provided review and appeal rights in relation to the assessment. The Appellant neither requested a review, nor made an appeal to the Tribunal against the assessment.

7. On 26.3.14 HMRC wrote to the Appellant stating that it required the assessed sum to be paid with interest, totalling £18,625.18.

8. In a letter of 5.9.14 to the Appellant HMRC recorded that the sum had been received on 4.6.14.

9. On 26.10.20 Mr. Cotterill of the Appellant wrote to HMRC asking it to accept a claim for VAT repayment following the Upper Tribunal's decision in *Rank Group* UT/2018/0149. On 11.11.20 HMRC replied stating that that they were unable to identify a valid appeal against the protective assessment raised in relation to the claim. In further correspondence of 1.7.21 HMRC repeated that there was no live appeal in relation to the protective assessment.

10. On 15.7.21 Mr. Buchsbaum, on behalf of the Appellant, wrote to HMRC essentially asserting that the Appellant was due a refund on the basis that there was no mechanism for raising a protective assessment under s.80(4A) VATA and the November 2011 assessment was therefore invalid, and that because HMRC had accepted that the original return wrongly overstated the output VAT the second limb of s.80(4A) VATA was no longer satisfied and the assessment was invalid for that reason also. HMRC responded on 10.3.22, disagreeing with Mr. Buchsbaum's assertion, again noting that the Appellant had not appealed against the November 2011 assessment, because the Appellant had deemed it "pointless and a waste of time" to appeal, and stating that HMRC could therefore not confirm that they would make any refund to the Appellant.

11. On 1.4.22 Mr. Buchsbaum replied, asserting amongst other things that the Appellant's claim was "…one long case and is not affected by interim procedural matters", and that by deferring enforcement of it, HMRC had effectively "…self-appealed the assessment, and therefore there was no need or purpose for us to appeal to the Tribunal." HMRC replied on 5.7.22 disagreeing with Mr. Buchsbaum, iterating their position that there was no valid appeal against the assessment, and stating their belief that in order to make claim the Appellant would have to make a late appeal to the Tribunal.

12. On 4.8.22 a Notice of Appeal was filed on the Appellant's behalf. Attached to the Notice of Appeal as the decision being appealed was Mr. Buchsbaum's correspondence with HMRC, and their replies, but not any copy of the November 2011 assessment. The Notice of Appeal stated that the Appellant was not sure whether the appeal was made in time. HMRC treated the Notice of Appeal as an application to make a late appeal and notified an objection to it.

13. In the Tribunal's view the following issues arise for resolution by the Tribunal:

(1) What decision of HMRC is the Appellant seeking to appeal?

(2) Was the decision of HMRC that the Appellant seeks to appeal an appealable decision?

(3) Is the appeal out of time?

(4) If so should permission be given for a late appeal?

(5) Would it be an abuse of the Tribunal's process to permit the Appellant to bring an appeal?

WHAT DECISION OF HMRC IS THE APPELLANT SEEKING TO APPEAL?

14. Mr. Buchsbaum argued that this was not a late appeal, but an appeal for HMRC to pay it the Appellant money. He claimed that the November 2011 assessment was not an assessment, merely a notice of intention, that HMRC's letter of 5.7.22 was an appealable decision, and that the appeal was against the decision not to grant the claim for repayment. Mr. Buchsbaum said that what was required was an automatic refund, albeit he accepted that there was no statutory basis for this assertion.

15. The Appellant therefore asserts that it appeals against a decision made by HMRC in the 5.7.22 letter not to grant the claim for repayment.

WAS THE DECISION OF HMRC THAT THE APPELLANT SEEKS TO APPEAL AN APPEALABLE DECISION?

16. Appealable decisions in respect of VAT are listed within s.83 VATA. Under s.83(t) VATA an appeal lies to the Tribunal with respect to a claim for the crediting or repayment of an amount under section 80, an assessment under subsection (4A) of that section or the amount of such an assessment.

17. The Appellant's difficulty is that its claim for the crediting or repayment of an amount under s.80 VATA had already been decided, in in its favour, by HMRC's letter of 17.11.11. Thereafter there was no claim for an amount under s.80 VATA, rather HMRC made a protective assessment in the event that it was successful on appeal, that the Appellant failed to appeal against. The Appellant's appeal is therefore not with respect to a claim for the crediting or repayment of an amount under section 80, and if it is not in respect of another appealable decision then the Tribunal does not have the jurisdiction to entertain it.

18. Further, the Tribunal does not accept that the correspondence of 5.7.22 was an appealable decision. Whilst no single factor is determinative of the issue, the Tribunal notes that: the letter did not state any appeal rights, the letter did not actually decide any refund, and the letter specifically stated that the only matter capable of review and appeal was the November 2011 assessment. Read objectively we conclude that the correspondence did not contain any appealable decision.

19. Therefore under r.8(2)(a) of the FTT Rules we strike out this appeal, in so far as it asserts that it is against any decision other than the November 2011 assessment, as we do not have the jurisdiction to hear it because it is not against an appealable decision.

IS THE APPEAL OUT OF TIME?

20. We now move on to assume that, contrary to Mr. Buchsbaum's submissions, the Appellant in fact appeals against HMRC's November 2011 assessment. An appeal against that assessment was due within 30 days of the assessment being notified. Any appeal against that assessment is some 11 years out of time. In the circumstances the precise length of time makes no difference to our decision.

IF SO SHOULD PERMISSION BE GIVEN FOR A LATE APPEAL?

21. We are required to follow the approach in In *William Martland v HMRC* [2018] UKUT 178 (TCC) ("***Martland***") at [44]—[46], where the Upper Tribunal said that:

> (1) In considering applications for permission to appeal out of time, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be;
>
> (2) The FTT can usefully follow the three-stage process in *Denton*;

(3) At the third stage, the balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. The FTT's role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist; and

(4) In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal.

22. In *Denton v TH White Ltd (and related appeals)* [2014] EWCA Civ 906 the Court of Appeal had set out a three-stage test for relief from sanction applications at [25] – [31]:

(1) The first stage is to identify and assess the seriousness or significance of the failure to comply with any rule, practice direction or order. If the breach is not serious or significant then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the Tribunal decides that the breach is serious or significant, then the second and third stages assume greater importance;

(2) At the second stage the Tribunal should consider why the failure or default occurred;

(3) At the third stage the Tribunal should consider "all the circumstances of the case, so as to enable it to deal justly with the application".

23. As to stage 1 – the appeal being some 11 years late is serious and significant in the context of a 30-day statutory time limit.

24. As to stage 2 – Mr. Buchsbaum said that the Appellant's interpretation was that it was "on the coat-tails" of the *Rank* litigation, they were "piggy-backing" and that it was deemed "pointless and a waste of time" to appeal the November 2011 assessment. Mr. Buchsbaum accepted that the Appellant was never formally joined with the *Rank Litigation*. We find therefore that the Appellant took a deliberate decision not to appeal the November 2011 assessment. We find that there was no good reason not to appeal that assessment: it provided appeal rights for the very purpose of enabling the Appellant to protect its position as HMRC had protected its own position in making the assessment. Further, having been told on 1.7.21of the need for there to be a live appeal, it was more than a year later that the appeal to this Tribunal was made. Thus, even if there had been a good reason for the lateness of the appeal prior to 1.7.21 the Tribunal finds that there was no good reason for the additional serious and significant delay of more than a year after that date.

25. As to stage 3 – without descending into Mr. Buchsbaum's technical arguments on the nature of protective assessments which we do not need to resolve for the purpose of this stage of the proceedings, we record that on the merits Ms. Harry for HMRC accepted that the Appellant has a strong case. We go further. As we understand it the merits of the underlying case are all on the Appellant's side because the VAT recovered by the protective assessment was, ultimately, never due from it.

26. At stage 3 we are also bound to give particular weight for the need for time limits to be observed.

27. Taking into account all the circumstances we do not think it just to permit a late appeal against the November 2011 assessment. This appeal is very late, without any good reason, and even when HMRC pointed out the need for a live appeal against the November 2011

assessment the Appellant did nothing to make such an appeal for more than a year. The obvious merits of the Appellant's case are, in our view, outweighed by these factors and the need to give particular weight to the need for time limits to be observed. In so far as this appeal is against the November 2011 assessment (albeit it is stated not to be), we refuse permission for it to be made late.

28. In the light of our decisions on jurisdiction and the late appeal we do not propose to answer the question, initially proposed by the Tribunal itself, as to whether permitting an appeal against the 5.7.22 correspondence would be an abuse of the Tribunal's process.

DECISION

29. For the above reasons the appeal against the correspondence of 5.7.22 is struck out for lack of jurisdiction, and the application to make a late appeal is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

30. 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.

HOWARD WATKINSON
TRIBUNAL JUDGE

Release date: 14 August 2023