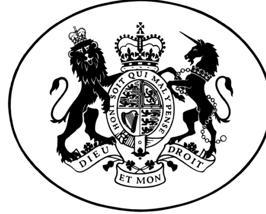
[2012] UKFTT 645 (TC)



TC02312

Appeal number: TC/2011/02822

TYPE OF TAX – VAT – Application under Rule 20 The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (2009 SI 273) for an extension of 4 years and 2 months of time to appeal. Application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Xs & Os PAISLEY CROSS LTD	**Appellants**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE GRETTA PRITCHARD, BL, MBA, WS

Sitting in public at George House, 126 George Street, Edinburgh on Tuesday 4 September 2012

Nigel Gibbon for the Appellant

Kim Tilling, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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Decision

Introduction

1. Xs and Os Paisley Cross Ltd is a limited company operating a gaming machine amusement centre at 4 St Mirren Street, Paisley. Its directors are John and Elaine Graham, who similarly trade as a partnership in Xs and Os Amusements at a separate location. They have two requests for an extension of time for lodging an appeal under para 4(a) of Rule 20 The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (for ease of understanding and in conformity with other case law these requests are referred to as applications) before the Tribunal; and two separate decisions are issued.

2. There are two other separate similar applications by separate parties, namely Bathgate Leisure Limited and Kirkern Limited in respect of which two other separate decisions are issued.

3. All of the applications made are for the extension of time for admission of notice of appeals not lodged in time in respect of appeals against refusals by HMRC for repayment of VAT in respect of gaming machine income.

4. HMRC objected to this application by way of an application for strike out.

5. The evidence for all four cases was taken together at the request of all parties. No oral evidence was given by the persons or by the directors of the bodies making the applications.

6. Because at the submission stage the arguments became clouded by more recent case law relating to the potential outcome on the merits of any appeal the Tribunal requested written submissions. These were made with a request from HMRC that in the event of considering refusal on the paper submissions a further opportunity should be given for oral submissions.

7. The judge quite independently had some queries relating to the submissions and without taking account of the suggestion by HMRC wished to have further information.

8. As will be seen from the later findings in fact the potential for success on the merits of both the application and the potential appeal appeared to the Appellants' agent Mr Gibbon to have strengthened in the period between the first hearing and the final hearing on submissions, which was correct.

9. As will be seen again from the findings in fact and the reasons the Tribunal may consider many factors in the exercise of its discretion and the advantage seen by the Appellants to be gained from the delay cannot be given so much weight as the Appellants may have wished.

10. The Appellants have made a valiant attempt to come in to the potential claim it may have had, but unfortunately made no attempt to overcome the original rejection letter dated 19 January 2007, which advised that an appeal was available and should be lodged within 30 days of the date of that letter. From all the Tribunal has considered it has come to the conclusion this application cannot be granted.

The hearings

11. There were three hearings. The first was on 13 October 2011, the second on 16 April 2012 which did not proceed due to the Appellants representative taking ill, and the third on 4 September 2012. At the first hearing there was written evidence consisting of Bundles 1 and 2 described below. There was oral evidence from Mr John O'Hara, Chartered Accountant of O'Hara's Chartered Accountants, the Appellants accountant. No oral evidence was given by the Appellants. The Tribunal requested written submissions for some clarification of the position of both parties particularly with regard to the delay, given the very long delay in this matter. Submissions were made and found in Bundles 3 — 7 (relating to all four cases of which only those described below as relevant relate to this application).

12. However the second hearing did not proceed. At the third hearing both parties made further unsolicited submissions (Bundles 8 and 9).

13. The Appellants final Bundle 9 contained fresh evidence which the Appellants sought to have admitted and to which HMRC objected and which is dealt with below. These further submissions were made as the law on the merits had moved on in the interim and the Appellants in particular wished account to be taken of the merits of the potential appeal and HMRC's attitude to other claims. They also appeared to attempt to strengthen their reasons for lateness by lodging a written statement by one of the Appellants and anonymised correspondence to overcome what appeared to the Tribunal to be a perceived lack of substance in the available evidence. Again this is dealt with later.

14. The Bundles relate to four cases altogether which were heard together but in respect of which it was requested four decisions be issued. For ease of reference the bundles are identified as follows:-

> Bundle 1 — Appellants' documents. These relate also to three other applications not conjoined with this case but all with the same purpose on the same topic which have material in Bundle 1, Parts 1-5. Only Part 1 and Part 5 relate to this decision.
>
> Bundle 2 — HMRC's documents in numbered sections 1-16.
>
> Bundle 3 — The Appellants first written submissions prior to the ECJ decision in *Rank Group plc v HMRC* LON/2006/0875 issued on 20 November 2011 (more fully explained later).
>
> Bundle 4 — HMRC Skeleton Argument for John and Elaine Graham t/a Xs and Os Amusements.

Bundle 5 — HMRC's Skeleton Arguments for this application.

Bundle 6 & 7 — HMRC's Skeleton Argument for the other two separate cases.

Bundle 8 — HMRC's unsolicited final submissions.

Bundle 9 — Appellant's further unsolicited evidence and final submissions.

5 Bundle 10 — Further cases referred to on the final day of the hearings.

Where reference is made to any page or section of any Bundle it should be treated as repeated here.

Preliminary matters/adjournments

15. At the outset of the third hearing intended to be on the submissions (Bundles 8
10 & 9) lodged prior to the hearing Ms Tilling for HMRC objected to the fresh written evidence lodged by the Appellants (Bundle 9 Annex C).

First Decision: Bundle 9 Annex C consisted of two anonymised letters from HMRC both dated 30 March 2007 and which the Tribunal was advised were addressed to representatives of unidentified taxpayers who made claims in respect of refunds of
15 VAT paid on gaming machine income following the case of *Finanzampt Gladbeck v Linneweber* (C-453/02) (*Linneweber)* in ECJ, and during the early stage of what are now referred to as the *Rank* cases. Both of the taxpayers had had letters of rejection but had subsequently requested reconsideration. As a result they were offered the proposition that their reconsideration be held over till the result of *Rank plc v HMRC*
20 LON/06/0875) (*Rank)* was known. The Appellants sought to have the anonymised letters admitted as relevant material to show HMRC's practice in 2007.

As found below the Appellants had not asked for a review or reconsideration of HMRC's decision so the file was closed so far as HMRC was concerned. They were still following the BB 20/06 guidance, and the original refusal letter predated the
25 anonymised letters.

Second decision: At Bundle 9, Appendix D are three statements, one from each of the Appellants in the four cases referred to above. One which relates to two claims is from the Appellant John Graham who also had a claim in respect of John and Elaine Graham t/a Xs and Os Amusements. His letter advises that they believed their claims
30 were ongoing. Bundle 9 Appendix DP3 is the relevant letter in respect of this application, and makes clear he understood his "appeals" as he calls them were out of time. The correspondence is admitted. It does not however as it stands add any strength to the late admission application. The reason for this is that the operator of a gaming machine amusement centre is regulated on many fronts. Time limits apply in
35 licensing of betting and gaming operations, in business tax matters and personal tax matters. Mr Graham is an experienced business man who already had dealings with HMRC about his other amusement centre business, who had also already instructed an appeal in respect of his other claim but who took no action on this matter. Although in the letter Mr Graham claims they understood from their accountants the

claims were ongoing that appears a contradiction to the clear evidence of refusal. In addition no oral evidence was given on behalf of the Appellants by Mr Graham so as to be tested in cross examination. The attitude conveyed by the written evidence suggests unusual and careless behaviour. The Tribunal considered refusing the admission of the statement but in the spirit of the overriding objectives of tribunals considered it fairer to explain the lack of strength of the evidence.

Third Decision: Bundle 9 Appendix E contains material handed in on the morning of the hearing with a request for inclusion as evidence. It was numbered Pages 3-9, and P14 & 15. It was agreed Pages 6 and 7 were not relevant and should be excluded.

Pages 3, 4 and 5 consisted of another anonymised letter which assisted HMRC in that it gave a clear picture of refusal of reconsideration in circumstances where HMRC appear to the taxpayer to have "stood over" the decision. The correspondence referred to in that letter is not enclosed nor the date given of the change in HMRC policy referred to, so the quality is difficult to assess. What is certain is that the evidence is not relevant to this decision and is therefore rejected.

Page 9 is a letter from Mazars, Solicitors dated 19 December 2006 in response to a letter of 7 December 2006 not included in the Annex. However, it appears it was a rejection of a *Linneweber* claim. Mazars' response was that they had heard the decision may have been issued prematurely as the Commissioners of Customs & Excise "are prepared to hold over claims …. Until a decision has been reached in the case due to be taken before the VAT Tribunals in early 2007. We would be grateful if you could confirm our understanding of the facts is correct by return".

Page 8 is HMRC's reply.

HMRC replied on 11 January 2007 as follows:-

> "…
>
> HM Revenue & Customs hereby confirm the contents of the letter have been noted, and that this item of correspondence will be retained for future reference.
>
> Please be advised HM Revenue & Customs will contact you in due course with further information regarding this matter".

This letter by HMRC points to them having undertaken to contact the taxpayers agents. The Tribunal was not advised of the final outcome. However, there is no parallel here with the Appellants. The Tribunal was asked to consider that it may be relevant to HMRC's general policy on the process and might assist in assessing Mr O'Hara's evidence as to his truthfulness. The letters are admitted. Following on HMRC's submissions it became apparent HMRC only gave a delay to those parties who decided to go on in the process and did not stop at the first rejection stage. The Tribunal believed Mr O'Hara.

Page 14 is a gaming machine trade publication "Coinslot" article about refusal of settlement of VAT repayment claims which had at first asking, been rejected. It goes

on to say "This is despite the fact that taxpayers often did not appeal as they had agreed with HMRC that it was not necessary to do so in light of the *Rank* litigation. We have successfully reopened claims that have been refused on this basis ….". The article is admitted. However, this application is not made on this basis and this information is not relevant.

Page 15 is a copy of an email from the writer of the article referred to above, Mr Rob McCann, to Mr O'Hara. It explains further what Mr McCann has experienced. However, there is no case which he produced (pp 3-9) which show a claim rejected and not having later correspondence with HMRC has been re-opened. P15 is admitted but found not to add strength to the Appellant's application.

Law used or referred to in this decision

16. Value Added Tax Act 1994 (VATA 1994) S83 which permits an appeal against revenue decisions on VAT repayment claims and gives power to apply for an extension of time to lodge an appeal.

17. VAT Tax Tribunal Rules S1 1986/590 (1986 Tribunal Rules) which were in force at the time of the decision which restricts the time for lodging appeals to 30 days from the date of decision.

18. The Transfer of Tribunal Functions and Revenue and Customs Appeals Order SI 2009/56 Schedule 3, para 2, which provided that the application which is made should be dealt with under the current Rules. With regard to this application it was accepted by both parties that the application since it came before this Tribunal in 2011 would be dealt with under the now existing tribunal legislation namely, 2009 Tribunal Procedure Rules, in terms of the amendment to VATA 1994 contained in the Transfer of Tribunal Functions and Revenue and Customs Appeal Order 2009, para 216-219.

Note: As the original decision was made prior to the introduction of the above amendment there was no requirement for HMRC to carry out any review.

19. The Tribunal Procedure (First Tier Tribunal) (Tax Chamber) Rules 2009. (SI 2009/273) (2009 Tribunal Procedure Rules) which are more fully stated later for ease of understanding.

Other relevant material

20. Revenue and Customs Business Brief 20/06 (BB20/06)

21. Revenue and Customs Business Brief 40/09 (BB40/09)

22. Revenue and Customs Business Brief 11/10 (BB 11/10)

All contained in Part 1 of Bundle 1.

Cases referred to in this application

1. *Finanzampt Gladbeck v Linneweber (C-453/20) (Linneweber)*
2. *Medical House v HMRC* (2006) TC/2006/
3. *Black Pearl Entertainments Ltd v HMRC* (TC/2010/07835)
4. *Advocate General for Scotland v General Commissioners for Aberdeen City* [2005] CSOH 135
5. *Former North Wiltshire District Council (now abolished and replaced by Wiltshire Council)* [2010] UKFTT 449 (TC)
6. *Pen Associates Europe Ltd* [2011] UKFTT 554 (TC)
7. *Roger Kyffin v The Commissioners of Customs and Excise* (MAN 617/1978)
8. *Wombwell Sports & Social Club v HMRC* (TC/2010/00413)
9. *JEM Leisure v HMRC* (TC/2011/05627)
10. *Cascade Amusements v HMRC* 2012 UKFTT 259(TC)
11. *David Pledger v HMRC* [2010] UKFTT 342(TC)
12. *Matthew Richard Griffiths v HMRC* TC/2010/05212 and TC/2010/05589
13. *Corporate Support Intl (in liquidation) v HMRC* [2011] UKFTT 352(TC)

23. Following full consideration of all of the written and oral evidence and giving due consideration to the very full submissions made, the following facts are found as follows:-

Findings in Fact

24. The Appellants operate a gaming machine amusement centre at 4 St Mirren Street, Paisley. On 31 May 2006 O'Hara's Chartered Accountants submitted a voluntary disclosure on behalf of the Appellant to recover VAT expressed in the letter of claim as "overpaid". The VAT had been paid on gaming machine income under the law prevailing at the time of payment and covered the period beginning with the VAT quarter payment on 31 May 2003 – to the VAT quarter payment on 31 May 2005 in the sum of £27,223 with further claims intimated as to be submitted later.

25. The further claims were never submitted.

26. The claims were made following a decision in *Linneweber*. *Linneweber* had been referred to the ECJ which in that case decided that the same gaming machines, although in different locations, could not be treated differently for tax purposes. Previously the gaming machines had been treated differently in different locations. The ground for the decision was for ensuring fiscal neutrality.

27. In the UK, the industry newsletter (not provided as evidence) apparently provided operators with guidance on the taxation of gaming machine income which led to many claims being made. In the UK there are different types of gaming machines which are treated differently. That would be the subject of the main appeal here, if admitted.

28. In reply to the claim HMRC wrote on 19 January 2007 following further consideration of the *Linneweber* case and enclosing BB 20/06 advising that the UK had not applied different tax treatment to identical machines, and so the UK had not breached the principle of fiscal neutrality. The claim was therefore rejected. The letter contained advice about appealing to the VAT and Duties Tribunal within 30 days of the decision.

29. There was no further contact with HMRC till 6 October 2010 when Mr O'Hara wrote to HMRC in the following terms:

> *"We refer to your letter of 19 December 2007. (sic)*
>
> *As you know the latest litigation was found in favour of the Rank organisation, which has had its voluntary disclosure upheld. We therefore look forward to the receipt of our client's repayment. Documentation supporting the repayment was submitted with an original claim.*
>
> *We look forward to hearing from you"*.

30. This letter was some four years and four months after the rejection letter with no other correspondence passing. It was written despite the fact that no attempt had been made to appeal the first refusal. No review or reconsideration had been requested.

31. His reason for not proceeding was that following the *Linneweber* decision the trade association for gaming machine proprietors had advised members of a case being brought in the UK by the *Rank Group plc* which he believed would lead to repayment to his clients.

32. In response to the letter, HMRC wrote on 19 January 2007 rejecting the request explaining that claims previously rejected and not appealed would not be considered. They referred to BB 11/10. They also advised no new claims could be made. They considered the matter closed. They reserved their right to challenge the methodology of calculating the claim and also unjust enrichment.

33. The *Rank Group plc* ("Rank") overview stated by HMRC in Bundle 4 is incorporated here as follows on the understanding that it relates to the merits of the Appeal, if admitted:-

"50. In February 2005 the ECJ returned its decision on the German Linnewebber appeal, deciding that Article 13B (F) of the 6th Council Directive (EEC) 77/388 precluded national legislation which provided that the operation of all games of chance and gaming machines was exempt from VAT where it had been carried out in licensed public casinos, while the operation of the same activity by traders other than those running casinos did not enjoy the same exemption. The decision was given that a breach in fiscal neutrality had occurred in that the German tax authority had treated income from the same machine differently.

51. Prior to 6 December 2005 income from gaming machines as defined by the Value Added Tax Act 1994 Group 4 Schedule 9 was liable to the standard rate of VAT on the grounds that they were excluded from the exemption for betting and gaming which that group provided. In application the definition of "gaming machine" covered those machines where the element of chance in the play was provided by "means of the machine". As such those machines to which the definition applied were taxable for the purposes of VAT. However, income from games of chance played on machines where the result is determined by other means was VAT exempt. In addition, some machines had been developed to take advantage of section 16 of the Lotteries & Amusements Act 1976 or section 21 of the Gaming Act 1968; ie small prize gaming. As such S16/21 machines and FOBT's (sic) (Note: Fixed Odds Betting Terminal) *were respectively subject to exercise duty but were exempt for the purposes of VAT.*

52. Thereafter the UK revised its definition of "gaming machine", which came into force on 6 December 2005, so as to provide that FOBT's and section 16/21 machines came within the definition of a "gaming machine". In addition the revision brought further clarity in that it confirmed that where the element of chance is provided in the game such is irrelevant for the purposes of application of the definition.

53. The Rank (gaming machine) appeal challenges HMRC on the grounds that the UK also breached the principle of fiscal neutrality. HMRC disputes that they have applied different tax liabilities to identical gaming machines and in consequence disputes that they have breached fiscal neutrality principles."

34. Mr Gibbon updated the *Rank* position in his final submission in Bundle 9 as follows:-

"Both Rank Group appeals were heard in May 2008. The Decision in respect of mechanised cash bingo machines was released in May 2008 under reference number 20688. The decision in respect of gaming machines was released in August 2008 under reference number 20777. Rank Group plc won both cases.

HMRC appealed both decisions to the High Court of England & Wales. The appeals were heard in March 2009 and judgment was given on 8th June 2009, in each case in favour of Rank Group plc.

HMRC appealed to the Court of Appeal which referred the case to the ECJ in June 2010.

In the meantime, in December 2009, the First Teir Tribunal issued another decision in favour of Rank Group plc in relation to gaming machines. HMRC appealed to the Higher Tribunal which heard the appeal in April 2010 and referred the case to the ECJ.

The oral hearings at the ECJ in Rank Group plc took place on 30th June and the judgment was released in November 2011. The ECJ has held that there is a breach of fiscal neutrality where gaming machines (with internal random number generators) have been subject to VAT whereas other gaming machines (with external random number generators) have been exempt from VAT. In such circumstances the operators of those gaming machines with internal random number generators are entitled to a refund of the VAT which they have paid.

[It should be noted that the ECJ has not ruled that income from gaming machines with external random number generators was exempt and the case will be referred back to the Court of Appeal of England and Wales for it to decide whether or not such income was, or was not exempt. It should be noted that both the Tribunal and the High Court of England and Wales decided that such income was properly exempt so the likelihood is that the Court of Appeal will make a similar finding, in which case operators of gaming machines with internal random number generators will be entitled to refunds of overpaid VAT.]"

35. However in BB 11/10 HMRC indicated that VAT claims in respect of gaming machine income would be repaid where they were already in existence or subject to appeal on a claim. Many appeals and claims had been officially stayed by the Tribunals Service. Many claims had been held over for a decision by HMRC by agreement with the taxpayers and representatives where used. Many were held over in Tribunals. All of these were regarded as "current claims". Where claims have been repaid, recovery assessments have been issued and stayed.

36. Following the letter of 19 January 2007 from HMRC the Appellants requested on 5 April 2011 an appeal be allowed to be admitted to the Tribunal out of time. The request was made on behalf of the Appellants by Mr Gibbon.

37. Mr O'Hara's reason for recommending to his clients to proceed with requesting this is based on his understanding of HMRC's attitude to these claims. He believed from an informal chat he had had with a person he described as a VAT specialist, Mr Joe Wilkins, that all claims of whatever nature to do with gaming machines were being held over by HMRC till the *Rank* case was concluded. He had no recollection of when that call was made and no record of it.

38. Mr O'Hara kept no record of telephone calls. Mr John Graham had provided trade information but it had not been lodged with the Tribunal and no findings can be

made on that. Mr O'Hara assumed his 2006 claims had been stood over from his casual conversation with Mr Joe Wilkins, a VAT specialist. He had not sought written advice on his client's particular circumstances from the VAT specialist. He did not make any check with HMRC. He made no appeal on behalf of his client though they had clearly instructed an attempt in respect of their separate claim. He did nothing.

39. Indeed he was the only person who gave evidence since he claimed it was his assumption which gave rise to the delay. However there was no evidence from his clients till the lately lodged letter following the first hearing when the oral evidence was closed, and subsequent to the oral submissions at the conclusion of the oral evidence confirming their understanding at the dates in question. The letter declaring the Appellant's understanding was submitted very late in the day.

40. In his oral evidence Mr O'Hara claims to have attempted an appeal against the first rejection letter in this matter before Christmas that year but without any written evidence no findings are made.

41. The Appellants had received the second rejection letter dated 18 October 2010. Mr O'Hara had been made aware of HMRC's rejection letter by his clients. Mr O'Hara was aware of the requirement in respect of correspondence which was to go to the appointed representative that it required a mandate from the taxpayer. Mr O'Hara had not obtained that or passed it to HMRC. The Appellants had provided Mr O'Hara with the second rejection letter. Mr O'Hara again had a telephone conversation with Mr Joe Wilkins who recommended Mr O'Hara get in touch with Mr Gibbon which he did. This application was finally lodged on 5 April 2011 by Mr Gibbon's office.

Principles to be applied to an application for an extension of time to bring an appeal.

42. The legal foundation and the first principle for the Tribunal is the law as it stands.

43. The power to extend time for lodging an appeal is contained in Rule 20(4) of the 2009 Tribunal Procedure Rules which states:

> "(4) If the appellant provides the notice of appeal to the Tribunal later than the time required by paragraph (1) or by an extension of time allowed under rule 5(3)(a) (power to extend time)—
>
> (a) the notice of appeal must include a request for an extension of time and the reason why the notice of appeal was not provided in time; and
>
> (b) unless the Tribunal extends time for the notice of appeal under rule 5(3)(a) (power to extend time) the Tribunal must not admit the notice of apepal".

44. The decision has an element of discretion on the part of the Tribunal and must take account of Rule 2(1) of the 2009 Tribunal Procedure Rules which provides:-

"The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly".

At Rule 2(2) it goes on to state:

"Dealing fairly and justly includes—

5 (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
10 in the proceedings;"

At Rule 3 it further provides:

"(1) The Tribunal should seek, where appropriate—

(a) to bring to the attention of the parties the availability of any appropriate alternative procedure for the resolution of the dispute; and

15 (b) if the parties wish and provided that it is compatible with the overriding objective, to facilitate the use of the procedure.

(2) Part 1 of the Arbitration Act 1996(a) does not apply to proceedings before the Tribunal."

45. As a result the first consideration at Rule (2)(a) is proportionality. This issue
20 was raised by Mr Gibbon in his submission at Bundle 9 at page 6 para 23 where he relies on Judge Walters at para 20 tests set out in *JEM Leisure v HMRC* TC/2011/5627. On proportionality Judge Walters stated that the Tribunal should *"take account of all factors relevant to the proportionate exercise of our discretion .... And such factors would in principle include a consideration of the merits of the*
25 *proposed appeal so far as they can conveniently (and proportionately) be ascertained"*. The merits in this appeal, are claimed to show success by the Appellants which appears to have some substance. However the issue is still to be subject to some examination by both the Court of Appeal in *Rank* as yet to be determined and still also subject to the requirement for further information by HMRC
30 however *Rank* is determined.

46. From the legal provision by the UK government what the Tribunal must look at are the importance of the issues which include but do not consist entirely of the merits. Looking firstly at the merits the ECJ has decided that there is inequality with regard to fiscal neutrality in respect of gaming machine income in some
35 circumstances. The matter is back in the Court of Appeal and no final decision issued. The issue is still in balance. The worthiness of the merits can only take the Appellants some way.

47. The Tribunal must also look at the Appellants conduct. They had been advised of the right to appeal the first decision and of the time limit. They took no action to advance their own cause. It is relevant to this decision that that was their attitude at the time. There was a vague oral suggestion by Mr O'Hara of some consideration of appealing but no written evidence to substantiate that, so no weight can be given to it. For this reason it is disproportionate to place account of the merits at the top of the list or treat them in such a way as to exclude consideration of other issues in respect of this application. The position of HMRC in the matter of prejudice has also an aspect of proportionality.

48. Also in respect of the issue of costs that is not disproportionate as no costs are awarded in basic cases, against the Appellants. So far as the cost of this application is concerned they considered it necessary obviously to overcome their previous lack of proper care and their apparent mistaken belief which was not tested by verbal evidence. That is their decision for which they must take responsibility. The Tribunal was satisfied from the substance of the VAT repayment claims that the Appellants resources were sufficient. No claim regarding inadequacy was submitted.

49. The issue of proportionality also brings into consideration the matter of predictability and legal certainty which is the background to the balancing exercise which on the one hand has the Appellants' right to reclaim VAT as also their inattention to the procedures required to pursue their claim actively and on the other the prejudice to HMRC in terms of legal certainty and the public interest, in being unaware of the Appellants apparently mistaken belief. (See *Former North Wiltshire Council v HMRC* [2010] UKFTT 499 (Wiltshire) (Bundle 2 section 8) where the application was granted. It should be noted that that case involved several repayment claims. HMRC did not object to the application for an extension of time to the most recent appealable decision. In that case the Tribunal also adjourned the first hearing and made directions for submission of written submissions. Also in one of the claims HMRC had itself taken over two years to refuse it, so there was a long delay on their part which is not the position in this claim. There is a modest delay here but not so long as to weigh heavily in the balance.

50. In the Wiltshire application a mistaken belief had been held by the Appellants but based on a written publication from a firm of chartered accountants prepared for public use but not constituting professional advice. It was also a matter of the application that the revenue had not technically refused the claim, only restated a long time position on the matter of VAT on parking charges. In one of the letters from HMRC to the council it is not clear what HMRC have decided and certainly would have given the impression of holding out claims. A subsequent letter on a subsequent claim received a negative reply but the council had believed the cases were all held over. The Tribunal were not persuaded this case assisted the Appellants or sufficiently so as to followed here despite Mr Gibbon's submission on its persuasiveness.

51. The complexity of the issues does not arise as apparently the *Rank* decision should ultimately resolve the issue which would mean the underlying appeal hee is not a lead case.

52. The Tribunal is satisfied HMRC are entitled to have some weight given to the necessity for legal certainty.

53. Rule 2(2) was observed in all other matters and did not affect the balancing exercise principle.

5 54. Another principle for the Tribunal to consider is the effect of the English Law with regard to Civil Procedure where the Rules specify circumstances to consider when looking at the exercise of discretion in relation to a sanction imposed for failure to apply any rule, practice direction or court order.

Rule 3.9(1) of CPR

10 (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including —

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

15 (c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal
20 representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(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.

25 55. It is accepted these do not apply in Scotland. There are no formal equivalent considerations applicable in Scotland to such an exercise of discretion, though there is case law.

56. In this respect *Lord Advocate for Scotland v General Commissioners of Aberdeen City* [2006] STC 1218 (Bundle 2 Tab 7) Lord Drummond Young sets out
30 criteria for a late appeal under S49(1) of the Taxes Management Act 1970. The judicial review submission by HMRC had been that the Commissioners decision to allow this particular late application based on the statutory provision of "reasonable excuse" had been irrational and unreasonable (the English equivalent are the "Wednesbury" tests of reasonableness referred to only briefly at the hearing of this

application as having an equivalence in Scotland) and being an accepted UK wide standard in VAT appeals. Although not adopting *Wednesbury* principles here Lord Drummond Young commented on the exercise of discretion which is relevant.

57. Lord Drummond Young found from para [18], [19] and [20] of his Opinion that finality for the revenue was in issue. This arose because of S33 of the Taxes Management Act 1970 which provided for repayment in respect of an error or mistake. However it also provided under S3(2) as follows:-

> "….
>
> (2) Provided that no relief shall be given under this section in respect of an error or mistake as to the basis on which the liability of the claimant ought to have been computed at the time of the return was in fact made on the basis or in accordance with the practice generally prevailing at the time."

58. He was concerned that was in contrast to any provision which sought to enable a claimant to appeal out of time. However, he goes on at para [22] to state that:

> "*Section 49 is a provision that is designed to permit appeals out of time. As such it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired.*
>
> *The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit; and particular reasons must be shown for disregarding that time limit. The limit must be regarded as the judgement of the legislature as to the appropriate time within which proceedings must be brought in the normal case and particular reasons must be shown if a claimant or appellant is to bring proceedings, or institute an appeal beyond the period chosen by Parliament."*

He continues:-

> *"[23] Certain considerations are typically relevant …. First is there a reasonable excuse for not observing the time limit for example because the appellant was not aware … there were grounds for an appeal? If the delay was caused on the part of the Revenue … Secondly once the reason has ceased to operate have matters proceeded with expedition? Thirdly is there prejudice to one or other parts …. The public interest may give rise to a number of issues. One is the policy of finality in litigation and legal proceedings; matters have to be brought to a finality without the possibility of being re-opened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded….*

A third issue is the policy that is to be discussed in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether to allow an appeal in late; Fifthly (sic) *has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is available, and may of itself provide a reason for refusing leave to appeal late.*

[24] Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed, in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one another, for example in a case where there is a reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies."

59. This guidance from Lord Drummond Young is in the Tribunal's opinion much in line with Mr Walters' description of the balancing exercise required in the judgement of this application and also ascribes to that judgement that discretionary nature of the balancing exercise and is adopted here. Although it differs in one major respect from the CPR Rule 3.9(1) in that the matter of whether the failure to comply was intentional is not there, when looking at this application the failure to comply starts at the point where the Appellants did not request a review or reconsideration of the first decision or appeal it. That alone is an indicator of the Appellants failure to deal with their business correspondence effectively thereby commencing their personal culpability which they cannot deny when the letter was addressed personally to them. In all other respects it shows HMRC is entitled to certainty. The Appellants do not have a good reason for not following up on what had occurred despite the misdirected reassurance from their accountant. They did not display any business acumen in this matter.

60. They did not give evidence when appropriate and were not subject to cross-examination as to their conduct. They again failed in a procedural way. Although the Tribunal was offered the possibility of hearing from the Appellants there appeared to the Tribunal some prejudice to HMRC in that. The quality of the Appellants' evidence was very poor as can be determined from the previous findings.

61. Those are the matters the Tribunal has considered as having to be taken into account here in balancing the interests of the Appellants and HMRC.

Decision

62. The Appellants request to extend the time for lodging the appeal is refused. The following direction is made. The reasons for the decision are set out below.

Direction

63. The appeal is struck out pursuant to Rule 8(2) of the 2009 Tribunal Procedure Rules. This is because the Tribunal does not have jurisdiction as the appeal is out of time and leave to extend the time has not been granted and there is no other tribunal having jurisdiction.

Reasons

64. Having taken account of the facts and the principles to be considered in the exercise of the Tribunal's decision making and the exercise of its discretion, the balancing exercise must be undertaken. On the one hand there is the test of whether the Appellants had a reason for not appealing timeously. They say they understood their claim was ongoing, and they understood from their accountants it was ongoing and would be decided when the *Rank* case was ultimately decided. They also claim not to have abandoned their claim. They had made a claim. Even if their accountants had told them that was held over, it appears to the Tribunal not to be credible or the behaviour of an experienced business partnership not to have asked their accountant for some positive confirmation that a claim such as this one which had been refused.

65. The opportunity to join what is now a queue had long gone before this application was made. There was no extensive delay on HMRC's part to assist the Appellants and balance the culpability for not coming to the Tribunal timeously and effectively. The failure to comply was in the Tribunal's opinion on a balance of probability not intentional, but the failure to take steps to ensure that HMRC was holding over the claim does take away from the element of continuity claimed by the Appellants in their letter. The Tribunal is not well advised by convincing evidence that the intention existed throughout the purported period of the claim. There is from the evidence an element of wishful thinking exposed due to the claim about the informal telephone advice from Mr Wilkins. It may have been true there was a call. It may have been true Mr O'Hara was told all outstanding claims were being held over and current appeals stayed till the outcome of *Rank* was known. However, in this case the claim had been refused. It was not an open outstanding or current appeal claim. So regrettably abandonment occurred through neglect, and the explanation is not reasonable.

66. Looking at public administration, policy and proportionality and legal certainty the Tribunal must look at HMRC's position. The government needs to know its liabilities so far as they can be established. The law provides some safeguards from open ended commitment to repayment of VAT by restrictions on claims through closing backdating periods, and by restriction on appealing through time limits. The Tribunal must have regard to potential loss to HMRC in the event of appeals, as out of time as this one being admitted.

67. Ms Tilling explained that that was the reason this case was being proceeded with as it (along with the other three referred to above) were so very late that HMRC could not consent to the application. She advised that a number of applications have been made late and some had been admitted by HMRC or granted by a tribunal in respect of much shorter delays. Tribunals had allowed late appeals in a number of claims. However as could be seen from the *JEM* decision even the period of 21 months was not allowed. HMRC still consider these periods too long. On the balance of prejudice to either party it was at first appearance on a balance probably almost equal. However, the Tribunal considered the potential loss to the Appellants was just that. It was only potential. It was at the outset uncertain. The case law has advanced in the interim and made the Appellants have what they consider real hope. That however is not the Tribunal's view. Their hope is not real. Their actions have spoken louder than words. Their lack of proper attention has made their hope false. Compared with the potential prejudice to the Appellants not to get in, HMRC suffered similar prejudice in having to re-open this and potentially deal with many other applications to appeal closed claims. On balance the Tribunal considered the prejudice to HMRC to be much greater being difficult to contend with on a much wider scale than could be considered reasonable.

68. The Tribunal for all of these reasons considers the balance falls in favour of HMRC on the balancing test, in the exercise of its discretion.

69. As a result the Tribunal does not grant the application and the appeal is not admitted.

70. 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.

JUDGE GRETTA PRITCHARD, BL, MBA, WS
TRIBUNAL JUDGE

RELEASE DATE: 16 October 2012