TC03349

Appeal numbers: TC/2011/02059, TC/2012/02545 & TC/2012/02675

VAT – application for permission to appeal out of time – repayment claims following Rank litigation – claims formally rejected by HMRC but correspondence continued – whether permission should be granted – Data Select, O'Flaherty and Mitchell considered – held yes

FIRST-TIER TRIBUNAL
TAX CHAMBER

PETER ARNETT LEISURE (a firm) **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
MRS CAROLINE DE ALBUQUERQUE

Sitting in public at 45 Bedford Square, London on 27-29 November 2013

James Henderson of counsel, instructed by Deloitte LLP, for the Appellant

Michael Jones of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns an application to bring three appeals out of time.

2. The appeals relate to matters connected with what is commonly called the *Rank* litigation, that is the various appeals that have snaked their way through the UK and European courts on matters relating to exemption from VAT for certain kinds of gaming activities.

The facts

Introduction

3. We received a bundle of documents and heard oral evidence from Nick Arnett ("Mr Arnett"), a partner in the Appellant firm with responsibility for financial matters and from Martin Pierce, a certified accountant and partner in David Bailey, chartered accountants acting for the Appellant.

4. We find the following facts.

5. The Appellant firm is a partnership. At all material times it has carried on a bingo business, initially from single premises in Gosport, Hampshire, but latterly from five bingo clubs across southern England.

6. Apart from traditional bingo (known in the industry as "mainstage bingo" or "main participation bingo") ("MSB"), the Appellant conducts a number of related activities in its clubs. The two relevant ones for the purpose of this appeal are "mechanised cash bingo" ("MCB") and gaming machines (variously described as "slot machines", "amusement machines with prizes" or "fruit machines") ("Slots").

7. MCB is also referred to as "interval bingo", "instant bingo", "Parti bingo" or "Mini Cash bingo", and it is a shorter and automated form of the normal bingo game which is played either before or after MSB at the Appellant's clubs.

8. The Slots are machines which are located in designated areas within the clubs and are "played" by customers when they are not participating in a game of bingo.

9. David Bailey have been the advisers to the Appellant for many years. Martin Pierce has been involved with the Appellant since he joined the practice as a trainee in 1978, and has carried out regular compliance and book-keeping work for it, including detailed VAT advice, for nearly twenty years. It would be fair to say that his firm have been trusted advisers to the Appellant for many years and the relationship between them has been very close and informal. They have been open with the Appellant when they have felt "out of their depth" in any situation and the Appellant has trusted them to do so.

The Appellant's Rank claims

10. The Appellant was obviously aware of the challenge being made by Rank Group plc against the VAT treatment of MCB, which resulted in a successful appeal to the VAT and Duties Tribunal. That decision was reported on 27 May 2008.

11. In the period running up to that time, the House of Lords decision in *Fleming (t/a Bodycraft) v HMRC and Condé Nast Publications Limited v HMRC* [2008] UKHL 2 had been issued on 23 January 2008; that decision (broadly) confirmed that there should be a transitional period during which retrospective claims for overpaid VAT should be admitted outside the normal time limits, and it opened up the possibility of reclaims for the period from 1973 to 1996. Following that decision, a deadline of 31 March 2009 was set for the submission of such claims.

12. Following the initial tribunal decision in *Rank* in relation to MCB, Mr Pierce finalised a claim on behalf of the Appellant for a repayment of VAT which, according to the tribunal's decision, had been wrongly accounted for by the Appellant on MCB. This covered the period 1 April 2005 to 31 March 2008, and was for a total sum of £1,499,158. It was compiled entirely from the detailed historical VAT records which David Bailey had retained for the purposes of backing up the VAT returns. This claim was submitted to HMRC with a letter dated 9 June 2008, and is referred to in this decision as "the MCB Capped Claim". In the letter submitting the claim, the following paragraph was included:

> "We further wish to claim that this overpayment be stood over pending the result of any appeal that HM Revenue & Customs may wish to make in the Rank Group case in its ongoing Linneweber Appeal."

13. As will be seen below, HMRC eventually paid this claim (following a verification visit on 4 August 2009), with only minor alterations and it is not therefore one of the claims comprised in the current appeals. However, they initially rejected it by letter dated 31 July 2008, in which they also said:

> "If you disagree with this decision you may request a reconsideration, where the evidence to support your request will be examined. Any comments should be addressed to this Office and your letter will then be forwarded to the Review and Reconsideration Team.
>
> You also have the right to appeal to an independent VAT and Duties Tribunal. If you wish to a request *[sic]* reconsideration or submit an appeal to a tribunal you must do so within 30 days from the date of this letter."

14. Mr Pierce considered that a request for reconsideration was only appropriate where there was new information to be reviewed in support of the claim. So far as he was concerned, the claim was stood behind the *Rank* case as he had requested in his original letter. It also did not occur to him to appeal the rejection, as he considered the whole matter to be held in abeyance until the final outcome of any appeal in the *Rank* case was known.

15. Following a telephone call from a Mr Gooch at the Appellant on 16 July 2008 (when he was informed that a claim by Rank, possibly for Slots income, was under appeal and that there might also be the possibility of a claim in respect of MSB following a claim of that nature being made by Gala Coral) Mr Pierce turned his attention to compiling claims on behalf of the Appellant for repayment of VAT in respect of its Slots and MSB income. These claims ("the Capped Slots Claim" and "the Capped MSB Claim") were submitted to HMRC under cover of a letter dated 14 August 2008. In that letter, he made the following request:

> "We further wish to claim that these overpayments be stood over pending the final outcome of any court cases and resulting appeals that HM Revenue & Customs have with the Rank Group and Gala Coral Group in these matters."

16. He received a letter dated 23 September 2008 in response to his letter of 14 August 2008. HMRC rejected both claims, and their letter included the same paragraph on the matter of reconsideration as their earlier letter dated 31 July 2008 (see [13] above), but with the additional final sentence: "This team will review all of the facts of the case, and advise you of the outcome.". In place of the final paragraph about rights of appeal and time limits contained in the earlier letter, the following final paragraph was included:

> "Your client's *[sic]* also have a right to appeal to a Tribunal if you wish. Public Notice 700 (section 28 – Appeals) gives more detailed advice regarding how to appeal and this is available online at www.hmrc.gov.uk or by ringing our National Advice Service on 0845 010 9000 (you can call between 8.00 am and 8.00 pm, Monday to Friday.)"

17. It can be seen that no reference was made in the rejection letter dated 23 September 2008 to any particular time limit for appealing against the rejection. As Mr Pierce had submitted the claims expressly on the basis that they should be stood behind the relevant lead cases, he considered nothing further needed to be done on them until the lead cases had been resolved.

18. Mindful of the 31 March 2009 deadline, Mr Pierce then, in November 2008, turned his attention to the preparation of the historical claims dating back to 1973. There were two categories of claims, those covering the period up to 1996 which, with reference to the House of Lords decision referred to at [11] above, are referred to in these appeals as the "Condé Nast claims" (but which, somewhat confusingly, are commonly also referred to as "Fleming claims"); and those covering the period from 1996 to 2005, referred to as "Scottish Equitable claims", after the name of the relevant lead case. The *Scottish Equitable* claims are largely irrelevant for the purposes of the current appeals.

19. Mr Pierce prepared three Condé Nast claims, one each for income from Slots, from MCB and from MSB. The first (the "Slots Condé Nast Claim") covered the period from 1 November 1975 to 30 November 1996 and was for £1,822,899; the second ("the MCB Condé Nast Claim") covered the period from 1 January 1977 to 30

November 1996 and was for £1,350,243; and the third (the MSB Condé Nast Claim") covered the period from 1 April 1973 to 30 November 1996 and was for £698,421. These were submitted to HMRC's "Southern Region Voluntary Disclosure Team" in Stroud, Gloucestershire, under a covering letter dated 11 March 2009, in which Mr Pierce requested that the claims be stood over behind *Rank* and *Gala Coral* in almost exactly the same terms as set out at [15] above.

20. On the same day, he sent another letter to the same address, submitting *Scottish Equitable* claims for the same three categories of Slots, MCB and MSB (in respect of the period from December 1996 to June 2005) as well.

21. By letter dated 19 March 2009 headed simply with the Appellant's name and VAT number, HMRC in Stroud acknowledged receipt of "the above claim" and said it had been forwarded to "the relevant team" – the 'Fleming Claims Team (Leeds)'.

22. The next correspondence Mr Pierce received comprised three letters, all received on the same day (6 April 2009):

(1) A letter dated 1 April 2009 from "017 Voluntary Disclosure Unit" at an address in Sunderland. This letter referred specifically to the MCB Condé Nast Claim (though HMRC referred to it, in their usual style, as a "Fleming" claim) and said HMRC had decided to appeal the tribunal decision on MCB, consequently it was rejecting the Appellant's claim. It went on to say:

> "If you disagree with this you may request a local reconsideration. Any reconsideration does not affect your right to appeal to an independent Value Added Tax Tribunal under VAT Act 1994 section 83(T). The procedure and time limit for making an appeal are set out in Notice 700, section 28 and in the explanatory leaflet issued by the president of the tribunals, obtained from our National Advice Service."

(2) A letter dated 1 April 2009 from the same HMRC office, acknowledging receipt of a claim "in respect of an alleged breach of fiscal neutrality regarding UK law relation to the VAT liability of gaming machines before 6 December 2005." It could be inferred from this that the letter related to the Slots Condé Nast Claim. It rejected the claim (stating that HMRC did not accept there was any infringement of fiscal neutrality, and also stating that since fixed odds betting terminals only came into existence in 2001, claims for earlier periods were unacceptable), and included the same concluding paragraph as their other letter of the same date.

(3) A letter dated 2 April 2009 from the Stroud office to which all the claims had originally been sent. This letter, headed simply with the Appellant's VAT number, was quite short:

> "I write to acknowledge receipt of your claim dated 11th March 2009, received in this office on 17th Match *[sic]* 2009. This will be looked at in detail and a written response informing you of our decision will be issued shortly."

23. Somewhat confused, on 20 April 2009 Mr Pierce rang the telephone number on the first two letters, was transferred a number of times but eventually spoke to someone who explained that HMRC were inundated with Fleming claims, but all would be dealt with eventually. Mr Pierce explained the claims related to the *Rank* litigation, but the individual he spoke to did not know about *Rank*. She simply said that as long as the claims had been submitted by the end of March, they would all be dealt with eventually and he did not need to do anything further until the *Rank* case was finalised.

24. On the same day he also spoke to the HMRC team at Stroud, and asked if everything they needed from him in relation to the three categories of capped claims was in order. He was told that nothing was required to be done as "it all rested with the courts at the moment".

25. On 20 April 2009, HMRC's Betting & Gaming Team in Wolverhampton wrote to the Appellant, sending assessments to Bingo Duty for the period 1 May 2006 to 29 June 2008 (in relation to MSB) and for the period 1 May 2006 to 30 March 2008 (in relation to MCB). They explained that these were protective assessments, issued in case the VAT repayment claims were upheld. They said:

> "At the moment, until the result of the voluntary disclosure review is known this assessment will remain on file, but will not be enforced."

Mr Pierce regarded this as good news, as it implied HMRC were contemplating the repayment of VAT which had been claimed in relation to MSB and MCB.

26. Mr Pierce was still concerned particularly about the Condé Nast claims, so he telephoned the Stroud office of HMRC again on 27 May 2009. They confirmed that all Fleming work had been passed to Sunderland; he should await their reply, which would take time. He then called again about the capped claims; he was told that a decision in the *Rank* case was due at the beginning of June (it appears this would have been referring to the High Court judgment on both the MCB and Slots appeals). As a result of this conversation, he noted that he needed to wait for that decision and then get back in touch with HMRC to prioritise the MCB claim.

27. Following the release of the High Court judgment, HMRC issued a Brief (40/09) on 14 July 2009 stating that "HMRC will now consider claims for output tax wrongly accounted for by bingo operators on MCB participation fees". They then wrote to David Bailey on 22 July 2009 to confirm they were now considering MCB claims and therefore proposed to arrange a verification visit in relation to the Appellant's claim.

28. This visit took place on 4 August 2009. At the visit, Mr Pierce presented the visiting officer with a "top up" claim for MCB to extend the original MCB Capped Claim from 30 March 2008 to 26 April 2009 (the last date for which overpayment could be claimed before a change in the law). He also submitted a "top up" for the MSB Capped Claim to extend the claim period from 30 June 2008 to 26 April 2009; he had intended to hand this to the visiting officer, but at the officer's request he posted it instead.

29. HMRC's visiting officer wrote on 5 August 2009 to confirm acceptance of the figures (subject to one slight adjustment, which reduced the MCB Capped Claim by £17,084 to £1,482,074). The letter ended with the following paragraph:

> "I await your written comments as to why these claims should not be rejected on the ground of unjust enrichment before I notify the Voluntary Disclosure Unit accordingly."

30. Mr Pierce wrote back on the same day, providing a response on the unjust enrichment point.

31. On 10 September 2009, Mr Pierce sent an email to the visiting officer, enquiring about progress on the repayment. The officer replied on the same date, saying:

> "I returned everything to the Voluntary Disclosure Seat for repayment action as far as I was concerned. I would not expect to hear anything further myself as my involvement has finished. I would suggest you contact the Vol Dis Seat, presumably via the National Advice Service to see what the delay is."

32. Coincidentally, on the same day the Error Correction Team in Stroud wrote to David Bailey about the MCB Capped Claim. They said that whilst HMRC were appealing the High Court decision, they were prepared to pay out on the claim (including the later "top up" claim) against an undertaking to repay (with interest) if HMRC won the appeal.

33. In that letter, it was emphasised that the offer only extended to MCB claims:

> "Any claims in relation to other types of bingo or gaming machines will be retained on file and dealt with in due course."

Mr Pierce took this to be recognising that the other disputed claims were simply "on hold" until the *Rank* litigation was finalised.

34. In another letter also dated 10 September 2009, the Error Correction Team at Stroud wrote concerning the new MSB claim for £267,874 that had been submitted by Mr Pierce in August by way of a "top up" to the original MSB Capped Claim. This letter set out a summary of reasons why HMRC argued that MSB claims should be rejected, and "formally rejected" the top-up claim. The letter went on to say:

> "Irrespective of the points of law relating to the liability of the supplies above, I would also point out that, should the claims be allowed in the future, that these will be subject to capping regulations."

Mr Pierce took this to be an acknowledgment that HMRC would reconsider their position on the MSB claims generally in the light of the outcome of the *Rank* litigation.

35. The letter dated 10 September 2009 went on to include the following wording:

If you have any further information that you want me to consider, please send it to me now.

If you do not agree with my decision, you can

- ask for my decision to be reviewed by an HMRC officer not previously involved with the matter, or
- appeal to an independent tribunal

If you opt for a review you can still appeal to the tribunal after the review has finished.

If you want a review you should write to, *[sic]* within 30 days of the date of this letter, giving your reasons why you do not agree with my decision. We will not take any action to collect the disputed tax while the review of the decision is being carried out.

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

36. By a letter dated 18 September 2009, HMRC's Error Correction Team in Stroud informed David Bailey that the three *Scottish Equitable* claims submitted in March 2009 could not be repaid, on the basis that the relevant time limits had already passed before they were submitted. The same form of words about review or appeal was included as in the other letter of the same date (except that a name and address was given for the person to be contacted if a review was requested). Mr Pierce considered, in the light of his experience of HMRC's approach to the MCB claims, that he needed to take no further action as those claims were also simply "parked" pending the conclusion of the Rank litigation. This letter was followed up by a later letter (see [38] below), also refusing the *Scottish Equitable* claims on different grounds.

37. On 24 September 2009, Mr Pierce submitted the form of undertaking to HMRC to unlock payment of its MCB Capped Claim and associated "top up" claim.

38. On 29 September 2009. HMRC chased for payment of the "MCB" element of the protective Bingo Duty assessment raised on 20 April 2009

39. On 4 November 2009, HMRC at Stroud wrote again to David Bailey, refusing the three *Scottish Equitable* claims (for MSB, MCB and Slots income) on substantive grounds (as well as the time limit point mentioned in their earlier letter). This letter included a further statement of review and appeal rights, in similar form to the 18 September letter (but saying that any review request should be addressed to the writer of the letter). Although the letter contained a misunderstanding (in that the writer expressly assumed that MCB was just a form of MSB), Mr Pierce regarded this letter as simply seeking to protect HMRC's position in relation to the *Scottish Equitable* claims; however as the general approach was similar to what had happened in the MCB Capped Claim (which was now being paid), he did not consider any particular action was required until there were further developments in the *Rank* litigation.

40. Shortly afterwards, the MCB Capped Claim was paid by HMRC.

41. As the *Scottish Equitable* claims are not subject to these appeals, we do not consider them further, other than to observe that the way in which HMRC's decisions were notified piecemeal did not assist the clarity of communications generally.

42. Having seen some press coverage which suggested HMRC were now considering paying Slots claims (following a further Tribunal decision on that area), and having read Brief 75/09 (which suggested that HMRC were now considering MSB claims), Mr Pierce wrote to them again on 23 December 2009. He referred to the MSB Capped Claim and the Slots Capped Claim submitted on 14 August 2008 (and the later associated "top up" MSB claim), and HMRC's letter dated 23 September 2008 rejecting the 2008 claims, and asked for the claims to be reconsidered in the light of this new development.

43. HMRC replied by letter dated 10 January 2010. They informed David Bailey that they would be calling shortly to arrange a verification meeting in relation to the MSB Capped Claim (and the associated "top up" claim). In relation to the Slots Capped Claim, it stated that "the claim remains rejected as per our letter of 23rd September 2008". No mention was made of any appeal or review rights in relation to the latter decision.

44. The HMRC visit took place on 18 February 2010, at which time the calculation of the MSB Capped Claim and the associated "top up" claim were agreed, subject to a very small adjustment.

45. On 26 February 2010, HMRC chased for payment of the outstanding "MSB" element of the 20 April 2009 Bingo Duty assessment, implying a decision in principle had been made to pay the VAT reclaim on the MSB Capped Claim.

46. In the meantime, Mr Pierce had considered Brief 11/10, issued by HMRC on 16 March 2010. This Brief followed the decision of the Tribunal in December 2009 in relation to gaming machine takings, and indicated HMRC intended now to consider claims for overpaid VAT on gaming machine takings, subject to their intended appeal and also to the fact that claims could not cover any period after 5 December 2005.

47. In the light of this Brief, on 12 April 2010 Mr Pierce submitted what he described as a "revised claim", i.e. a Slots Capped claim covering the period only from 1 July to 5 December 2005. This claim was in the amount of £199,745 (compared to the original claim of £1,319,969 for the period 1 July 2005 to 30 June 2008).

48. The agreed amount of the MSB Capped Claim was paid by HMRC on 26 April 2010.

49. In response to Mr Pierce's "revised" Slots Capped Claim of 12 April 2010, HMRC sent a letter dated 30 April 2010 which did little more than acknowledge Mr Pierce's letter, refer to an enclosed copy of Brief 11/10 and state that all claims

previously lodged would be considered in due course, in chronological order of receipt, with the aim of making payment by 31 March 2011.

50. Nothing material then happened until December 2010, when HMRC contacted David Bailey to arrange a verification visit for 1 February 2011. Then, on 25 January 2011, they wrote again (this time from the VAT Error Correction Team in Liverpool), stating that they regarded the Appellant's Capped Slots Claim as closed, because the original claim had been rejected and that rejection had not been appealed.

51. The visit on 1 February went ahead in any event, and the calculation of the Appellant's Capped Slots claim (as amended on 12 April 2010) was agreed. The visiting officer agreed to take up with the Error Correction Team the question of the admissibility of the claim in the light of their letter dated 25 January 2011. Having done so, he wrote to David Bailey on 28 February 2011 confirming that HMRC's position remained that the original claim had been rejected, that rejection had not been appealed in time and therefore no payment would be made.

52. Mr Pierce received that letter on 8 March 2011 and after an unsuccessful attempt to take the matter further with HMRC, he lodged notice of appeal with the Tribunal on 10 March 2011. That appeal, which therefore relates to the Slots Capped Claim carries Tribunal reference TC/2011/02059 and is one of the appeals the subject of the present application.

53. On 21 April 2011 Mr Pierce lodged a further Slots claim in respect of the period from 1 April 2007 to 31 March 2011. That claim was rejected by letter dated 13 October 2011 and the rejection was validly appealed in time. That appeal forms no part of the present application.

54. Mr Arnett had meetings from time to time with colleagues in the bingo industry, in which they discussed various matters of common concern, including the progress on their various VAT reclaims in connection with the *Rank* litigation. During one such meeting in November 2011, he became concerned that matters were perhaps not proceeding as they should, and his friend arranged for Deloitte LLP (his own advisers) to call Mr Arnett. They did so on 16 November 2011 for a preliminary conversation. Mr Arnett asked Deloitte to contact David Bailey for more detailed information, which they did. There followed a meeting at the Appellant's offices on 4 December 2011, in which it became apparent to Mr Arnett, based on Deloitte's initial view, that there might perhaps be a question mark over whether all appropriate steps had been taken at all times in conducting the various claims with HMRC. Mr Arnett asked Deloitte to take matters on fully, which they agreed in principle to do. They did however first require to complete their own client engagement process and also (to some extent in advance of doing so) a more detailed investigation of the factual history.

55. On 23 January 2012, the Appellant signed Deloitte's formal engagement letter and immediate steps were put in hand to appeal against HMRC's refusal to consider the various claims any further. We were not told what the position was in relation to the *Scottish Equitable* claims, but on 31 January 2012 appeals in relation to the

rejection of the MCB Condé Nast Claim and the Slots Condé Nast Claim were lodged with the Tribunal.

56. HMRC have objected to all three appeals being notified to the Tribunal out of time, and we heard their objections (in the form of applications to strike all three appeals out) alongside the Appellant's applications for permission to appeal out of time.

57. We understand HMRC have accepted that the MSB Condé Nast Claim was never formally rejected by them, so no application in relation to that claim is before us.

58. It can be seen that the Appellant has broadly made three streams of claims under the *Rank* litigation: in relation to "main stage" bingo, in relation to "interval" or "mechanised cash" bingo, and in relation to gaming or "slot" machines. In each stream, there are three elements, a "capped" claim covering whatever periods still fell within the normal statutory time limits at the time it was made, a "Condé Nast" (or "Fleming") claim covering the period from (broadly) 1973 up to December 1996, and a "Scottish Equitable" claim covering the period from December 1996 up to the start of the "capped claim" period.

59. Thus there are no less than nine elements to the Appellant's total claim, and multiple claims within some of those elements.

60. It might be considered appropriate to attempt to separate out each of the three claims the subject of the present appeals and look at them in isolation. Because of the complex and interwoven factual background lying behind all the claims in aggregate, we do not consider it would be proper for us to do so – in doing so, we would be in danger of examining individual trees too closely and ignoring the forest.

61. However, we do consider that some attempt to analyse out the separate claims will bring more clarity and meaning to the overall picture, so we have carried out an exercise (the result of which appears in the Appendix to this decision) of creating a combined outline chronology which attempts to strike a balance between creating an overall picture whilst at the same time teasing out the separate strands for closer examination in the context of that picture.

The law

62. If the Appellant's applications for permission to appeal out of time are not granted, then HMRC are entitled to have the appeals struck out; if the applications for such permission are granted, then HMRC's applications to strike out the appeals must fail. That was not disputed between the parties.

63. The relevant statutory provisions are not in dispute. There is a primary 30 day time limit for bringing an appeal to the Tribunal. The current relevant provision is that contained in section 83G(1)(a)(i) Value Added Tax Act 1994 ("VATA94"):

> "An appeal… is to be made to the tribunal before… the end of the period of 30 days beginning with… in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates…"

64. Section 83G(6) provides that an appeal can be brought after the relevant time limit "if the tribunal gives permission to do so".

65. In relation to the Slots Capped Claim (if it is accepted that the HMRC "decision" under appeal was made before 1 April 2009), then the provisions are different but to the same effect. There was no dispute about them, so we do not set them out in detail here.

66. The real question before us, therefore, was whether we should give permission for the appeals, to any extent, to be brought out of time.

67. It is agreed that this is a matter for the exercise of the Tribunal's discretion, unfettered by any particular rules. As the discretion must be exercised judicially, however, it is clear that we should form a view as to the factors that we should take into account in exercising it, and the weight to be given to those factors.

68. Some guidance on these matters can be gleaned from the cases, but each case must be decided on its own facts; and this is particularly significant when the facts are as complex as they are in this case.

69. The leading cases on this issue are *Data Select Limited v HMRC* [2012] UKUT 187 (TCC) and *O'Flaherty v HMRC* [2013] UKUT 161 (TCC). In addition, we were referred to a number of other cases, including *Mitchell v News Group Newspapers Limited* [2013] EWCA Civ 1537 and *Fred Perry (Holdings) Limited v Brands Plaza Trading Limited and another* [2012] EWCA Civ 224.

Submissions

70. Mr Jones gave his usual careful and well structured submissions. He pointed out that the starting point (with which we agree) is that time limits are generally to be adhered to unless good reason can be shown why they should be overridden.

71. He structured his submissions around the five factors listed by Morgan J in the Upper Tribunal in *Data Select*:

> (1) <u>What is the purpose of the time limit?</u> In his submission, it was to provide certainty, so that the government could plan its income and expenditure without unexpected surprises caused by stale old claims.
>
> (2) <u>How long was the delay?</u> He submitted that the Slots Capped Claim was almost 2 ½ years out of time, and the other two claims were closer to 3 years out of time.

(3) Is there a good explanation for the delay? He submitted there was not. The claims were rejected and the Appellant was informed in the rejection letters that it would need to appeal that decision if it did not accept it. It had failed to do so. Any suggestion that HMRC had misled the Appellant or David Bailey into thinking there was no need to appeal was misconceived, especially towards the end of the period of delay.

(4) What will be the consequences for the parties of an extension of time? For HMRC, the consequence would be that they would be at risk of having to fund claims which they had previously considered closed for some time. That would conflict with the principle of certainty and finality and fly in the face of the general policy that challenges to assessments should in general be brought within the statutory period.

(5) What will be the consequences for the parties of a refusal to extend time? Obviously, the result would be that the Appellant would lose potentially valuable claims.

72. On balance, he submitted, an assessment of these various factors should lead to the conclusion that the applications for permission to appeal out of time should be refused.

73. Mr Henderson structured his submissions around the checklist in CPR 3.9 (see below), whilst acknowledging that the rule only provided a "useful framework" for considering the exercise of discretion, which could equally validly be considered as a "more general enquiry" into the question of whether the discretion should be exercised. By reference to the various items in the list, he submitted as follows:

(1) The interests of the administration of justice. He argued that "the interests of justice" required permission to be granted. The Appellant had, he submitted, acted reasonably throughout. They were entitled to rely on David Bailey to submit and progress their claims for them. They had also passed through to David Bailey all the regular updates that they received about the progress of the *Rank* litigation and HMRC's response to it from other sources. The claims themselves would not be particularly difficult to deal with and the loss to the Appellant if the claims were barred was severe for it. We would observe that Mr Henderson has in part conflated "the interests of the administration of justice" with "the interests of justice" here, but the points he made could equally well be addressed under other headings in the CPR list.

(2) Was the application made promptly? He submitted that the Appellant had acted quickly when it was realised there was a potential problem.

(3) Was the failure intentional? He submitted it was clear from the overall circumstances that it was not.

(4) Was there a good explanation for the delay? He submitted that from the Appellant's perspective there was. They had relied entirely on David Bailey, and that reliance was reasonable in the circumstances. There had been various

events (such as the repayments of two of the claims) that had bolstered this confidence, quite reasonably. So far as Mr Pierce was concerned, the explanation was to be found in the confusing communications from HMRC, in particular in the Spring of 2009.

(5) Compliance with other requirements. He put no particular emphasis on this point.

(6) Was the default that of the Appellant or of its representative? Here, he submitted the facts showed that any default ought not to be laid at the door of the Appellant.

(7) Can the trial date still be met? As the claims are all "parasitic" on the *Rank* litigation, he submitted this was not relevant. The Slots Capped Claim and the Slots Condé Nast Claim would await resolution of that aspect of the *Rank* litigation and the MCB Condé Nast Claim would now fall to be paid, subject only to verification.

(8) The effect of the default on the parties. He submitted that if the Appellant had submitted protective appeals in time, the situation today would be effectively the same – the appeals would simply be stayed pending the outcome of the *Rank* litigation. Therefore HMRC were effectively arguing that they should be exonerated from liability as a result of a mistake by the Appellant's adviser. The evidence would not go stale as it was all available in the accounting records that had been used to compile the claims.

(9) The effect of granting relief on both parties. For the Appellant, the benefit would be immense. It would be able to recover the significant amounts to which it should become entitled following the *Rank* litigation. Conversely, for HMRC it would simply have to pay out the amounts for which it was properly liable from the outset.

Discussion and conclusion

74. We observe that *Data Select* and *O'Flaherty* were Upper Tribunal decisions concerned directly with the exercise of the Tribunal's discretion to permit appeals against HMRC decisions outside the statutory time limit. *Data Select* was concerned with the same VAT provisions as we are concerned with in this appeal. *O'Flaherty* was concerned with the parallel jurisdiction conferred on the Tribunal in relation to direct tax matters, but the parties agreed that it was nonetheless directly relevant to this appeal.

75. On the other hand, we observe that *Mitchell* and *Fred Perry* were concerned with applications for relief from sanctions imposed for failure to comply with time limits set out in the Civil Procedure Rules ("CPRs") (or Court Orders) in the context of High Court litigation. We observe that underpinning the comments of the Court of Appeal in both those cases was a concern that the Courts had become too tolerant of a "culture of delay and non-compliance" in the conduct of litigation before the High Court; the Court of Appeal wished to send a very clear message that this culture was

being tackled head on, and participants in the litigation process needed to be aware that firm sanctions imposed by High Court Judges and Masters for delay and non-compliance would be backed up by the Court of Appeal.

76. Of necessity, compliance in the context of High Court proceedings is a fairly black and white issue. If an order is made for, or if the CPRs require, a particular step within a particular time frame then it will be clear precisely what the requirement is and whether it has been complied with or not. The waters will not generally be muddied by communications which imply that a particular deadline is being relaxed or suspended; and the Court is directly concerned to police the efficient management of the litigation that passes through it under the processes laid down in the CPRs.

77. Thus, whilst both the *Data Select/O'Flaherty* cases and the *Fred Perry/Mitchell* cases are concerned with the exercise of judicial discretion to extend strict time limits or provide relief from sanctions for failure to comply with them, we should not forget the very different contexts of the two lines of cases – the one concerned with the policing of sanctions for breach of time limits and other requirements within the narrow confines of the litigation process itself (against the background of a clearly-signalled toughening up of the Court's approach) and the other concerned with the policing of time limits in "the outside world", albeit in the particular part of that world concerned with taxation.

78. It seems to us that the only reason the *Fred Perry/Mitchell* line of cases is being cited in the context of extensions of time for bringing tax appeals is because previous tax cases, borrowing from parallel concepts in the CPRs, have fixed on the old "list" in CPR3.9 of factors which were formerly to be taken into account in considering relief from sanctions in High Court cases. If (as is clearly the case, from the various comments made in *Fred Perry* and *Mitchell*) the intention of the change in CPR 3.9 from its old "checklist" format to the new shorter format was to toughen up the approach to non-compliance, that seems to us to be a factor which is quite specific to High Court litigation (and an attempt to change the prevailing culture in it), which does not necessarily map across to the field with which this decision is concerned.

79. It is clear, from *Data Select* and *O'Flaherty*, that the Upper Tribunal has considered a reference to the old CPR 3.9 "checklist" as a helpful tool in assisting it to consider the exercise of its discretion. Both those hearings predated the "toughening up" of CPR 3.9, so did not consider whether they should now consider the new version rather than the old. In the present case, all relevant time limits would have expired long before the change to CPR 3.9 and therefore the parties appeared to be agreed that we should have regard to the old "checklist" version of that rule, rather than the new "tougher" version. We agree, but with the rider (made clear in all the cases) that CPR 3.9 is nothing more than a handy reference list for the sorts of issues that are commonly taken account of, and therefore a handy framework for considering the exercise of the Tribunal's discretion.

80. We consider therefore that, whilst it is appropriate to note the hardening in judicial attitudes to procedural non-compliance inherent in *Mitchell* in particular, the guidance in that case is specific to the conduct of litigation and should not be regarded

as authority for the proposition that judicial attitudes to extensions of time in other fields (such as that in issue in these appeals) should be "tougher" than hitherto. In saying this, we do not disregard the decision of the Upper Tribunal in *HMRC v McCarthy & Stone (Developments) Limited Monarch Realisations No 1 plc (in administration)* [2014] UKUT B1 (TCC) though, as that decision was released after the hearing of this appeal, the parties did not have the opportunity to include reference to it in their submissions. We consider that *McCarthy & Stone*, like the *Mitchell* and *Fred Perry* cases, is more directly concerned with procedural compliance in the context of litigation – a far more straightforward and "black and white" matter than the long-running saga which is the subject of the present appeals.

81. For the future, therefore, we would suggest that the toughening up of CPR 3.9 in response to a very particular perceived need to change the compliance culture in High Court litigation means that Tribunals would be better served, in the exercise of their discretion in cases such as this, to continue to pay regard to the rather more wide-ranging old "checklist" version of CPR 3.9 and/or the "five factors" listed by Morgan J in the Upper Tribunal in *Data Select*.

82. Thus we consider it appropriate to include a review of the old CPR 3.9 checklist as part of our decision-making process.

83. Addressing those factors in turn, we comment as follows:

(1) Interests of the administration of justice. We consider this factor to be more directly referable to the case of an extension of time in the course of litigation.

(2) Was the application made promptly? When the Appellant became aware of the need for an application, it acted with reasonable speed in our view. The question is more how we view the period of delay up to that time.

(3) Was the failure to comply intentional? In our view, it was not. As soon as it was realised that an application was necessary, it was made with reasonable speed.

(4) Was there a good explanation for the failure? This is the heart of the matter, to which we turn in more detail below.

(5) Has the party in default otherwise complied with relevant requirements? Of necessity, we must take a broad view of this aspect. As a general proposition, we consider Mr Pierce approached the whole process of making the repayment claims with a good deal of organisation and method. Outside the context of litigation, there is no record of relevant past compliance that we can consider. We observe that he usually took the initiative with HMRC and was prompt in his replies to their questions.

(6) Was the failure caused by the Appellant or by its representative? Here, the failure was clearly attributable to the adviser and not to the Appellant. On the basis of the longstanding relationship with David Bailey, we consider the

Appellant had every reason to believe matters were properly in hand until very late in the day.

(7) Can the trial date still be met? This is not relevant in this case.

(8) The effect which non-compliance had on each party. HMRC do not appear to have regarded non-compliance as particularly important until January 2011; they were involved, as part of a massive nationwide project, in intensive discussions and negotiations with numerous taxpayers including this Appellant and they made no complaint about it until very late in the day.

(9) The effect of granting relief on the parties. For HMRC, it is said that the effect would be to re-open some very large claims for matters which it had considered long closed. In reality, however, these claims are a very small part of a very large ongoing project for HMRC. For the Appellant, the effect of granting relief would be (apparently) to unlock the immediate repayment of its MCB Condé Nast Claim and, conversely, the refusal to grant relief would be to deprive it of an apparently strong legal entitlement to all three claims. The amounts involved for the Appellant are clearly large so far as it is concerned, and whilst much of it might be regarded as being in the nature of a windfall, nonetheless it flows, to the extent it is recoverable, from a legal entitlement.

84. By way of illustration that the same points come up whatever framework is adopted, we would address the five factors identified by Morgan J in *Data Select* as follows:

(1) What is the purpose of the time limit? We agree its purpose is to provide certainty, so that the government could plan its income and expenditure without unexpected surprises caused by stale old claims.

(2) How long was the delay? We agree that the Slots Capped Claim was almost 2 ½ years out of time, and the other two claims were closer to 3 years out of time. But the length of the delay on its own does not tell the full story, which can only be understood by reference to the explanation for the delay, considered below.

(3) Is there a good explanation for the delay? We address this point below.

(4) What will be the consequences for the parties of an extension of time? For HMRC, the consequence would be that they would be at risk of having to fund claims which they say they had previously considered closed for some time. On the other hand, we question whether it is reasonable, in the circumstances outlined above, to assert that HMRC should have considered the claims closed.

(5) What will be the consequences for the parties of a refusal to extend time? Obviously, the result would be that the Appellant would lose potentially valuable claims, at least one of which it is said will be paid without further ado if we give permission for a late appeal.

85. Whichever framework we adopt for considering it, the heart of the application lies in the explanation for the failure, and an assessment of the force of that explanation.

86. This Tribunal has said on a number of occasions that an appellant cannot totally hide behind his adviser's defaults. If it were otherwise, there would be a perverse incentive for taxpayers to engage the least competent advisers they could find, on the basis that they could subsequently evade responsibility for their defaults. But equally, it is clear that there is a difference between that situation and a situation in which a taxpayer engages the advice and assistance of apparently competent external professional advisers to help him with a particularly complex issue but is then let down by that adviser in some way.

87. In the present case, we are satisfied that the historical relationship between the Appellant and David Bailey was such that the Appellant was eminently justified in reposing trust in them for the purposes of its *Rank* repayment claims. Indeed, the way in which the claims themselves were so carefully compiled, evidenced and submitted speaks volumes for the professionalism of David Bailey.

88. And so far as David Bailey themselves are concerned, whilst they could be criticised for failing to appreciate that an immediate appeal to the Tribunal was necessary as soon as the first rejection of each claim was received, the course of communications with HMRC shows that they received very mixed messages from them at many stages of the whole saga.

89. A quite clear pattern was established over the course of the period from March 2008 up to early 2011. Claims were submitted, with a specific request for them to be stayed behind the ongoing litigation. They were rejected, but that was no more than was expected. It was not made clear at any point that the only way to preserve the claims was to submit a protective appeal to the Tribunal, indeed HMRC's course of conduct led to directly the opposite conclusion. The MCB Capped Claim was initially rejected, then reconsidered as the *Rank* litigation progressed, then ultimately paid. In response to enquiries as to the mixed messages being received, soothing reassurances were given. The MSB Capped Claim was initially rejected, then rejected again when the MCB Capped Claim was reconsidered, then the associated top up claim was also rejected, before both claims were finally reconsidered again and paid in response to a further development in the *Rank* litigation. In the light of these experiences, David Bailey can hardly be criticised for taking the view that HMRC were approaching matters on a pragmatic, rather than a legalistic, basis and acting accordingly.

90. With reference to the Condé Nast claims, there was less communication, but when the first confusing rejections were received, we are satisfied that Mr Pierce questioned the position with HMRC twice (on 20 April and 27 May 2009) and was reassured that he did not need to do anything until the Fleming Team got in touch with him. That further contact never happened. In "normal" situations, one might consider that a further enquiry might be reasonable after a decent interval. But in relation to *Rank* claims, the situation is anything but normal. It is now nearly six years since the first tribunal decision in that litigation, and it has still not been

finalised. Since the whole basis on which the claims had been submitted was that they should be stood over until the litigation had been finalised, since HMRC had not given any clear message that the only way to preserve such claims was to notify them to the Tribunal and since it was well known that HMRC were "inundated" with claims, it was reasonable in our view for Mr Pierce to refrain from bothering HMRC until the dust had settled on the *Rank* litigation.

91. Having thus considered the explanation for the delay, and taking into account all the other matters set out above, we consider that this is a case in which we should exercise our discretion to permit the three appeals to be made after the expiry of the relevant time limits in each case, notwithstanding the apparently long delay.

92. The applications for permission to appeal out of time in the three appeals are therefore GRANTED.

93. Either party may apply for further directions to progress the appeals to a hearing, but we hereby direct that unless and until such an application is made, all proceedings in the three appeals are stayed and all time limits are extended generally.

94. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 19 February 2014

Amended by correction of typographical error in paragraph [63] pursuant to Rule 37 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 and re-issued to the parties on 28 February 2014.

Appendix

Outline chronology of claims

The claims marked by asterisks and shading are the subject of the present decision

Date	MCB Capped Claim	MSB Capped Claim	Slots Capped Claim*	MCB Condé Nast Claim*	MSB Condé Nast Claim	Slots Condé Nast Claim*	MCB Scot Equ Claim	MSB Scot Eq Claim	Slots Scot Eq Claim
27 May 08	Tribunal decision issued								
9 Jun 08	Claim submitted covering period 1.4.05 to 31.3.08. Claim £1,499,158								
31 Jul 08	HMRC initial rejection of claim								
14 Aug 08		Claim submitted covering period 1.7.05 to 30.6.08 claim £963,229	Claim submitted covering period 1.7.05 to 30.6.08 claim £1,319,969						
19 Aug 08			Tribunal decision issued						
23 Sep 08		HMRC reject claim	HMRC reject claim						
11 Mar 09				Claim submitted covering period 1.1.77 to 30.11.96 claim £1,350,243	Claim submitted covering period 1.4.73 to 30.11.96 claim £698,421	Claim submitted covering period 1.11.75 to 30.11.96 claim £1,822,899	Claims submitted for period 1.12.96 to 30.6.05. MCB: £3,274,403, MSB: £1,557,950 and Slots: £3,428,054		
19 Mar 09				HMRC acknowledge "the above claim" and confirm it has been sent to Fleming team					
1 Apr 09				Letter sent by HMRC rejecting claim		Letter sent by HMRC rejecting claim			
2 Apr 09				Letter sent by HMRC saying claim would be examined and replied to shortly					
20 Apr 09				Call to HMRC Fleming team, who say they are inundated, all claims received by 31 March 09 will be dealt with in due course, no action needed until *Rank* litigation finalised					
20 Apr 09	Call to local Voluntary Dicslosure team, told nothing needed to be done as matters were with the courts								
20 Apr 09	HMRC issue protective Bingo Duty assessment								
27 May 09	Call to Error Correction Team to enquire on *Rank* progress. Told to wait for impending decision and then get back in touch, prioritising MCB claim. Other claims for MSB and Slots still not resolved			Call to Error Correction Team, questioning apparent conflict between 1 and 2 April letters. Told simply to await further response from Fleming team					

8 June 09	High Court upholds Tribunal		High Court upholds Tribunal						
22 Jul 09	HMRC contact to say now considering claims. Proposed verification visit	In same letter, HMRC say claims for "gaming machines or other types of bingo will not be considered at this point"			In same letter, HMRC say claims for "gaming machines or other types of bingo will not be considered at this point"			In same letter, HMRC say claims for "gaming machines or other types of bingo will not be considered at this point"	
4 Aug 09	Verification visit, covering also top up claim for period 1 4 08 to 26.4.09 for £319,295	Top up claim for period 1.07 08 to 26.4.09 submitted for £267,874							
10 Sep 09		HMRC reject top up claim, but say that even if that view is changed, the capping rules will still apply							
10 Sep 09	HMRC offer to pay claim, against undertaking to repay with interest if appropriate	In same letter, HMRC say that "any claims in relation to other types of bingo or gaming machines will be retained on file and dealt with in due course"			In same letter, HMRC say that "any claims in relation to other types of bingo or gaming machines will be retained on file and dealt with in due course"			In same letter, HMRC say that "any claims in relation to other types of bingo or gaming machines will be retained on file and dealt with in due course"	
18 Sep 09							HMRC state that the total claim "cannot be paid", arguing the transitional provisions following *Fleming* are effective		
24 Sep 09	Claim form returned to HMRC								
29 Sep 09	HMRC chase payment of Bingo Duty assessment								
4 Nov 09							HMRC state that the claims are also invalid for technical reasons, but confusing MCB with MSB		
5 Nov 09	Notice of payment received from HMRC								
11 Dec 09			Tribunal decision						
23 Dec 09		Letter to HMRC asking for reconsideration of claims, now that HMRC views appear to have changed							

12 Jan 10		HMRC write to say they are now considering, propose verification visit	In same letter, HMRC say this claim "remains rejected"						
18 Feb 10		Visit takes place and revised figures submitted to HMRC							
26 Feb 10		HMRC chase Bingo Duty assessment							
11 Mar 10			HMRC issue Brief 11/10, stating that gaming machine claims will now be considered						
12 Apr 10			Following developments, letter to HMRC asking for claim now to be addressed, in reduced sum of £199,745 for period 1.7.05 to 5.12.05						
26 Apr 10		Payment issued by HMRC							
30 Apr 10			HMRC say all previous claims will now be considered for payment						
26 May 10	Upper Tribunal and Court of Appeal references to ECJ on bingo and gaming machines								
16 Dec 10			Letter from HMRC arranging verification visit for 1 Feb 11						
25 Jan 11			Letter from HMRC saying claim was						

			rejected and not appealed, so will not be paid						
1 Feb 11			Figures agreed at verification meeting but further discussion on rejection						
28 Feb 11			HMRC confirm rejection						
10 Mar 11			Upon receipt of letter and after speaking with HMRC, appeal lodged with Tribunal, ref 2011/02059						
21 Apr 11			Further claim submitted for period 1.4.07 to 31.3.11 for £1,489,992						
13 Oct 11			HMRC reject claim						
19 Oct 11			Further appeal notified to Tribunal (not part of present applications)						
10 Nov 11	ECJ decision on references issued								
16 Nov 11	Deloitte LLP call Appellant on introduction from business associate, start gathering information from David Bailey								
5 Dec 11	Appellant meets with Deloitte LLP for initial discussion, requested to act, gather further information and start formal client engagement process								
23 Jan 12	Client engagement process completed, Appellant signs engagement letter with Deloitte								
31 Jan 12				Appeal notified to Tribunal		Appeal notified to Tribunal			