



TC01820

Appeal number: TC/2010/07711

VAT – notice of appeal served out of time – whether interests of fairness required tribunal to extend time for service – no – application dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

STATUS INVESTMENTS LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE DAVID DEMACK

Sitting in public in Manchester on 17 January 2012

Simon Buchan, Messrs Barber, Harrison & Platt, for the Appellant

Mr Wayne Conroy of HM Revenue and Customs, for the Respondents

DECISION

1. The application by Status Investments Ltd (Status) is for permission to appeal out of time against a decision of the Commissioners to reject a voluntary disclosure in which it sought to recover output tax declared and paid on its gaming machine income from 24 January 1989 to 28 December 2006, the latter being the date on which both the disclosure and application were made. In the voluntary disclosure Status claimed that it was entitled to recover that tax following the High Court judgment in *Rank Group plc v Commissioners of Customs and Excise* [2009] Ch D All ER(D) 65.

2. The voluntary disclosure was rejected by the Commissioners on 17 January 2007 and, under s.83 of the Value Added Tax Act 1994, Status then had 30 days in which to appeal. In the letter of rejection, the Commissioners did inform Status that it might appeal their decision, but failed to inform the company of the statutory time limit for the purpose.

3. Before me, Mr Wayne Conroy of HMRC appeared to represent the Commissioners. Status was represented by Mr Simon Buchan of Messrs Barber, Harrison & Platt, chartered accountants of Sheffield.

4. By its representatives, Status explained the reasons for the late notification of its appeal in its Notice of Appeal of 23 September 2010, as follows:

“Our client was unaware that he was required to submit an appeal within a set time limit as HMRC’s letter of 17 January 2007 made no mention of any time limit in relation to submitting an appeal. Our client believed that the submission of a protective claim was all that was required whilst awaiting a ruling in respect of the Rank Group case.

Following the Rank Group decision, our client wrote to HMRC on 17/7/09, 18/5/10 and 22/6/10. HMRC did not reply to our client in respect of this matter until 19/7/10 at which time HMRC suggested that our client may wish to submit a late appeal to the VAT tribunal.”

5. I might add that Status did not appeal to the tribunal until the Commissioners took court proceedings against it to recover the tax in dispute.

6. Essentially, Mr Buchan relied on the fact that Status had made a claim to recover output tax said to have been overpaid, which it pursued in correspondence, so that he submitted that it was entitled to depend on the Commissioners’ assurance in their Brief 11/10: “The aim is to process all existing claims, where satisfactory evidence to support the claim has been provided, by 31 March 2011”. Implicitly, he claimed that the interests of fairness and justice required me to grant the application.

7. Mr Conroy contended that the application should be refused, simply maintaining that the Notice of Appeal was given long after the statutory time limit for its service had expired, and it was not in the interests of justice to permit appeals after long periods of delay.

8. A number of applications similar to that before me have been dealt with by the tribunal, some under the VAT Tribunal Rules 1986 and others under The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 which came into force on 1

April 2009 on the tribunal system being reformed. I was not referred to any of the resulting decisions, but find it helpful to refer to a number of them.

9. In one fairly recent case under the 1986 Rules, that of *The Medical House plc v Commissioners of Revenue and Customs* (1986) Decision no. 19859, which came before me, I considered, as per rule 3.9 of The Civil Procedure Rules (CPR), the following matters:

- a. The interests of the administration of justice
- b. Whether the application for relief had been made properly
- c. Whether the failure to comply was intentional
- 10 d. Whether there was any good explanation for the failure
- e. Whether there had been non-compliance with other rules, practice directions, etc.
- f. Whether the failure was caused by the party or its legal representative
- g. Whether any fixed date could still be met
- 15 h. The effect which the failure to comply had on each party
- i. The effect which the granting of relief would have on each party.

10. The Commissioners accepted that Medical House would have been entitled to the VAT input tax credit it claimed following the decision of the Court of Justice of the European Communities (the ECJ) in *Kretztechnik AG v Finanzamt Lenz* (Case C465/03) [2005] STC 1118 but nevertheless I determined that the remaining factors had such weight that there should not be an extension of time: the interests of legal certainty required finality of VAT obligations.

25 11. Exceptionally, Judge John Walters QC granted an application for an extension of time to appeal in *Former North Wiltshire District Council v Commissioners of Revenue and Customs* TC00714, an application made under the 2009 rules. He held that the tribunal was under no obligation to consider the criteria in r.3.9 of the CPR, but should apply the overriding objective of r.2.2 of the 2009 rules to deal with cases fairly and justly. He balanced on the one hand the assessment of the appellant's culpability in delaying appealing and the prejudice to the Commissioners in terms of the public interest in good administration and legal certainty and, on the other hand, the loss and injury which would be suffered by the appellant if its application were to be refused.

35 12. In another case brought under the 2009 rules, that of *Aston Markland v Commissioners of Revenue and Customs* TC/2011/01404, the tribunal observed that there is no guidance in the legislation as to the criteria to be applied when considering whether to give permission for a late appeal. However, it observed that in *GSM Worldwide Ltd v Commissioners of Revenue and Customs* TC/2010/07222, the then President of the tribunal, Sir Stephen Oliver QC, said in the context of a provision similar to that found in s.83G(3) of the Value Added Tax Act 1994:

45 “To allow the application I would have to be satisfied that there were exceptional reasons that, consistent with the obligation to deal fairly and justly with those parties, required me to extend what would otherwise be the statutory 30 days for appealing. I am unable to think of any good reason that

accounts for GSM's delay in lodging the appeal notice. For those reasons I dismiss the application."

13. And in another case with which Sir Stephen dealt, that of *Ogedegbe v Commissioners of Revenue and Customs* LON/09/0200, he said, "While this Tribunal has got power to extend the time for making an appeal, this will only be granted exceptionally". I observe that in the *Ogedegbe* case the tribunal considered the appellants' case to have little prospect of succeeding.

14. I might also mention yet another case. In *Pledger v Commissioners of Revenue and Customs* [2010] UKFTT 342 (TC) the tribunal declined to exercise its discretion to permit a late appeal where the appellant had "deliberately embarked upon a course of delay and obstruction".

15. In my judgment, amongst the most important considerations in the instant case is the fact that the interests of legal certainty require finality of legal obligations. Any contributory delay to the service of the notice of appeal said by Status to have been occasioned by the Commissioners may be excused on the basis of their being unable properly to deal with the company's correspondence in 2009 and 2010 as the *Rank Group* appeal was in the process of being dealt with by the ECJ.

16. Mr Buchan advanced no good reason for Status's failure to serve notice of appeal, if not timeously then within a reasonable time of the Commissioners' rejection of the voluntary disclosure. His reliance on the contents of the Commissioners' brief 11/10 as reason for such failure does not, in my judgment, amount to good reason. The company did nothing between January 2007 and July 2009 to pursue its claim; that appears to me to be a deliberate decision. That too, in my judgment, is an important consideration.

17. I am not bound by any of the decisions to which I have referred, and must exercise my own discretion in determining whether to allow the application. Nevertheless, I have taken account of them all in arriving at my own decision. Since I am satisfied that there were no exceptional reasons that require me, consistently with the obligation under the 2009 rules to deal justly and fairly with the parties to the appeal, to extend the statutory time for appealing, I dismiss Status's application.

18. 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.

TRIBUNAL JUDGE

RELEASE DATE: 13 February 2012

