



TC01952

Appeal number: TC/2011/06166

PROCEDURE – Appellant’s application to extend time limit for filing notice of appeal – appellant’s explanation for delay considered - prejudice to HMRC considered to be limited in circumstances where assessment made to protect HMRC’s position pending Court of Appeal and Upper Tribunal decisions – permission to extend time limit granted

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CASCADE AMUSEMENTS

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JUDGE SWAMI RAGHAVAN
CHARLES BAKER**

Sitting in public at the Appeal Service Venue, Southampton on 28 March 2012.

The Appellant did not appear and was not represented at the hearing.

Ms Ratnett for the Respondents

DECISION

Introduction

1. This case concerns an application by HMRC to strike out the Appellant's appeal on the grounds that the appeal is out of time. The appeal ought to have been made by 7 April 2011 but was not made until 9 August 2011.
2. The appellant applies for permission to extend the time limit to file its Notice of Appeal. This is opposed by HMRC.
3. The underlying dispute relates to the appellant's claim for repayment of £38,582 covering VAT periods 02/05 to 02/06. That amount, together with associated statutory interest of £5,283.28 has been repaid by HMRC in line with the High Court judgment in *CRC v The Rank Group Plc* 2009 EWHC (Ch) 1244 and the decision of the First Tier Tribunal in *The Rank Group Plc v CRC* [2009] UKFTT 363 (TC). HMRC appeals against the High Court decision to the Court of Appeal and against the First Tier Tribunal decision to the Upper Tribunal.
4. The appeal before this Tribunal is an appeal against an assessment for £38,585 under section 80(4A) Value Added Tax Act 1994 ("VATA 1994") and £5,283.28 under s78 VATA 1994 which HMRC say have been issued to protect their position, should their appeals be successful, in relation to recovery of the amounts which have been repaid.

Proceeding in the absence of the appellant or his representative

5. The appellant did not appear and was not represented at the hearing. At the hearing Ms Ratnett told us HMRC understood the appellant's representative had told HMRC that they were not intending to turn up. We were satisfied from reviewing the Tribunal's file and from hearing what Ms Ratnett had told us that the appellant had been notified of the hearing. We noted that the Tribunal had available to it the reasons given for the late appeal in the appellant's Notice of Appeal of 9 August 2011 and in a letter from the appellant to the Tribunal dated 28 November 2011. In the circumstances we were satisfied it was in the interests of justice to proceed with the hearing under Rule 33 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Procedure Rules").
6. After the hearing we found out that the appellant had in fact written to the Tribunal on 14 March 2012 to say that its reasons for its late appeals were as set out in the appellant's letter of 28 November 2011.

Evidence

7. We had before us a documents bundle produced by HMRC which included correspondence between the appellant and HMRC, and between the appellant and the Tribunal, in relation to the appeal in issue and also some correspondence between HMRC and the appellant in relation to two earlier appeals.

Background

8. Prior to the appeal in issue the appellant had in March 2008 appealed against a
5 decision issued on 21 January 2008. On 7 April 2010 the appellant had also appealed
against a decision issued on 16 October 2009. The appellant's representative in those
appeals and in the current appeal is a Mr Philip Crowther. According to HMRC no
objection was taken by HMRC to the late filing of the previous appeals.

9. On 8 March 2011 HMRC wrote to the appellant in a letter headed "Notification of
10 Assessment". This explained that the appellant's claim dated 21 December 2006 in
the amount of £38,582 and associated statutory interest of £5,283.28 had been repaid
in line with the judgment of the High Court in *Rank* and the December 2009 decision
of the First Tier Tribunal but that those decisions were under appeal to the Court of
15 Appeal and the Upper Tribunal. The letter went on to explain that an assessment had
been raised in equivalent amounts to the repayment and that in the event the Court of
Appeal overturned the earlier decisions HMRC would expect the appellant to pay the
amounts charged by the assessments. The letter mentioned that no action would be
taken to collect the tax charged by the assessments until the Court of Appeal and the
20 Upper Tribunal had given their judgements and further that if the appellant did not
agree with the assessments and wanted to appeal to the tribunal he should do this
within 30 days of the date of the letter.

10. On 9 August 2011 the appellant completed its notice of appeal and filed this with
the Tribunal.

25 *Law*

11. Section 83G of the VATA 1994 provides

30 " (1) An appeal under section 83 is to be made to the tribunal before –
(a) the end of the period of 30 days beginning with –
(i) in a case where P is the appellant, the date of the document
notifying the decision to which the appeal relates

...

(6) An appeal may be made after the end of the period specified in
subsection (1)..., if the tribunal gives permission to do so."

35 12. Rule 20 of the Procedure Rules as amended by SI 2010/2653 (with effect from 29
November 2010) states:

"(1) A person making or notifying an appeal to the Tribunal under
any enactment must start proceedings by sending or delivering a notice
of appeal to the Tribunal.

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(4) If the notice of appeal is provided after the end of any period
specified in an enactment referred to in paragraph (1) but the

enactment provides that an appeal may be made or notified after that period with the permission of the Tribunal –

(a) the notice of appeal must include a request for such permission and the reason why the notice of appeal was not provided in time; and

5 (b) unless the Tribunal gives such permission, the Tribunal must not admit the notice of appeal.”

Appellant’s arguments

10 13. In its notice of appeal the reasons for the late appeal were stated to be that the appellant was not aware that the letter that was received constituted a decision which required an appeal to be submitted against it. The appellant had sought professional advice and the conclusion was that an appeal should be submitted.

14. In its letter to the Tribunal of 28 November 2011 the appellant gave the following further explanation:

15 “The protective assessment in question was raised at the same time that the assessment/ Notice of Error Correction was raised for the repayment to the appellant of the output tax declared on gaming machine income. This caused confusion with the appellant as they were not aware that any further action was required regarding these assessments. The appellants accountants then took advice regarding the letter received and were informed that this was a protective assessment which required an appeal to be submitted to the Tax Tribunal.”

Respondents’ arguments

25 15. Ms Ratnett gave us a skeleton argument, for which we were grateful, and took us through this.

16. The circumstances for a Tribunal to allow an appeal out of time must be exceptional and the burden of proof as to why the Tribunal should exercise its discretion to permit a late appeal falls on the appellant.

30 17. HMRC’s letter of 8 April 2011 clearly stated the relevant time limits. Having made two previous appeals the appellant must have been fully aware of the process involved in submitting an appeal.

35 18. While not applicable per se the tests contained in Rule 3.9(1) of the Civil Procedure Rules 1998) (“CPR”) provided a series of tests which were useful to consider in giving effect to the overriding objective of the Tribunal to deal with cases fairly and justly.

19. HMRC’s contentions on the relevant tests were

(CPR 3.9(1))

(a) the interests of the administration of justice)

It is not in the interests of justice to permit appeals after long periods of delay. There is a public interest in the finality of decisions.

(b) whether application for relief made promptly

the appeal was 4 months out of time with no credible explanation for that.

5 **(c) whether failure to comply was intentional**

Given the explanation of appeal rights in HMRC's letter the failure to comply was intentional.

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

10 The explanation of appeal rights in HMRC's letter together with the appellant's awareness of the process from having made previous appeals meant there was no good explanation.

(h) the effect that the failure to comply had on each party and (i) the effect which granting relief would have on each party

15 There is a public interest in the finality of HMRC's decisions, and HMRC would suffer prejudice if the statutory time limit was side-stepped by allowing appeals where that had been delay to be brought out of time. There is no real and practical loss if the appellant is denied relief. If HMRC were unsuccessful in the appeals pending before the Court of Appeal and the Upper Tribunal HMRC's protective recovery assessment
20 would be withdrawn.

In terms of the length of the delay the First Tier Tribunal case of *GSM Worldwide Limited* (2010) TC 07222 was referred to as an example of a case which had a similar length of delay and where permission to appeal out of time was refused.

25 *Discussion*

20. In exercising the Tribunal's discretion, which is a discretion at large, we found it useful to take account of the checklist of factors set out in CPR Rule 3.9(1). In particular we first considered whether the appellant had a good explanation for the delay.

30 21. While HMRC's letter of 8 March 2011 was no doubt more complex than the usual notification of assessment in so far as it had to explain the particular circumstances of the assessment being taken on a protective basis and the dependencies on the outcome of higher appellate litigation, the explanations were clear and the statement of appeal rights unambiguous. We do not find the appellant's
35 account of the delay as advanced in their letter, namely that this was due to the appellant being confused, and his accountants having to seek advice on the letter, to be persuasive enough to amount to being a good explanation for the delay.

40 22. We went on to consider the effect that the failure to comply had on each party and the effect which granting relief would have on each party and further how the respective prejudice to each party should be balanced.

23. While we accept HMRC's argument that there is a public interest in finality of decisions as a generality, in the particular circumstances of this appeal we consider that prejudice, and this was conceded by Ms Ratnett, is of limited relevance here. As at the date of this application, the finality of the decision is conditional on the
5 outcome of appeals before the Court of Appeal and the Upper Tribunal which are yet to be decided. This is not the sort of situation where a late appeal prevents HMRC from "closing their books". In finding the prejudice to HMRC to be limited we also take account of the length of the delay being close to 4 months.

24. As for the prejudice to the appellant, HMRC say that there is no real and practical
10 loss or injury to the appellant because if HMRC were unsuccessful in the Court of Appeal and Upper Tribunal in *Rank* then these protective assessments would be withdrawn. While that may well be what HMRC would do, if we refused the appellant permission to extend his time limit for appeal, we are conscious that the withdrawal of
15 assessment does not follow automatically by operation of statute, rather the appellant would be reliant on HMRC reaching the view that it should withdraw the assessment. If, for any reason, HMRC did not withdraw the assessment and the relief sought today were denied, the appellant, by losing the ability to challenge that assessment, would lose something of value.

25. Although we are not necessarily persuaded the appellant has a good explanation
20 for filing his appeal late, we consider that in the particular context of this protective assessment the prejudice to the appellant outweighs the prejudice to the Respondents.

26. We therefore decide that our discretion to grant the appellant's application for permission to extend his time for appeal is granted in favour of the appellant, and that HMRC's application to strike out is dismissed.

25 27. 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
30 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.

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SWAMI RAGHAVAN
TRIBUNAL JUDGE

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RELEASE DATE: 18 April 2012

