



**TC02164**

**Appeal number: TC/2011/00306**

*VALUE ADDED TAX – Application by the Appellant for an extension of time to appeal against decisions by HMRC – Balancing exercise undertaken setting off the loss to the Appellant if the extension was not granted against (a) the public interest in the need for good administration, legal certainty and respect for the general time limit for bringing an appeal which Parliament has laid down; (b) the discerned prejudice to HMRC in having to reopen their examination of the Appellant’s claim were an extension of time for appealing to be granted; and (c) the Appellant’s discerned culpability for the long delay in initiating its appeal – held on the facts that the balance was against granting an extension of time to appeal – application refused and appeal struck out*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ELTHAM HILL CLUB AND INSTITUTE**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE JOHN WALTERS QC  
M M HOSSAIN FCA FCIB**

**Sitting in public at Bedford Square, London on 12 July 2012**

**Mr Adams, for the Appellant**

**Ms Lynne Ratnett, HMRC, for the Respondents**

## DECISION

5 The Respondents objected by a Notice dated 8 April 2011 to the Appellant's request for permission to appeal, or to notify the appeal, out of time, which was made in their Notice of Appeal dated 18 December 2010.

10 The decision against which the Appellant seeks to appeal was communicated to the Appellant by the Respondents by a letter dated 7 December 2006. The appeal is therefore made almost 4 years out of time.

15 At the hearing on 12 July 2012, the Tribunal heard both the Appellant's request for an extension of time and the Respondent's application for the appeal to be struck out. The Tribunal reserved its decision.

20 Following consideration, the Tribunal's decision is to refuse to extend the time for the service of the Appellant's Notice of Appeal and to strike out the appeal. Accordingly, the following Directions are made, for the Reasons which appear below.

### DIRECTIONS

- 25 1. The Appellant's application for an extension of time in which to appeal against the decision of HMRC contained in HMRC's letter dated 9 July 2009 is REFUSED.
- 30 2. The appeal is STRUCK OUT pursuant to rule 8(2) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules"). This is by reason of the Tribunal not having jurisdiction in relation to the appeal (rule 8(2)(a) of the Rules) because, the extension of time in which to appeal having been refused, the appeal is brought out of time in relation to the decision of HMRC contained in HMRC's letter dated 7 December 2006.

### REASONS

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#### **Introductory facts**

40 1. On 24 August 2006, the appellant, Eltham Hill Club and Institute ("the Club") lodged a claim with the Respondents ("HMRC") to recover output VAT on gaming machine income which the Club asserted was not properly liable to VAT.

45 2. The claim was a 'Fleming' claim based on the decision of the European Court ("the ECJ") in *Finanzamt Gladbeck v Linneweber* (C-453/02) which, the Club has argued, established that income from gaming machines was exempt for VAT purposes. The claim was in the amount of £15,405 plus interest and covered the period from 2003 (period 09/03) to 2005 (period 11/05).

3. On 3 October 2006 HMRC responded to the Club asking for further information. This was supplied by the Club in a letter dated 14 November 2006, which concluded with the words: 'I await your reply but I assume that we will have to await a Tribunal/Test Case decision before you will move on this'.

5 4. On 7 December 2006 HMRC wrote again to the Club asserting that the ECJ's decision in *Linneweber* did not give rise to the result claimed by the Club and specifically did not provide a basis for an argument that the UK's VAT treatment of gaming machines had 'breached fiscal neutrality'. The letter contained in terms a formal rejection of the claim made by the Club. It concluded with advice on an  
10 appeal against the decision to an independent tribunal.

5. However no appeal was made, Mr Adams told the Tribunal, 'because the matter was before the Courts and Tribunal'. He explained that the Club was waiting for a decision in the *Rank Group plc* appeal. Mr Adams accepted in hindsight that it was a mistake that the Club did not appeal at that stage.

15 6. The Club wrote a letter to HMRC on 12 October 2010 stating: 'I now understand that the matter has now been resolved and that you have accepted the decision of the VAT Tribunal in respect of Rank, and are authorising repayments'. This was a reference to HMRC's Business Brief 11/10 which stated, amongst other things, that 'claims that have previously been rejected (for whatever reason) and  
20 which are not under appeal will not be considered.'

7. On 4 November 2010 HMRC replied to the Club stating that its claim had already been rejected and was not appealed and that, therefore, the claim was considered closed and HMRC would not reconsider it.

8. The Club challenged this decision with HMRC by a letter dated 18 November  
25 2010, to which HMRC responded advising the Club that it could still make an application to the Tribunal to ask if it would accept a late appeal.

9. At this stage the Notice of Appeal dated 18 December 2010 was filed. The reasons given for the appeal being made or notified late were as follows:

30 'Initial rejection of our claim for overpaid tax was based on Business Brief 20/0-6. The whole situation was before the Tribunal and Courts in the *Rank* (Gaming Machines) case. When this case was partially resolved Revenue and Customs Brief 11/10 initiated repayments but only in respect of claims that had not been rejected for whatever reason. Our initial claim made in 2006 has subsequently been proved valid and the revenue rejection of our reclaim in 2010 has been unreasonably rejected.'

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**Principles relating to the extension of time to bring an appeal and their application in this case**

10. Section 83G(6) VAT Act 1994 gives the Tribunal power to extend the time within which this appeal may be brought, and in the exercise of the discretion involved in the power we must give effect to the overriding objective in rule 2(1) of the Rules to deal with cases fairly and justly.

5 11. We were referred by Ms. Ratnett to several previous Tribunal decisions, among them: *The Medical House plc* (2006) (VTD 19859) – a decision of Judge Demack refusing an extension of time to appeal; *Former North Wiltshire DC* [2010] (UKFTT) 449 – a decision of the present judge extending time for appealing; and *Pen Associates Ltd.* [2011] (UKFTT 554) – a decision of Judge Demack refusing an  
10 extension of time.

12. We hold that we must pay particular attention to whether the Club has shown good reason for the delay in lodging the appeal and whether extending time would be prejudicial to the interests of good administration and legal certainty.

13. Beyond this, we must take account of all factors relevant to the proportionate  
15 exercise of our discretion (proportionality being an aspect of fairness and justice) and such factors would in principle include a consideration of the merits of the proposed appeal so far as they can conveniently (and proportionately) be ascertained. If some factors point one way and some another, we must carry out a balancing exercise.

14. As to the merits of the proposed appeal, we face a difficulty in that it appears  
20 to us that the area of law sought to be explored in the proposed appeal is complex and developing, and the precise facts of the Appellant’s case have not been clearly explained. We have no means of assessing the strength of the Appellant’s case on the breach of fiscal neutrality point (an issue of substantive law), or on any other procedural points arising (such as the merits of the “Fleming” claim), and we cannot  
25 conveniently proceed independently to any evaluation of the strength of the Club’s case.

15. We can however say that it does not appear to us that the case the Club wishes to advance is obviously hopeless or even weak. In the circumstances we will, at this stage, assume that the case is strong.

30 16. It is certainly potentially valuable to the Club. A consequence of striking out the appeal will be to extinguish the Appellant’s right to litigate a claim quantified at over £15,000 plus interest.

17. We conclude that, taking no account of the difficulties caused by the lateness  
35 of the appeal, a refusal by this Tribunal to entertain the appeal would be a real and practical loss or injury to the Club – cf *Former North Wiltshire DC* at [63].

18. That is a factor in favour of extending time for appealing. It cannot however “trump” all other factors (cf *Former North Wiltshire DC* at [61]).

19. Against it we must balance the public interest in the need for good  
40 administration, legal certainty and respect for the general time limit for bringing an appeal which Parliament has laid down (cf section 83G VAT Act 1994). The facts on

which the Club relied in quantifying its claim may be to some extent estimates, and in any case HMRC has ‘closed its books’ on the Club’s claim and we conclude that the prejudice to HMRC in having to reopen their examination of the Club’s claim would be real, and more significant than it was in *Former North Wiltshire DC*, where HMRC had not opposed a grant of an extension of time to appeal a related decision to that in issue in the decided application (cf *ibid.* at [67]). This is a factor of some significance pointing against the grant of an extension of time to appeal.

20. A crucial factor in our judgment is our estimate of the Club’s culpability in delaying to lodge its Notice of Appeal. The delay was almost four years and a delay of this length would, in most normal cases, prevent the exercise of the discretion to extend time to appeal.

21. The explanation received by the Tribunal for the delay was given us by Mr Adams. It appears that the Club somehow thought that since the matter was being, or would be, or would be likely to be litigated by another party, there was no need for the Club to make its own formal appeal.

22. We take into account the fact that the Club did not have professional advice, but conclude that the Appellant was seriously culpable for the delay in initiating its appeal. The fact that the Club assumed that it would have to wait for another case to be fought (the Club’s letter of 14 November 2006) can even be construed as a statement of an intention *not* to make its own appeal (presumably because of the costs implications). There is certainly no evidence that the Club had regard to HMRC’s need to know where it stood in relation to potential litigation, which we must consider in our function of being fair to both parties. Moreover we discern no conduct by HMRC in relation to the delay which would mitigate the Club’s culpability – compare the position on the facts in *Former North Wiltshire Council DC – ibid.* at [74] to [78].

23. Our discussion above effectively covers the criteria in CPR rule 3.9(1) which, as HMRC submitted and as the Tribunal decided in *Former North Wiltshire DC* – see: *ibid.* [55] to [56] – the Tribunal is not obliged expressly to consider but which the Tribunal will often in practice consider in giving effect to the overriding objective of the Rules.

24. The necessary balancing exercise involves our weighing against the assumed real and practical loss or injury to the Club of being prevented from pursuing a claim of this value and assumed merit – (a) the public interest in the need for good administration, legal certainty and respect for the general time limit for bringing an appeal which Parliament has laid down; (b) the discerned prejudice to HMRC in having to reopen their examination of the Club’s claim were an extension of time for appealing to be granted; and (c) the Club’s discerned culpability for the long delay in initiating its appeal.

25. We conclude that the factors pointing against the grant of an extension of time for appealing in this balancing exercise outweigh the assumed real and practical loss or injury to the Club of being prevented from pursuing a claim of this value and assumed merit. Had we concluded otherwise we would have wished to examine more

closely the actual merit of the claim but in the circumstances this is unnecessary. We refuse the Club's application to extend time to bring an appeal against HMRC's decision of 7 December 2006, which has the consequence that the Tribunal has no jurisdiction to entertain the appeal and it must be struck out. We direct accordingly.

5 **Right to apply for permission to appeal**

26. This document contains full findings of fact and reasons for our decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Rules. 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.

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**JOHN WALTERS QC  
TRIBUNAL JUDGE**

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**RELEASE DATE: 1 August 2012**