TC02436

Appeal number: TC/2012/3689

VAT - Application by the Appellant for an extension of time to appeal – balancing of the various factors – Application dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

MOULTON WORKING MENS CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE LADY JUDITH MITTING
MR MICHAEL ATKINSON

Sitting in public in Northampton on Tuesday 13 November 2012

Mr R J Vann, Accountant for the Appellant

Mr Ridley, officer of HMRC, for the Respondents

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DECISION

1. In its Notice of Appeal dated 28 November 2011, Moulton Working Mens Club ("The Club") applied for an extension of time in which to lodge the appeal, the decision appealed against being dated 19 July 2007. The Respondents opposed this application and themselves applied for the appeal to be struck out. Both applications came before us on 13 November 2012.

2. We heard no oral evidence, the Club's case being put by its Chartered Accountant, Mr RJ Vann, who had acted for the Club throughout. Mr Ridley represented the Respondents. The facts were not in dispute and we find them to be as follows:

The Facts

3. The Club is a not for profit, non commercial members' club, owned and run by its members. Financially, its aim is to break even at the end of each accounting year. Occasional years, it runs into a revenue deficit and equally, in occasional years, it shows a small revenue profit, unlikely to be more than £1,500. This surplus would be applied to maintaining the fabric of its building.

4. Following the ECJ in decision in *Finanzamtgladbeck v Linneweber* (c-453/02), the Club believed it had over paid output tax on gaming machine income which it maintained should properly have been treated as exempt. It sought to recover the overpaid output tax by way of a Voluntary Disclosure dated 15 August 2006, covering periods 1 July 2003 to 30 November 2005 and in the sum of £6,752

5. By letter dated 19 July 2007, the Respondents rejected the claim, merely stating that it was their view that the UK does not breach fiscal neutrality in the way gaming machine income was taxed. The letter went on to offer a reconsideration. Mr Vann told us that it had been his intention to apply for a reconsideration but had clearly overlooked it. He did not realise it had been overlooked until he received a response from the Respondents on the case of Wilby Working Mens Club which he was running along side the present case. He took no further action.

6. Mr Vann advised us that he was aware of the right to appeal to the Tribunal, the details of how this could be done, having been given to him by the Respondents in the Wilby case. However he and the Club made a deliberate decision not to appeal. This decision was based on the assumption and belief (which he now accepted had been wrong) that to appeal would have incurred a vast amount of funds, considerably beyond the means of the Club. Mr Vann accepted that he had misunderstood the system of merely lodging an appeal to be stood over behind the Rank case and had assumed, and so advised his client, that the Club would have to instruct lawyers of the same level as those in the Rank case to argue the Club's case, including all its European dimensions.

7. By letter dated 13 October 2010, the Club, by this time aware that Rank had succeeded in its appeal before the Tribunal, enclosed a copy of its original Voluntary Disclosure, asking again for repayment. Mr Vann explained to us that this was not a fresh claim (which would by now have been out of time by virtue of the capping provisions) but a reinstatement of the original.

8. By letter dated 3 November 2010, the Respondents advised that this claim had already been rejected and had not been appealed and was therefore considered to be closed. Reference was made to Business Brief 11/10 which had been issued on 16 March 2010. The Brief contained the Respondents' reaction to the Rank litigation and stated that

> "claims that had previously been rejected (for whatever reason) and which are not under appeal will not be considered. No new claims for the repayment of VAT paid for the period between 1 November 1998 and 5 December 2005 can be made. The aim is to process all existing claims ….. by 31 March 2011".

9. By letter dated 5 August 2011, the Club replied to this letter pointing out that the effect of the Tribunal decision in Rank was to support the voluntary disclosure as representing the correct tax treatment of the supply and it was therefore unnecessary to appeal. Secondly, it was pointed out that the Business Brief post dated the claim and was not therefore applicable. The Respondents replied on 3 November 2011, repeating that the claim had already been rejected, was not under appeal and was therefore closed and would not be reconsidered.

10. The Notice of Appeal was received on 3 December 2011.

The Club's case

11. Mr Vann, other than taking us through the chronology, added little to what he had set out in the correspondence referred to in the preceding paragraphs. He maintained, and this was accepted by Mr Ridley that the Respondents had paid out on a number of similar claims and it was unfair and discriminatory not to be meeting the Club's claim. Mr Ridley had no knowledge of the claims which had been met and the reasons why but both parties seemed to agree with our suggestion that the claims may have been those which had been appealed. Mr Vann also pointed to certain delays by the Respondents in replying to correspondence.

The Tribunal's approach to the Applications

12. Under Rule 20(4) of the 2009 Tribunal Procedure Rules, an appellant may apply for an extension of time in which to lodge his Notice of Appeal. The Tribunal is thus given the power to extend the time within which an appeal may be brought and in exercising the discretion involved in that power we have to give effect to the overriding objective in Rule 2 (1) of the Rules to deal with cases fairly and justly.

13. In exercising our discretion, we take our approach from that set out by Judge John Walters QC in paragraph 68 of the case of *Former North Wiltshire District Council v HMRC* (TC/00/714).

> 68. In our judgment, the crucial balancing exercise which we must carry out in order to exercise our discretion in a fair and just disposal of the application is between, on the one hand, our assessment of the Appellant's culpability in the delaying to lodge their notice of appeal and the prejudice to HMRC 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 an extension of time is refused. We consider that the criteria in CRP 3.9(1), which are relevant to this case, are effectively addressed in this balancing exercise.

Conclusions

14. As set out in paragraph 13, the approach of the Tribunal is in effect a balancing exercise in which we have to identify the various and relevant factors to which we should give weight and, of some importance, the weight to be attached to these factors.

15. This is a small non profit making club and the financial impact of "losing" the repayment would be significant. This is a factor which would be favourable to the Club in their application for extension.

16. We were not called upon to a make detailed analysis of merit and indeed had very little information before us upon which we could. The Respondents had requested no further information from the Club in response to the voluntary disclosure, having merely rejected the claim. We expressly asked Mr Ridley if the claim would be repaid as other similar ones were being, if we allowed the extension. He, for perfectly proper reasons, would not commit to repayment but he readily accepted that given the current status of the Rank litigation, this would be a claim to which consideration for repayment would be given. For our purposes, all we need say is that the claim quite clearly is not without merit – again a factor which would be favourable to the Club.

17. In considering the prejudice to the Respondents if an extension were to be given, we were in some difficulty. We tried to press Mr Ridley who told us he had not been briefed on the question of prejudice. Quite clearly, it is always in the public interest and the interest of good administration that there should be legal and financial certainty. This need will inevitably weigh against an applicant in an application to extend time limits. However there may well be additional prejudice unique to a particular case. Mr Ridley was unable to tell us what, if any, further investigation into the claim would be made if the application were to be granted. We would have thought that some investigation would be needed but as we were told of none we cannot take this into account as being a factor favourable to the Respondents.

18. We have discussed above the factors favourable to the Club – the financial significance to them of the amount claimed and the fact that their claim is not without

merit. However these factors must be weighed against the length of the delay and the culpability of the Club in that delay. The decision letter was dated 19 July 2007. The appeal was received on 3 December 2011. Throughout this period it cannot be overlooked that the Club was being professionally advised. As Mr Vann now accepts, his belief that the mere lodging of the appeal would inevitably lead to the incurring of further expense was incorrect. Whilst we accept that this was why the appeal was not lodged, it cannot excuse it. Any delay by the Respondents in answering the correspondence cannot justify the Club's delay in lodging its appeal.

19. It is our conclusion, having weighed all the factors above mentioned, that whilst there are clearly some factors weighing in favour of granting the extension these are by far outweighed by the pure length of the delay and the discerned culpability of the Club for the delay in initiating the appeal.

20. For the reasons given above, we therefore refuse the Club's application for an extension of time in which to lodge its appeal and we grant the Respondents' application that the appeal be struck out.

21. 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.

LADY JUDITH MITTING
TRIBUNAL JUDGE

RELEASE DATE: 17 December 2012