



TC02879

Appeal number: TC/2012/02467

*VAT – Late Appeal – Re payment claim – Golf green fees – Strike out
Application – HMRC procedures misleading – Application dismissed –
Extension of time granted*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

YEOVIL GOLF CLUB

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE RACHEL SHORT
MR RICHARD CORKE**

**Sitting in public at Exeter Magistrates Court, Heavitree Road Exeter on 11 July
2013**

Mr Paul Clifford for the Appellant

Mr Martin Priest, representing HM Revenue and Customs, for the Respondents

DECISION

1. This is an appeal against an application by HMRC to strike out the Appellant's
5 appeal under Rule 8 of the Tribunal Procedure (First tier Tribunal) (Tax Chamber)
Rules 2009 (the "Tribunal Rules") on the basis that the appeal was made two years
and five months out of time. The appeal concerns the VAT treatment of "green fees"
charged by the Appellant, Yeovil Golf Club ("Yeovil") for the periods September
1973 – August 1989 and January 1990 – December 2008. The correct VAT treatment
10 of green fees is currently under consideration in the Tax Tribunals (the leading case
being *Bridport & West Dorset Golf Club* TC/1214).

2. This appeal was heard before this Tribunal on 7 February 2013 and was
adjourned in order for the parties to provide more specific evidence of the
correspondence and other communications between HMRC and the Appellants
15 relating to the appeal for these particular periods. This information has now been
provided. The Appellant has a number of similar appeals with HMRC which are stood
behind this above mentioned case.

Relevant Legislation

3. The time limits for making an appeal in respect of a decision of HMRC
20 concerning VAT are set out at s 83G (1)(a) VATA and stipulate that appeals must be
made within 30 days of the date of the issuance of the HMRC document notifying the
decision.

4. The Tribunal Procedure (First tier Tribunal) Tax Chamber Rules 2009, SI
2009/273, set out at Rule 8 the circumstances in which a party's case may be struck
25 out. Rule 5 sets out the Tribunal's case management powers, including the ability to
grant extensions of time for making an appeal. Rule 2 sets out the overriding
objective of the Tribunal Rules "to deal with cases fairly and justly".

The Facts.

5. Mr Clifford represents a number of golf clubs, including Yeovil. As a result of
30 decisions of the European courts concerning the correct VAT treatment of
membership fees, on behalf of the Yeovil and other of his clients, Mr Clifford had
discussions with a representative of HMRC in 2008 concerning the correct process for
making VAT appeals. As a result of these discussions Mr Clifford put in VAT re-
claims in respect of membership fees for a number of clients including Yeovil.

6. In March 2009 Mr Clifford also realised that he could put in similar claims in
35 respect of green fees (referred to as "temporary members' subscriptions") and made
such a claim on behalf of the Appellant on 10 March 2009. HMRC responded on 26
May 2009 rejecting the claim in a letter which set out in detail both what was required
were the Appellant to decide to appeal against this decision and what rights the
40 Appellant had to a statutory review of the decision. The letter made clear that these

were two distinct procedures. After setting out details of the statutory review procedure, the letter stated;

5 “You also have a right to appeal directly to an independent tribunal against this decision. You can appeal without requesting a review by HMRC but you should note that you will not be entitled to a review once an appeal has been made to the tribunal”.

7. Mr Clifford replied to that letter on 1 August 2009, making a clear statement that he wished to appeal against HMRC’s decision. Nevertheless, and counter to the statements about the procedure made in their 26 May letter, HMRC wrote to Mr Clifford on 17 August 2009 to tell him the results of their statutory review. This was despite the fact that Mr Clifford had requested an appeal rather than a review. HMRC’s letter of 17 August did set out in its final paragraph the Appellant’s right of appeal to the Tribunal.

8. In response to this letter Mr Clifford called both HMRC and the Tribunals to ask whether he needed to make a further appeal. No documentary evidence of these telephone conversations was produced to the Tribunal. He was told that since details of his claims were already held, there was no need to make a further claim.

9. No further action was taken until June 2011 when the *Bridport* decision was published. At that time Yeovil themselves wrote to HMRC asking about the repayment of VAT which they now believed was due (letter of 9 June 2011) on the basis that they were “part of this class action”. HMRC responded on 27 June 2011 referring to their letters of May and August 2009 but stating that “*I can find no documents relating to a tribunal appeal in respect of our letters of 26 May 2009 or 17 August 2009*” and that “*unless you can show that a valid appeal has been lodged with the Tribunal, no valid claim exists and no repayment can be considered*”.

10. Mr Clifford wrote to HMRC on 10 August 2011 stating his belief that these claims had been appealed against and that they were stood behind the *Bridport* case. Mr Clifford then discussed the issue with the Tribunal and was told that he should put in a new appeal on line, which he did on 27 January 2012. He received a letter on 13 February 2012 from the Tribunal confirming receipt of his appeal.

Arguments

11. Mr Clifford said that on the basis of his original conversations with HMRC in 2008, the correspondence with HMRC in 2009 and his telephone conversations with HMRC and the Tribunals Service, he assumed that he had made a valid appeal in respect of the VAT on the green fees paid to Yeovil Golf Club for the periods in dispute. He pointed to a number of instances in that correspondence which seemed to suggest that there was a valid appeal outstanding, (such as the Tribunal letter of 13 February 2013 and HMRC’s letter of 29 February 2012). Mr Clifford accepted that he had no written evidence of his telephone conversations with HMRC and the Tribunal in August 2009 and that he had not sent the correct appeal forms until 27 January 2012. However he claimed that it is unfair for HMRC to reject his claim on

this basis since he believed he had acted on the directions of HMRC and the Tribunal and genuinely believed that he had made a valid appeal. He was not aware that a valid claim did not exist until this was stated by HMRC in their letter of June 2011.

5 12. Mr Clifford told the Tribunal that he had a number of similar claims in respect of green fees for other clients and he had followed the same procedure in all of those cases.

10 13. On behalf of HMRC Mr Priest said that he considered that the dispute had been closed in August 2009 and that no valid appeal had been made until 27 January 2012, two years and five months out of time. Mr Priest referred us to Rule 21 of the Tribunal Rules stating that the requirements for a valid notice of appeal, which he says were not complied with by Mr Clifford. He also referred to the statutory time limit which applied to VAT appeals at s 83G(1) Value Added Tax Act 1994. In his view HMRC's appealable decision was that stated in their letter of 17 August 2009 and the time limits for making an appeal ran from that date.

15 14. On behalf of HMRC Mr Priest said that HMRC's procedures were "confused" at this time as it was soon after the new appeal procedures had been introduced. He accepted that it was an error on the part of HMRC to respond to Mr Clifford's request for an appeal on 1 August 2009 with a statutory review.

20 15. Mr Priest referred us to a number of the relevant cases in the area and suggested on the basis of the *North Wiltshire Council* case ([2010] UK FTT 449 TC) and *Jem Leisure* ([2011] UK FTT 778 TC) that the tests in the Civil Procedure Rules ("CPR") were relevant in determining whether this late appeal should be allowed. In his view it would prejudice HMRC if an appeal was allowed so long after the original decision had been made.

25 **Decision**

30 16. Previous cases in this area demonstrate that it is only in exceptional circumstances that the Tribunal should allow a late appeal and that in coming to that decision the criteria laid out in the CPR are relevant if not over riding factors. In making this decision the Tribunal is aware of the suggestion from other cases which have considered similar questions that this is a power which should not be used lightly and that there are a number of different issues which need to be weighed in the balance in considering whether it is in the interests of justice to exercise this discretion. This includes, from HMRC's perspective, the interests of good administration and the need for legal certainty.

35 17. On the basis of the evidence provided, the Tribunal have concluded that Mr Clifford genuinely believed that he had made a valid appeal in respect of the VAT for these periods and that this belief arose partly as a result of HMRC's own confused procedures in 2009 at the time when the appeal procedure rules had just changed. Mr Priest accepted that the way in which Mr Clifford's correspondence had been dealt
40 with was incorrect and that the current procedures would have included asking Mr Clifford to confirm that he wanted to appeal to the Tribunal.

18. The Tribunal has also concluded that this confusion was compounded by the conversations which Mr Clifford had with HMRC and the Tribunal Service in August 2009 during which we suspect there was some confusion between existing claims made by Mr Clifford concerning membership fees, for which appeals had been received, and these claims for green fees.

19. Before considering any guidance available from the CPR tests, the Tribunal decided that Mr Clifford had acted on behalf of his clients in a responsible way and had been reasonably diligent in pursuing these claims, albeit that he had allowed himself to be misled by both HMRC and the Tribunals as to what the correct procedure for making a valid appeal actually was in 2009.

20. Previous authorities have suggested that the CPR concerning the courts' case management powers and particularly the criteria applied at Rule 3.9 (concerning the relief from sanctions) can also be taken account of in coming to this decision, where relevant. Taking each of the tests set out in Rule 3.9 in turn:

21. (i) *Interests of administration of justice*; We have not been provided with information to enable us to consider in detail the merits of the substantive appeal, but assuming that the appeal has some merit, (and the *Bridport* case suggests it does) we do not think that it is in the interest of justice to refuse an appellant the right to appeal on the basis of an honest error or mistake.

22. (ii) *Application made promptly*; this is the critical issue here. While Mr Priest says that the formal appeal notification was made more than two years late, Mr Clifford did act promptly in doing what he thought was required to make an appeal.

23. (iii) *Was failure to comply intentional*; While Mr Clifford could have been more diligent in checking what was required to make a formal appeal, we have concluded that there was no intentional failure to comply with the correct procedures.

24. (iv) *Was there a good explanation for the failure*; We do think that there is a good explanation for this failure; both HMRC's confusion as to the appeal procedures and the statements made by the Tribunals that Yeovil had existing appeals on record led Mr Clifford to believe that no further action was required to pursue the appeals.

25. (v) *Compliance with other rules and directions*; As far as the evidence which was produced to the Tribunal was concerned Yeovil have complied with other rules and directions in this matter.

26. (vi) *Was the failure caused by the party or their legal representative*; any failure here was the failure of Mr Clifford, Yeovil's agent. However, we do not consider that that fact has any effect on the decision in this appeal.

27. (vii) *Fixed date could still be met*; it remains possible to extend the time limit for making this appeal. The *Bridport* case has still not been finally decided.

28. (viii) *Effect of failure to comply*: For HMRC, this means there is one less of a large number of appeals to deal with. For Yeovil this will close off an opportunity of claiming relief for these periods.

5 29. (ix) *Effect of granting relief*; For Yeovil, this will put them back in the position which they believed themselves to be in, stood behind the *Bridport* case. For HMRC this would mean allowing an appeal to proceed when technically the requirements for making an appeal have not been met. This does not however seem to give rise to a significant risk of an large number of similar claims being made to HMRC's disadvantage and contrary to the law, because the circumstances established by
10 Yeovil are unlikely to be replicated in many other cases.

30. Taking account both of the over riding objectives of the Tribunal Rules to deal fairly and justly with cases, and adding to that the application of the CPR criteria, the Tribunal has concluded that this is an exceptional case in which it is in the interests of justice for the Appellant's appeal to be allowed to proceed.

15 31. For these reasons HMRC's application to strike out this claim is dismissed and the Tribunal extends the time limits for the making of the appeal in this case to 27 January 2012 and allows the Appellant's appeal to proceed.

20 32. 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.

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**RACHEL SHORT
TRIBUNAL JUDGE**

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RELEASE DATE: 10 September 2013