



TC04161

Appeal number: TC/2014/01180

*VAT – application for leave to appeal out of time – Strike-out sought –
Rule 8(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber)
Rules 2009 – leave to appeal late refused – Strike-out granted*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

PRESTON GOLF CLUB

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE KENNETH MURE, QC

Sitting in public at Manchester on Monday 10 November 2014

Appellant: Robert Hynes, Treasurer of Appellant

Respondents: Ms Susan Elwood, Presenting Officer, HMRC

DECISION

1. In this appeal Mr Hynes appeared for the Appellant Golf Club. He has been its
5 Treasurer for about two years. Ms Elwood appeared as Presenting Officer for HMRC.

2. There are two inter-related matters before the Tribunal. The Appellant has applied to appeal out of time. The Respondents seek a strike-out of the Appeal under Rule 20(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.
10 Helpfully Ms Elwood agreed to lead, which had the advantage that Mr Hynes was fully aware of the implications of the issues arising before he addressed the Tribunal.

3. The factual background is not controversial. The Appellant is a Golf Club and had been assessed to VAT in respect of green fees paid by non-members on the basis that this was a standard-rated supply. However, liability here became a matter of
15 controversy affecting many other clubs, which ultimately was appealed successfully in a test case to the Court of Justice of the EU. The issue was widely publicised and a considerable number of clubs lodged appeals.

4. This Appellant lodged a *Fleming* claim (per Section 121 FA 2008) in respect of over-payment of VAT of £101,781.07 and that for an extended period from about
20 September 1990 to September 2008. Quantification of the claim is a secondary issue and is not agreed. A “capping” restriction may apply. HMRC rejected the claim by letter dated 20 August 2009. A review was not sought. The right to appeal accordingly expired on 19 September 2008. HMRC heard nothing further from or on behalf of the Appellant until 2014. In the interim a decision favourable to another
25 golf club appellant was issued by the CJEU at the end of 2013 in the appeal of *Bridport & West Dorset Golf Club*. The circumstances of that appeal are somewhat similar to those giving rise to the Appellant’s claim, albeit subject to other issues such as a possible defence of *unjust enrichment* arising. Some other appeals (but not the Appellant’s) had been “stood behind” the *Bridport* appeal.

30 5. In January 2014 the Appellant’s accountants wrote to HMRC, seeking to “revive” the earlier appeal. HMRC rejected this by letter dated 28 June 2014, founding on the decision in *University of Liverpool* (VTD 16769), to the effect that this represented a *new* appeal, which was time-barred.

35 6. The Notice of Appeal is included as no 10 in the Bundle. It explains that the Appellant at the material time was in financial difficulties and was anxious to avoid the possible costs of an appeal and especially if its appeal became a test-case.

7. By Application dated 12 May 2014 HMRC sought to have the appeal struck-out in terms of Rule 20. The time-limit was 30 days and had long since expired (by four years, five months approximately).

40 8. Having completed her factual narrative Ms Elwood made her submissions in support of the Application for strike-out. The burden of proof, she argued, fell on the Appellant. It had to show a good cause for delay in lodging the appeal. The 30 day limit was well-known and, while short, was not onerous. A Notice of Appeal had to be completed but this did not require professional representation. A request for
45 review of HMRC’s refusal would not have involved costs. Nor would seeking

HMRC's advice about the nature of a Notice of Appeal. The Appellant had in any event the assistance of professional accountants.

9. The case-law affecting the issue was extensive, Ms Elwood noted. Two authorities were lodged, viz *Data Select Limited* [2012] STC 2195, and *Mr Assaf Ali Butt* [2014] UKFTT 955 (TC). Various criteria there are noted, in particular the purpose of the time-limit, the length of the delay, any explanation offered, and the consequences for refusal of leave.

10. Ms Elwood argued that the time-limit gave a measure of certainty. Here the delay was well over four years. There was no apparent reason for not seeking HMRC's advice. Professional advice was available to the Appellant. A conscious decision, apparently, had been taken not to pursue the initial appeal further. There had been a fear of possible costs. The issue had been well-publicised, and many other clubs had appealed, not all of which were represented by major accountancy firms.

11. In essence, Ms Elwood argued, there had been an intentional failure to pursue the original appeal. Effectively the original claim had been abandoned. The Appellant's stance now represented a new claim, which was time-barred. The interests of both the Appellant and HMRC had to be balanced, she continued. While the Appellant might suffer some loss, that did not outweigh the other considerations. Allowing late appeals without sufficient reason frustrates public financial planning. As there was no good reason for relief here, the appeal should be struck out, Ms Elwood concluded.

12. Mr Hynes then addressed the Tribunal on behalf of the Appellant. He confirmed that he did not dispute the historic factual narrative given by Ms Elwood. He focussed on the risk of the possible costs of an appeal, particularly if the Club's appeal had become a test case. The financial circumstances of the Club at the material time were precarious. Originally the appeal was timeous, Mr Hynes argued. The stance adopted by HMRC in rejecting the appeal had now been proved wrong. It was a legal point on which HMRC's initial view had been proved wrong. Their rejection of the Appellant's appeal was premature. It was eminently reasonable of the Appellant Club to consider that following the success of the taxpayer in *Bridport*, its own appeal should be reviewed. Hardship would be caused to the Club if the appeal were struck out.

Conclusion

13. I have a degree of sympathy for the Appellant in the whole circumstances. I appreciate that the value of the claim has not been quantified and possible defences as to *unjust enrichment* may arise. However, I consider it likely that the potential value of the claim is significant in relation to the financial circumstances of the Club.

14. Having said that, I consider that HMRC's stance is well-founded. The delay here is substantially in excess of four years. It appears that a conscious decision was taken not to pursue the original appeal, and I agree with Ms Elwood that on the basis of the decision in *University of Liverpool* the Appellant is now pursuing a new claim. It is suggested that the Appellant was fearful of possible expenses. Given that it had certain professional advice available, it should have appreciated that seeking a review and lodging a Notice of Appeal would not have involved any significant expense. Enquiries could have been made of HMRC, but it seems that they were not. The

30 day period for appealing is reasonable and well-known. I have considered the relevant *dicta* in the recent decisions of *Data Select Limited* and *Mr Assaf Ali Butt*. These do not, on my reading, offer any comfort to the Appellant.

5 15. Having regard to the whole circumstances I refuse leave to appeal out of time. Accordingly it follows that the strike-out application at the instance of HMRC must succeed.

10 16. 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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**KENNETH MURE, QC
TRIBUNAL JUDGE**

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RELEASE DATE: 1 December 2014

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