Appeal number: EDN/08/82

VAT– Application to lodge Substituted Notice of Appeal – refused - repayments and protective assessments issued whilst appeal sisted - failure to appeal timeously – deemed Rule 20 application - allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

CARLTON CLUBS LIMITED **Appellant**
(formerly Carlton Clubs plc)

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT

Sitting in public at George House, 126 George Street, Edinburgh on Friday 29 August 2014

Mr Moss of Ernst & Young LLP for the Appellant

Mr Peretz, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. The Hearing was in respect of an application dated 13 February 2014 to serve a Substituted Notice of Appeal. Strictly speaking therefore it is an application in terms of Rule 5 (3) (c) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") to amend the Notice of Appeal. On 22 August 2014 that Substituted Notice of Appeal was itself amended by deletion of paragraph 6.13(b).

2. This appeal ("the 2008 appeal") is one of the many cases sisted behind the long running *Rank Group plc* ("*Rank*") litigation since it raises the same factual and legal issues as in that litigation.

3. At this juncture the *Rank* litigation has led to six judgements in two separate strands of litigation. The second strand of litigation has been sisted pending the outcome of the first strand. *Rank* has obtained leave to appeal to the Supreme Court in the first strand of the litigation.

4. The *Rank* litigation has raised a number of legal issues but essentially it relates to the taxation of gaming machines and HMRC have disputed the claim that there was any breach of the principle of fiscal neutrality.

The factual background to this appeal

5. On 22 March 2006 the Appellant submitted a voluntary disclosure ("the section 80 claim") claiming repayment in the sum of £2,546,938.06 in respect of VAT accounted for on the turnover from gaming machines which the Appellant contended was in breach of the principle of neutrality and therefore repayable pursuant to section 80 of the Value Added Tax Act (VATA) 1994. Following correspondence HMRC issued a decision on 26 March 2008 ("the 2008 decision") rejecting the section 80 claim.

6. In the 2008 decision HMRC suggested that if the Appellant appealed then it should apply for the case to be sisted pending the outcome of the *Rank* decision. In so doing they had stated: -

> "This will ensure that your claim is on the Tribunal list and that it can be held until the final outcome of the lead case is known. Once this has occurred you can either have the case proceed to a full hearing or withdraw your case depending on the outcome of the lead case."

7. The Notice of Appeal in respect of that decision was dated 7 April 2008.

8. On 21 May 2008 the Tribunal issued a Direction reading:

> "Upon the application of the Respondents and the non-opposition of the Appellants, this Tribunal pursuant to Rule 19 of the Value Added Tax Tribunal Rules 1986 (as amended) hereby directs that this appeal and all matters relating thereto be sisted pending the release of the tribunal decision in The Rank Group Plc."

9. Although there have been several decisions in the *Rank* litigation (and the second strand of litigation is still in the Tribunal pending the outcome of the first strand) both

parties remain of the view that the 2008 appeal remains sisted. The Parties have agreed to submit an agreed Application to vary the May 2008 Direction to make explicit the terms of the sist.

10. On 16 March 2010, HMRC issued Revenue & Customs Brief 11/10. That stated that following the judgments of both the Tribunal[1] and the High Court (and subject to the appeals), HMRC intended to consider claims already received in respect of VAT paid on gaming machine takings. That Brief also indicated that HMRC would be issuing "protective assessments" under section 80(4)(A) VATA 1994 in respect of any repayments in order to allow them to recover any payments made should any of the appeals be successful.

11. Correspondence then ensued between the Appellant and HMRC in regard to the quantification of the repayment and that was stated by both parties to be on "a without prejudice basis".

12. By letter dated 3 August 2010, ("the August decision") HMRC intimated that they had arranged for repayment of the lesser sum of £2,249,727 "based on your final revised claim dated 27 July 2010" plus interest. It was described as "revised" in the context of a narrative identifying the original claim on 22 March 2006, the formal appeal to the VAT Tribunal and "your subsequent re-submission of the claim under Business Brief 11/10".

13. The August decision also indicated that HMRC had appealed the *Rank* litigation to the Court of Appeal and that in the event that that appeal was successful the Appellant would be expected to repay both the tax and the interest together with interest. In that regard therefore the protective assessments were enclosed, albeit HMRC stated that they would not request payment of the assessments "until such time as the Court of Appeal judgment is known. We will advise further what action the Commissioners are going to take at that time." The August decision also indicated that if the Appellant was not satisfied then the Appellant could ask for it to be reviewed or it could appeal to an independent tribunal both within 30 days of the date of the letter.

14. The August decision was not appealed.

15. Following the release of the judgment in the Court of Appeal, HMRC wrote to the Appellant on 29 January 2014 ("the January decision") seeking repayment of the tax and interest. That letter also indicated that the Appellant had the right to ask the tribunal to accept a late appeal against the original protective assessments.

16. On 13 February 2014, the Appellant made the application to serve the Substituted Notice of Appeal, which is the subject matter of this decision. That Substituted Notice of Appeal, as amended, purported to update the position and, in particular, adding the August and January decisions as decisions appealed against.

17. HMRC objected to that application on the grounds that the application "seeks to extend the original appeal to encompass two further decisions which were issued in August 2010 and should have been appealed at the time but were not. As such any

[1]Both the VAT and Duties Tribunal (before 2009) and the FTT (after 2009)

appeals against the further decisions are 3 years 4 months out of time." There is in fact only one decision in August 2010.

The general arguments

HMRC

18. HMRC state that the effect of the repayment in 2010 was to render the 2008 appeal devoid of purpose since the Appellant had received everything it sought in that appeal. Indeed, (see paragraph 12 above) the claim had been re-submitted in 2010. The protective assessments were issued since HMRC maintained that notwithstanding the ongoing *Rank* litigation, the *Rank* claims were incorrect and although HMRC had lost on a point of general application before a lower court, they were confident that they would succeed in a Higher Court. They wished to be able to enforce collection in the event that they succeeded. They had made it clear in the August decision that they would enforce the assessments if they were successful. Accordingly, the Appellant should have appealed the August decision and having failed to do so the application should be treated as an application for permission to appeal out of time.

19. It is argued that there was no reasonable explanation for the delay in appealing which was a very long delay being more than three years. Although HMRC accept that the consequence of a refusal to extend the time limit is that the Appellant would then not be able to contest payment of the sums set out in the assessments (in the event that HMRC did not ultimately succeed in the *Rank* litigation), that was no more than the inevitable consequence of any time limit to the bringing of proceedings, namely that the claimant loses a good claim that he might otherwise have had. The grant of an application for leave to appeal out of time should be the exception, not the rule and should not be granted lightly.

20. The January decision is not appealable to the Tribunal since it is merely a decision to enforce the protective assessments.

21. Lastly, the Appellant's argument on fiscal neutrality is a contentious red herring since, even if it is applicable it does not require taxpayers who do not comply with limitation periods to be treated in the same way as those who do so.

The Appellant

22. The Appellant's primary argument is that the 2008 appeal remained extant and "all matters relating thereto" had been sisted. The repayment that had been made had been expressly stated to be subject to the outcome of the *Rank* litigation. At no stage has HMRC ever accepted that the Appellant was unequivocally entitled to the repayment sought. It is argued that the August decision is not an independent decision but rather an integral part of the 2008 appeal. The section 80 claim remains open as it is the subject matter of the 2008 appeal.

23. The Appellant argues that it cannot be the case that the repayment in August 2010 meant that the 2008 decision was withdrawn in full at that stage. If that had been the case there would no longer have been an appealable decision. Further, the very fact that protective assessments were issued made it explicit that the payments were merely contingent and the 2008 decision remained in place. There was no admission of liability.

24. The 2008 decision remains extant and therefore the 2008 appeal remains extant. In the event that the Appellant is successful, following the final outcome of the *Rank* litigation, it would be entitled to be paid the original sum claimed (having now repaid the repayment) or such other sum as the Tribunal determines.

25. In essence, the argument is that the August decision and the issue of the protective assessments were simply a confirmation of the 2008 decision. The underlying proposition in the August decision is that the Appellant had made no overpayment of VAT and that is the subject matter of the 2008 decision and 2008 appeal. In those circumstances it is proper to amend the original Notice of Appeal to encompass that.

26. Lastly, in that regard, the quantum of the repayment had never been finally agreed since the negotiations had been on a "without prejudice" basis and HMRC had never conceded that an unconditional, absolute and permanent repayment, in any sum, was due to the Appellant.

27. An alternative argument is that if the August decision represented a new decision rather than a restatement and confirmation of the 2008 decision it is clearly a matter relating to the 2008 appeal and therefore is covered by the sist.

28. Further the Appellant argues that since the application for the Substituted Notice of Appeal was within 30 days of the assessments being "activated" it would be an abuse of process for HMRC to argue that there was a breach of time limits.

29. Finally, the Appellant argues that should it be decided that the 2008 appeal is no longer extant, because it had been satisfied by the repayment, then the Tribunal should accept the Appellant's application to serve the substituted Notice of Appeal as an application for leave to appeal out of time against the August decision and to grant leave to appeal out of time.

30. If leave to appeal out of time is not granted that would be a breach of the principle of neutrality which requires that taxpayers in a like position should be treated in a like way. There are many other taxpayers with similar appeals who did not seek and/or did not receive interim payments in 2010. Their appeals undoubtedly remain extant.

The Law

31. It was a matter of agreement that Section 83G (6) VATA 1994 provides: -

"An appeal may be made after the end of the period specified period…if the tribunal gives permission to do so."

32. The other relevant legislative provisions are Rules 2, 5 and 20 (1) and (4) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the Rules") and those are annexed at Appendix A.

33. In addition to the case law cited in this decision, a number of other cases were also furnished to us and they are listed at Appendix B.

Decision and reasons therefor

The 2008 appeal

34. The first issue for me to address was to decide whether the 2008 appeal is still extant. Clearly, technically, it is extant since both parties agree that the 2008 appeal is currently sisted pending the final outcome in the Rank litigation.

35. However, the next question is whether or not the negotiated repayment in 2010 rendered the 2008 appeal redundant. Was it indeed in response to a substituted claim? It is very clear from the correspondence, and the Business Brief, that the repayment was entirely contingent upon the outcome of the *Rank* litigation.

36. In the event that HMRC won that litigation in the Court of Appeal, then the protective assessments would be "activated". If they lost then it would depend if an appeal to the Supreme Court were to be allowed and if that was successful. If they were unsuccessful at every stage, then the protective assessments would never be "activated". In the event that HMRC ultimately lost the *Rank* litigation then the Appellant would be entitled to have the sist recalled and litigate.

37. It is quite clear that both parties used the words "without prejudice" when negotiating the quantum of the repayment. HMRC argued that neither party had stipulated to what that phrase related. Indeed Mr Peretz argued that the HMRC officer had simply been repeating what Ernst & Young had said. I do not accept that and in any event there was no evidence to that effect; it is mere speculation.

38. I accept the argument advanced for the Appellant that the words, "without prejudice" were utilised because technically, in the event that HMRC lost the *Rank* litigation, it would have been open to the Appellant to litigate in the 2008 appeal in regard to quantum since the interim repayment had not satisfied their claim in full and they wished to reserve that option. I accept that as that would be good, and appropriate, practice. I take the view that the "without prejudice" qualification was simply a pragmatic approach to achieving an interim solution with the minimum of expenditure in time and on professional fees.

39. Both parties understood that the repayment would have to be repaid to HMRC in the event that HMRC were successful in the *Rank* litigation and that the only logical vehicle whereby that could be achieved was protective assessments. Those assessments were simply a mechanism whereby HMRC, having made a contingent repayment, were placed in a position to recover same, if appropriate.

40. The complication is that, sadly, the Appellant does not appear to have focussed on the wording of the August decision (see paragraph 13 above) but has always assumed that matters would be resolved only after the **final** outcome of the *Rank* litigation is known. They relied on the wording in the 2008 decision to that effect.

41. By contrast, HMRC had clearly decided that they would decide on a course of action in regard to the repayment after the decision in the Court of Appeal. Effectively they had reserved their position.

42. Looking at the totality of the evidence, I find that the repayment in 2010 was explicitly a contingent payment and therefore it did not render the 2008 appeal redundant in the sense that HMRC had not unequivocally accepted liability. The

matter was not settled. In that regard see also paragraphs 73 - 77 below in relation to the 2012 correspondence.

The January decision

43. No oral arguments were advanced in regard to whether or not HMRC were correct in stating, in paragraph 2 of their Skeleton Argument, that the January decision was not a decision which carried a right of appeal to the Tribunal. I agree with that analysis since it was merely a decision to enforce previously issued and unappealed assessments.

The August decision

44. I do not accept the Appellant's argument that the August decision is not a separate decision. It is. An assessment, whenever issued carries its own right of an appeal.

45. Should the August decision and therefore the protective assessments in 2010 have been appealed? The very simple answer in that regard is yes. It would have been prudent to have done so as then there would have been no dubiety whatsoever. It seems to me that a protective appeal of a protective assessment is a matter of common sense.

46. The Appellant's first alternative argument is that the sist in the 2008 appeal sufficed to extend the time limits in respect of all matters relating thereto and the August decision relates thereto. It is argued that it is a prospective extension of all time limits. I agree with HMRC that the sist does not operate to extend a statutory time limit. Neither party provided any authority in support of their assertions. However, in Scots Law [2] "A sist is a stoppage or postponement of procedure in a case. It could more fully be called a "sist of process"".

47. However, as indicated above, the Tribunal has a statutory power to give permission to allow an appeal to be lodged after the expiry of the statutory time limit.

48. Accordingly, I take the view that although the 2008 appeal is still extant, and sisted, nevertheless the application for the Substituted Notice of Appeal should be taken as an application to make a late appeal of the August decision. Technically that should be an application in terms of Rule 20 of the Rules although it has not been expressed as such.

Additional Arguments in regard to a late appeal

HMRC

49. In addition to the arguments set out at paragraph 19 above, HMRC argue that the Appellant was professionally represented throughout and that prior to this application there had been no evidence as to why they had not appealed. HMRC have not contributed in any way to the delay. There is nothing exceptional about the Appellant's circumstances in that many of the other Appellants in cases sisted, or stayed, behind *Rank* did appeal the equivalent of the August decision whilst it is conceded that many did not. There are more than 1100 *Rank* appeals.

[2] Civil Procedure and Practice Hennessy 2nd Ed

50. Limitation rules provide legal certainty to Government so that it can plan expenditure in the public interest.

The Appellant

51. They argue that have good reasons, amounting to a reasonable excuse, for the late appeal. They acted very promptly once the excuse ceased to operate. There would be very clear prejudice to the Appellant if the appeal is not admitted, whereas there is no material prejudice to HMRC in that all that they stand to lose is a "windfall" benefit.

52. There is public interest in there being fairness in proceedings. Lastly, given the sist, there is no change in the quality of evidence.

The application for a late appeal

53. The Tribunal has a wide discretion.

54. The general approach to such discretionary decisions is set out in *AG for Scotland v Gen Comms for Aberdeen City*[3] ("*Aberdeen*"). Both parties referred to, and relied on that case. It is a matter of agreement that *Aberdeen* (at paragraph 23*)* is authority for the proposition that considerations or circumstances which would be relevant to the question as to whether proceedings should be allowed beyond the time limit include (1) whether there was a reasonable excuse for not observing the time limit, (2) whether matters had proceeded with reasonable diligence once the excuse had ceased to operate, (3) whether there is prejudice to one or other party if the appeal proceeds or is refused, (4) are there considerations affecting the public interest and (5) has the delay affected the quality of available evidence. Together with paragraph 22, that paragraph is set out in full at Appendix C.

55. I was not addressed on the last issue but I accept the Appellant's assertion in the Skeleton Argument that it seems beyond doubt that there will have been no effect on the quality of the available evidence.

56. HMRC argued that *Aberdeen* was also authority for the proposition that the Tribunal would have to be satisfied that there were exceptional circumstances for the delay in lodging the appeal. I do not agree. Paragraph 24 of *Aberdeen*, with which I certainly do agree, reads:-

> "Because the granting of leave to bring an appeal or other proceedings late is an exception to the norm, the decision as to whether they should be granted is typically discretionary in nature. Indeed in view of the range of considerations that are typically relevant to the question, it is difficult to see how an element of discretion can be avoided. Those considerations will often conflict with one and another, for example, in a case where there is a reasonable excuse for failure to bring proceedings and clear prejudice to the applicant for leave but substantial quantities of documents have been lost with the passage of time. In such a case the person or body charged with the decision as to whether leave should be granted must weigh the conflicting considerations and decide where the balance lies."

[3] 2005 SLT 1062, [2006] STC 1128

57. I was not referred to the case but I agree with the decision of Judge Berner at paragraph 36 in *O'Flaherty v HMRC*[4] and that reads:-

> "I was referred to … where Sir Stephen Oliver refused permission to appeal out of time. In the course of his decision, Sir Stephen made the point that permission to appeal out of time will only be granted exceptionally. It is in my view important that this comment should not be thought to provide a qualitative test for the circumstances the FTT is required to take into account. It should properly be understood as saying nothing more than that permission should not routinely be given; what is needed is the proper judicial exercise of a discretion, taking account all relevant factors and circumstances."

58. He goes on to record at paragraph 37 that: -

> "Time limits are prescribed by law, and as such should as a rule be respected". I agree entirely.

59. Paragraph 38 reads:-

> "These references to permission being granted exceptionally should not be elevated into a requirement that exceptional circumstances are needed before permission to appeal out of time may be granted. That is not what was said in *Ogedegbe* nor in *Aston Markland*, and it is not the case. The matter is entirely in the discretion of the FTT, which must take account of all relevant circumstances. There is no requirement that the circumstances must be exceptional."

That is the approach which I adopt.

60. I have considered, and weighed in the balance, all of the relevant circumstances including, but not restricted to, the circumstances identified in *Aberdeen* (see paragraph 54 above). In so doing, I have concurrently applied the three stage process set out by the Court of Appeal in *Denton & Others v T H Whyte & Another; Decadent Vapours Ltd v Bevan & Others* and *Utilise TDS Ltd v Davies & Others* ("Denton")[5]. The first of those is to identify the seriousness and significance of the failure to lodge an appeal in relation to which the relief sought. The second is to consider why the default occurred and the third is to evaluate all the circumstances of the case so as to deal justly with the application of the factors. Mr Moss lodged with the Tribunal, for which I thank him, electronic copies of paragraphs 24 to 41 of the Judgment in Denton. To that I have added paragraph 42. Those paragraphs are annexed hereto at Appendix D.

61. *Denton* was concerned with the exercise of a discretion derived from the procedural rules themselves. The issue in *Denton* was the efficient conduct of existing litigation. I have considered the need for litigation to be conducted efficiently and for compliance with the rules to be enforced, but I must also take into account the fact that I am exercising a discretion conferred by Statute in relation to the commencement

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[4] 2013 UKUT 01619 (TCC)

[5] 2014 EWCA Civ 906

of proceedings outside the statutory time limit. This raises different factors from those considered by the Court of Appeal in *Denton*.

62. Further, unlike Denton, the issue for this Tribunal is whether the Tribunal should exercise the discretion conferred upon it by Statute so as to effectively "shut out" the Appellant from litigating in the sense that potentially they would be unable to recover overpayments of tax and the interest thereon. That is a serious matter.

63. HMRC argued that this application should be distinguished from *Denton*, which was described as dealing with "Case Management", and the arguments in relation to "windfall" (see paragraphs 94 - 100 below) should be considered in that context.

64. My starting point is that a failure to meet a deadline set by Parliament is always a serious and significant matter. However, it is also Parliament that has given the Tribunal discretion to allow such a case to proceed. I do accept that time bar provisions are created for a reason and that they provide finality and certainty and that is not a matter that should be lightly disregarded.

Reasons for the failure

65. This is really a consideration of all of the factors affecting why the default occurred.

66. Taxpayers are expected to act with reasonable prudence and diligence in dealing with their affairs. I have already indicated that it would have been prudent to have appealed the issue of the protective assessments. However, I do take the view that the circumstances in this case were very unusual.

67. As I indicate in paragraph 39 above, both parties agreed that the protective assessments were the only realistic vehicle whereby the contingent repayment of tax could be recovered, if appropriate. The difference between the parties is in regard to their status and effect.

68. HMRC are clear that the August decision and therefore the protective assessments stand alone and carry separate rights of appeal. As I have previously indicated, I agree.

69. It is evident and I accept that, that the Appellant consistently <u>believed,</u> whether mistakenly or not, that:-

(a) The August decision was firstly contingent and secondly an integral part of the 2008 appeal,

(b) The sist effectively extended all time limits relating to the 2008 appeal, including statutory time limits,

(c) The issue of the protective assessments was merely a procedural device, since there is no statutory mechanism for interim contingent payments or repayments such as this,

(d) The assessments would not be "activated" unless and until the *Rank* litigation concluded and HMRC had won,

(e) In the event that *Rank* won then they would never be "activated",

(f) In those circumstances, lodging an appeal of the August decision was not required and in any event it would be a waste of time, money and effort for all concerned, including the Tribunal.

70. Quite apart from anything else, there would have been no problem if the Appellant had been correct in regard to 66(d). (They always accepted that HMRC would have to be repaid if HMRC succeeded in the *Rank* litigation*.)* Sadly, they were wrong.

71. The practical issue for the Appellant now is that, if *Rank* ultimately win the litigation, although the sist could be recalled and Judgment given in favour of the Appellant, the Appellant, is in a position where having repaid the monies to HMRC in response to the protective assessments there is no mechanism for recovering same other than by being permitted to make a late appeal.

72. Although the delay in this case is very long it is nevertheless wholly unsurprising since, because of the sist, there was little reason for the Appellant to consider the matter again after receipt of the August decision until receipt of the January decision. The only other prompt might have been the correspondence ("the 2012 correspondence") described in the next paragraphs.

73. To the extent, to which the August decision does appear to have been considered, my attention was drawn to correspondence between the parties between 4 November 2011 and 27 February 2012. That correspondence is relevant and, in part, turns on whether or not there was, at that juncture, still an existing or uncompleted claim or claims. At that stage, the appellant sought to amend the section 80 claim on three bases.

74. HMRC's opening stance in that correspondence, on 19 January 2012 had been to state that the files had been reviewed, the three previous payments noted (including the payment in terms of the August decision), and to cite *University of Liverpool*[6] requesting the Appellant to furnish arguments as to why the claims were not completed. Their view was explicit: - "The claims have been settled and payments made…"

75. On 9 February 2012, the Appellant wrote to HMRC confirming that payments had been made to it but that "the important issue in this context is the status and nature of those payments. We accept that if the Commissioners accepted liability and made payments in full and final settlement of the claims, those claims would be completed. This was manifestly not the case. … The … claim is still ongoing and uncompleted."

76. The response from HMRC on 27 February 2012, was to the effect that "whilst we accept that these claim periods are still open …".

77. Nothing material then happened until the issue of the January decision. The Appellant argues that the conclusion of the 2012 correspondence makes it abundantly clear that both parties considered that the 2008 appeal was still live and the outcome

[6] [16769] Man/96/728

of the *Rank* litigation awaited. In response, Mr Peretz indicated that he was not sure what "open" meant. He did, however, argue that it could not relate to the protective assessments issued as a result of the August decision. In my view, both parties are correct. The 2008 appeal remained extant but nothing altered the fact that those assessments were anything other than unappealed assessments. More pertinently, however, I find that it reflected the view of HMRC, after debate, that the 2008 decision and appeal were live.

78. Realistically, therefore the long delay was absolutely inevitable.

79. HMRC argue that when the August decision was issued the 2008 decision "fell by the wayside" since it had effectively been superseded. Mr Peretz extrapolated from the argument on supersession that that meant that HMRC should no longer have been perceived as awaiting the final outcome in the *Rank* litigation. That does not sit well with the 2012 correspondence. If the August decision had superseded the 2008 decision, there would be no reason to say that the claim was "open" in 2012 (even if the suggested amendments were not accepted).

80. HMRC argue that they did not contribute to the delay in lodging an appeal. In some ways that is true. Certainly, they made no contribution in 2010 since they highlighted the possibility of the need to appeal within 30 days. However, in the most unusual circumstances of this case, I find that they did in fact contribute. Firstly at the outset, it was clearly understood by both parties that the whole purpose of the sist was to await the final outcome of the Rank litigation. It was also clearly understood by both parties that liability, or not, turned on that. If the sist was recalled then only the question of quantum would be litigated, if at all. In conceding in early 2012 that the claim was open which, in that context, can only mean uncompleted, they reinforced the Appellant (and their advisors) in their belief that the "live" issue was the 2008 appeal, albeit it was sisted. Had they maintained their stance that there was a completed claim then no doubt this application would have been lodged in 2012.

81. As I indicate above, the Appellant was professionally advised throughout, albeit neither party advanced any specific argument in regard to that factor. Does that impact? Clearly, the Appellant did rely on Ernst & Young and has acted on their advice throughout. I am not here concerned with whether Ernst and Young had a reasonable excuse for their stance in this matter but only with the Appellant.

82. The whole issue of the *Rank* claims is mired in complexity. I therefore find it wholly reasonable that the Appellant should have relied on expert advice. The August decision was not appealed based on that advice. Reliance on a third party can, on occasion, amount to a reasonable excuse in certain circumstances [7]. In this instance it is but one factor to be weighed in the balance.

83. Looking at the totality of the evidence, I understand why the August decision was not appealed until the protective assessments were "activated", albeit, in my view that was a mistake. However, in the very unusual circumstances of this application I find that on the balance of probabilities, particularly given the terms of the sist and the lack of clarity thereanent, the contingent nature of the payments, and the professional advice proffered (to this day) the Appellant has established a reasonable excuse for failing to appeal the August decision within the statutory timescale.

[7] Rowland v HMRC [2006] UKSPC SPC00548

84. I observe that I have in mind, in conducting this exercise, the fact that discretion to allow a late appeal is wider than the discretion exercised when determining whether circumstances constitute a reasonable excuse for the purposes of specific legislation. The reasonableness of the excuse, albeit important, is only one factor of many to be weighed in the balance.

Did the Appellant act with reasonable diligence once the excuse ceased to operate?

85. Since I have accepted that the Appellant did have a reasonable excuse then the logical sequitur is that it did respond promptly since it made this application within the thirty days stipulated in the January decision.

Is there prejudice to either party if the application is granted?

86. On the question of prejudice, if the application to allow the late appeal is refused, the Appellant will be deprived of the opportunity of relying on the outcome of the *Rank* litigation. It will be shut out of effective litigation.

87. I have also weighed in the balance the possibility of success in the 2008 appeal and the sums of money at stake. Clearly there is some measure of merit in the 2008 appeal since the *Rank* litigation is very complex and to date HMRC has had a chequered history. However, the complexity of the 2008 appeal itself is not a major factor as the outcome of the *Rank* litigation will decide liability, leaving only quantum. The merits of the Appellant's case can only take it some way but it is relevant that that there is the possibility of success.

88. If the Appellant is not granted leave to appeal out of time then, in the event that HMRC are ultimately unsuccessful in the *Rank* litigation, the Appellant would be deprived of the right to seek, what would seem to be, at a minimum, in excess of £2 million.

89. HMRC's right to certainty has to be balanced with the Appellant's right to pay or be repaid the correct amount of tax.

90. I find that if I were to "shut out" the Appellant from effective litigation there would be an undoubted substantial prejudice to the Appellant and I take that finding into account in conducting my balancing exercise.

91. It is argued for HMRC that as the Upper Tribunal in Graham v HMRC [8] stated:- "There is prejudice to the Government in having to meet large, unexpected claims … Time bar provisions satisfy the need for a degree of legal certainty which should not be lightly overridden. A good reason to do so is usually required." I agree with that.

92. However, the facts in this application are entirely different. Of particular note in this instance is that in the event that HMRC win the Rank litigation then they will retain the funds which have been repaid. As at the date of the hearing all but a few thousand pounds had been repaid and an undertaking was given that the balance would be paid forthwith. If leave to appeal is granted full repayment of the recovery assessments is required in terms of Section 84(3) VATA 1994. This application was lodged with the Tribunal, and served on HMRC, before any monies had been repaid

[8] [2014] UKUT 75

so their books cannot have been closed, albeit, in the absence of an appeal, they will have had an expectation of being repaid as soon as they were successful in the Court of Appeal. That was only just shy of three months earlier than this application.

93. A claim in this matter cannot have been entirely unexpected…the January decision drew the Appellant's attention to the possibility of an application for a late appeal and if that is successful then depending on the outcome of the *Rank* litigation, a claim might follow.

94. What of the "windfall benefit" argument? As I indicated at paragraph 63 above, HMRC argued that this application should be distinguished from *Denton* because *Denton* dealt with limitation periods in the context of case management rather than limitation periods imposed by statute.

95. The Appellant had relied on paragraph 41 in *Denton* and that reads as follows:-

"[41] We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage."

96. HMRC argued that if the Appellant was not granted leave to appeal HMRC would not gain a windfall benefit as the failure to recover the tax and interest would be attributable solely to the failure to have lodged an appeal of the August decision timeously. It was a natural consequence. It was not exceptional.

97. By contrast the Appellant, although still firmly maintaining the primary argument that no late appeal was required, argued that if they were wrong in that then the words of paragraph 41 were wholly in point. The failure to appeal would be the consequence of a genuine mistake.

98. Judge Bishopp makes it clear at paragraph 27 in *Leeds City Council v HMRC* [9]: "Time limits are there to be complied with, and for the reason I have given; but mistakes do occur and if they are egregious – for example when there is a failure to comply without good reason with an 'unless' direction – or are not remedied promptly when discovered, they should not in my view lead to satellite litigation. What was said in Denton at [42] on that topic is of equal application to the tribunals." He stated that in the context that "…opposition to short extensions when a mistake has been made and when there is no real prejudice beyond the loss of a windfall gain is not within the spirit of the overriding objective of Rule 2 …".

99. The mistake in not appealing timeously, and I do find that it is a mistake rather than an oversight, is certainly not egregious although the consequences, if leave to make a late appeal is not granted will be shockingly bad for the Appellant. In the context of the *Rank* litigation it is a comparatively short extension since the 2008 appeal has been sisted for many years.

100. Overall, I find that the failure to appeal timeously has resulted in a potential windfall benefit for HMRC should they lose the *Rank* litigation and that causes very great potential prejudice to the Appellant.

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[9] 2014 UK UT 0350

Are there public interest considerations?

101. Of course there is a public interest in the fairness of proceedings as argued for the Appellant. However, I do not accept the Appellant's argument that HMRC have acted unfairly in these proceedings in that their inconsistent behaviour has led to substantive unfairness. From the moment the August decision was issued it should have been quite clear that if HMRC won in the Court of Appeal then the protective assessments would be "activated". The perceived unfairness arises because there was no appeal of those assessments in place. That is not the fault of HMRC since the August decision invited appeals of those assessments.

102. There is undoubtedly the issue of the policy of finality in litigation and other legal proceedings. Although the delay in this matter is very long, nevertheless in the context of the *Rank* litigation it is not long at all and the final outcome of the litigation may yet take years. If I allow leave to appeal at this stage the prospect of the sist being recalled is still in the distant future.

103. The Appellant argued that this application had no implication for any other cases and that was not disputed by HMRC. Indeed in inviting an application for a late appeal in the January decision, HMRC clearly had in mind the possibility that the Tribunal might exercise its statutory discretion.

Conclusion

104. Every application for admission of a late appeal depends on its own facts and circumstances. At all stages in the consideration of this matter I have had Rule 2 of the Rules very much in mind. It is imperative that any decision should be fair and just. I have weighed every factor and authority that was brought to my attention in the balance and, as can be seen, also some that were not.

105. I do not accept the Appellant's argument that fiscal neutrality demands that they should be put in the same situation as those other *Rank* Appellants who did not obtain a repayment or who appealed the protective assessments. The Appellant chose to seek the repayment and chose not to appeal.

106. One of the more persuasive factors, which has been that at the heart of this litigation, from the outset, is that there has been a clear understanding that everything other than quantum, and the difference between the parties on that was minimal in the context of the whole matter, depended on, and would be decided by the outcome of the *Rank* litigation.

107. In my opinion for the reasons given, the Appellant was wholly wrong to consider that (a) the sist extended to the August decision and therefore the protective assessments and (b) those protective assessments were a purely procedural matter to enable collection of the tax, nevertheless given that I find that there was a reasonable excuse for the failure and that action was taken very promptly I must consider all the other factors. I have done so. In this instance, although, of course they are important factors, in the context of this unusual factual matrix, certainty and public policy for HMRC are the least of the issues.

108. The statutorily and procedurally correct choice by HMRC to make repayments, issue protective assessments and demand payment whilst the outcome was still not

final, was an option open to them. They expected those assessments to be appealed. They expected, and encouraged an application for a late appeal where, as here there had been no timeous appeal.

109. Taking all of these factors, and the others mentioned in the course of this decision, and weighing them in the balance, and the decision is certainly not lightly taken, I conclude that it would be proportionate, fair and just to allow the Appellant's application to the Tribunal insofar as it seeks an extension of time for the Notice of Appeal in relation to the August decision and therefore the protective assessments.

110. Accordingly, for the reasons given this application is allowed in part.

111. 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.

TRIBUNAL JUDGE
RELEASE DATE: 11 September 2014

2.—Overriding objective and parties' obligations to co-operate with the Tribunal

(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes—

(a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules; or

(b) interprets any rule or practice direction.

(4) Parties must—

(a) help the Tribunal to further the overriding objective; and

(b) co-operate with the Tribunal generally.

5.— Case Management powers

(1) Subject to the provisions of the 2007 Act and any other enactment, the Tribunal may regulate its own procedure.

(2) …..

(3) In particular, and without restricting the general powers in paragraphs (1) and (2), the Tribunal may be direction—

(a) extend or shorten the time for complying with any rule, practice direction or direction, unless such extension or shortening would conflict with a provision of another enactment setting down a time limit;

20.—Starting appeal proceedings

[(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.][10]

(2) …..

(3) …..

[10] Substituted by Tribunal Procedure (Amendment No.3) Rules 2010/253 rule 6(5)(a) (November 29, 2010)

[(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 must 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

(b) unless the Tribunal gives such permission, the Tribunal must not admit the appeal.][11]

[11] Substituted by Tribunal Procedure (Amendment No. 3) Rules 2010/2653 rule 6(5)(b) (November 29, 1010)

APPENDIX B

1. *Xs & Os Paisley Cross Ltd v HMRC* [2012] UKFTT 645 (TC)
2. *HMRC v McCarthy & Stone* [2014] UKUT 196
3. *Tiga Aero Services Ltd & Others v HMRC* [2014] UKFTT 760 (TC)
4. *The Rank Group Ltd & Rank Group plc* Litigations
5. *Courts plc v Customs & Excise Commissioners* [2004] EWCA CIB 1527
6. *Data Select Ltd v HMRC* [2012] UKUT 187

APPENDIX C

Aberdeen

[22] Section 49 [of the Taxes Management Act] is a provision that is designed to permit appeals out of time. As such, it should in my opinion be viewed in the same context as other provisions designed to allow legal proceedings to be brought even though a time limit has expired. The central feature of such provisions is that they are exceptional in nature; the normal case is covered by the time limit, and particular reasons must be shown for disregarding that limit. The limit must be regarded as the judgment of the legislature as to the appropriate time within which proceedings must be brought in the normal case, and particular reasons must be shown if a claimant or appellant is to raise proceedings, or institute an appeal, beyond the period chosen by Parliament.

[23] Certain considerations are typically relevant to the question of whether proceedings should be allowed beyond a time limit. In relation to a late appeal of the sort contemplated by s49, these include the following; it need hardly be added that the list is not intended to be comprehensive. First, is there a reasonable excuse for not observing the time limit, for example because the appellant was not aware and could not with reasonable diligence have become aware that there were grounds for an appeal? If the delay is in part caused by the actings of the Revenue, that could be a very significant factor in deciding that there is a reasonable excuse. Secondly, once the excuse has ceased to operate, for example because the appellant became aware of the possibility of an appeal, have matters proceeded with reasonable expedition? Thirdly, is there prejudice to one or other party if a late appeal is allowed to proceed, or if it is refused? Fourthly, are there considerations affecting the public interest if the appeal is allowed to proceed, or if permission is refused? The public interest may give rise to a number of issues. One is the policy of finality in litigation and other legal proceedings; mattes have to be brought to a conclusion within a reasonable time, without the possibility of being reopened. That may be a reason for refusing leave to appeal where there has been a very long delay. A second issue is the effect that the instant proceedings might have on other legal proceedings that have been concluded in the past; if an appeal is allowed to proceed in one case, it may have implications for other cases that have long since been concluded. This is essentially the policy that underlies the proviso to s33(2) of the Taxes Management Act. A third issue is the policy that is to be discerned in other provisions of the Taxes Acts; that policy has been enacted by Parliament, and it should be respected in any decision as to whether an appeal should be allowed to proceed late. Fifthly, has the delay affected the quality of the evidence that is available? In this connection, documents may have been lost, or witnesses may have forgotten the details of what happened many years before. If there is a serious deterioration in the availability of evidence, that has a significant impact on the quality of justice that is possible, and may of itself provide a reason for refusing leave to appeal late.

APPENDIX D

Denton

GUIDANCE

[24] We consider that the guidance given at paras 40 and 41 of *Mitchell* remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages r 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]". We shall consider each of these stages in turn identifying how they should be applied in practice. We recognise that hard pressed first instance judges need a clear exposition of how the provisions of r 3.9(1) should be given effect. We hope that what follows will avoid the need in future to resort to the earlier authorities.

THE FIRST STAGE

[25] The first stage is to identify and assess the seriousness or significance of the "failure to comply with any rule, practice direction or court order", which engages r 3.9(1). That is what led the court in *Mitchell* to suggest that, in evaluating the nature of the non-compliance with the relevant rule, practice direction or court order, judges should start by asking whether the breach can properly be regarded as trivial.

[26] Triviality is not part of the test described in the rule. It is a useful concept in the context of the first stage because it requires the judge to focus on the question whether a breach is serious or significant. In *Mitchell* itself, the court also used the words "minor" (para 59) and "insignificant" (para 40). It seems that the word "trivial" has given rise to some difficulty. For example, it has given rise to arguments as to whether a substantial delay in complying with the terms of a rule or order which has no effect on the efficient running of the litigation is or is not to be regarded as trivial. Such semantic disputes do not promote the conduct of litigation efficiently and at proportionate cost. In these circumstances, we think it would be preferable if in future the focus of the enquiry at the first stage should not be on whether the breach has been trivial. Rather, it should be on whether the breach has been serious or significant. It was submitted on behalf of the Law Society and Bar Council that the test of triviality should be replaced by the test of immateriality and that an immaterial breach should be defined as one which "neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation". Provided that this is understood as including the effect on litigation generally (and not only on the litigation in which the application is made), there are many circumstances in which materiality in this sense will be the most useful measure of whether a breach has been serious or significant. But it leaves out of account those breaches which are incapable of affecting the efficient progress of the litigation, although they are serious. The most obvious example of such a breach is a failure to pay court fees. We therefore prefer simply to say that, in evaluating a breach, judges should assess its seriousness and significance. We

recognise that the concepts of seriousness and significance are not hard-edged and that there are degrees of seriousness and significance, but we hope that, assisted by the guidance given in this decision and its application in individual cases over time, courts will deal with these applications in a consistent manner.

[27] The assessment of the seriousness or significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the court should concentrate on an assessment of the seriousness and significance of the very breach in respect of which relief from sanctions is sought. We accept that the court may wish to take into account, as one of the relevant circumstances of the case, the defaulter's previous conduct in the litigation (for example, if the breach is the latest in a series of failures to comply with orders concerning, say, the service of witness statements). We consider that this is better done at the third stage (see para 36 below) rather than as part of the assessment of seriousness or significance of the breach.

[28] If a judge concludes that a breach is not serious or significant, then relief from sanctions will usually be granted and it will usually be unnecessary to spend much time on the second or third stages. If, however, the court decides that the breach is serious or significant, then the second and third stages assume greater importance.

THE SECOND STAGE

[29] The second stage cannot be derived from the express wording of r 3.9(1), but it is nonetheless important particularly where the breach is serious or significant. The court should
consider why the failure or default occurred: this is what the court said in *Mitchell* at para 41.

[30] It would be inappropriate to produce an encyclopaedia of good and bad reasons for a failure to comply with rules, practice directions or court orders. Para 41 of *Mitchell* gives some examples, but they are no more than examples.

THE THIRD STAGE

[31] The important misunderstanding that has occurred is that, if (i) there is a non-trivial (now serious or significant) breach and (ii) there is no good reason for the breach, the application for relief from sanctions will automatically fail. That is not so and is not what the court said in *Mitchell*: see para 37. r 3.9(1) requires that, in every case, the court will consider "all the circumstances of the case, so as to enable it to deal justly with the application". We regard this as the third stage.

[32] We can see that the use of the phrase "paramount importance" in para 36 of *Mitchell* has encouraged the idea that the factors other than factors (a) and (b) are of little weight. On the other hand, at para 37 the court merely said that the other circumstances should be given "less weight" than the two considerations specifically mentioned. This may have given rise to some confusion which we now seek to remove. Although the two factors may not be of paramount importance, we reassert that they are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered. That is why they were singled out for mention in the rule. It is striking that factor (a) is in substance

included in the definition of the overriding objective in r 1.1(2) of enabling the court to deal with cases justly; and factor (b) is included in the definition of the overriding objective in identical language at r 1.1(2)(f). If it had been intended that factors (a) and (b) were to be given no particular weight, they would not have been mentioned in r 3.9(1). In our view, the draftsman of r 3.9(1) clearly intended to emphasise the particular importance of these two factors.

[33] Our view on this point is reinforced by the fact that Sir Rupert recommended at para 6.7 of Ch 39 of his report that r 3.9 should read as follows, including a factor (b) referring specifically to the interests of justice in a particular case:

> "(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances including –
>
> (a) the requirements that litigation should be conducted efficiently and at proportionate cost; and
>
> (b) the interests of justice in the particular case."

This recommendation was rejected by the Civil Procedure Rule Committee in favour of the current version. In our opinion, it is legitimate to have regard to this significant fact in determining the proper construction of the rule. It follows that, unlike Jackson LJ, we cannot accept the submission 24 of the Bar Council that factors (a) and (b) in the new rule should "have a seat at the table, not the top seats at the table", if by that is meant that the specified factors are not to be given particular weight.

[34] Factor (a) makes it clear that the court must consider the effect of the breach in every case. If the breach has prevented the court or the parties from conducting the litigation (or other litigation) efficiently and at proportionate cost, that will be a factor weighing in favour of refusing relief. Factor (b) emphasises the importance of complying with rules, practice directions and orders. This aspect received insufficient attention in the past. The court must always bear in mind the need for compliance with rules, practice directions and orders, because the old lax culture of non-compliance is no longer tolerated.

[35] Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.

[36] But it is always necessary to have regard to all the circumstances of the case. The factors that are relevant will vary from case to case. As has been pointed out in some of the authorities that have followed *Mitchell*, the promptness of the application will be a relevant circumstance to be weighed in the balance along with all the circumstances. Likewise, other past or current breaches of the rules, practice

directions and court orders by the parties may also be taken into account as a relevant circumstance.

[37] We are concerned that some judges are adopting an unreasonable approach to r 3.9(1). As we shall explain, the decisions reached by the courts below in each of the three cases under appeal to this court illustrate this well. Two of them evidence an unduly draconian approach and the third evidences an unduly relaxed approach to compliance which the Jackson reforms were intended to discourage. As regards the former, we repeat the passage from the 18th Implementation Lecture on the Jackson reforms to which the court referred at para 38 of its judgment in *Mitchell*:

> "[i]t has changed not by transforming rules and rule compliance into trip wires. Nor has it changed it by turning the rules and rule compliance into the mistress rather than the handmaid of justice. If that were the case then we would have, quite impermissibly, rendered compliance an end in itself and one superior to doing justice in any case."

[38] It seems that some judges are approaching applications for relief on the basis that, unless a default can be characterised as trivial or there is a good reason for it, they are bound to refuse relief. This is leading to decisions which are manifestly unjust and disproportionate. It is not the correct approach and is not mandated by what the court said in *Mitchell*: see in particular para 37. A more nuanced approach is required as we have explained. But the two factors stated in the rule must always be given particular weight. Anything less will inevitably lead to the court slipping back to the old culture of non-compliance which the Jackson reforms were designed to eliminate."

SATELLITE LITIGATION AND NON-COOPERATION

[39] Justifiable concern has been expressed by the legal profession about the satellite litigation and the non-cooperation between lawyers that *Mitchell* has generated. We believe that this has been caused by a failure to apply *Mitchell* correctly and in the manner now more fully explained above.

[40] Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) cooperation between the parties and their lawyers. This applies as much to litigation undertaken by litigants in person as it does to others. This was part of the foundation of the Jackson report. Nor should it be overlooked that CPR r 1.3 provides that "the parties are required to help the court to further the overriding objective". Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation.

[41] We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage."

[42] It should be very much the exceptional case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly,

because the parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred.