Late appeal –s83G VATA 1994 – s18 CRCA 2005 – failures on both sides – permission to appeal granted

Appeal number: TC/2014/04510

FIRST-TIER TRIBUNAL
TAX CHAMBER

JOHN O'GAUNT GOLF CLUB **Appellant**

- and -

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

TRIBUNAL: Judge Malachy Cornwell-Kelly
Mr Julian Sims FCA

Sitting in public at Fox Court, Gray's Inn Road, London on 18 March 2015

Mr Charles Bradley, instructed by Streets Whitmarsh Sterland for the taxpayer
Mr Barry Sellers of HMRC for the Crown

DECISION

1 This is an application by the Revenue dated 24 October 2014 to strike out this appeal against their refusal to repay VAT, claimed by the Club to have been overpaid in the past on green fees charged to non-members. The ground for the application is that the appeal is out of time. We received oral evidence from Mr Simon Davis for the Club and from Mr Barry Sellers for the Revenue, as well as the usual documentary evidence. We find the following facts proved on the balance of probabilities, except where it is clearly indicated otherwise.

Facts

2 On 24th March 2009, Streets Whitmarsh Sterland ("Streets") from their office in Newmarket submitted to the Revenue what they described as a "protective" claim for a refund of value added tax ("VAT") paid on temporary members' green fees on behalf of the Club for £136,162, for various periods from 12/90 to 12/08.

3 It was signed by Mr Simon Davis, the General Manager of the Club, and had been prepared by the Club. Mr Davis told us that the Club had prepared the figures in the claim as the most cost-effective option, but that it was sent to Streets "to overview the figures" and that he expected that they would submit it to the Revenue – as in fact they did. Mr Davis did not however receive any confirmation from Streets that the claim had gone in, and he did not ask for any; he explained that Streets were the Club's auditors and accountants, but were not in general acting for them in dealings with the Revenue.

4 The claim was rejected by a letter from the Revenue dated 24 August 2009 addressed to Street's Newmarket office; the letter stated the taxpayer's rights to a review of the decision and to appeal to the tribunal. No copy was sent to the Club.

5 A letter dated 17 February 2010 from Streets' office in Cambridge noted that they had received no reply to their letter of 24 March 2009 submitting the claim and they enclosed a copy of it. The Revenue replied to the Cambridge office on 12 March 2010 explaining that the claim had been rejected by their letter of 24 August 2009, which they described as "forwarded to your Newmarket office", and a copy of it was enclosed. The Revenue's records state that a copy of that letter was also sent to the Club the same day.

6 We received evidence on this last point from Mr Barry Sellers, who also appeared as a witness for the Revenue as well as being their advocate. The officer who noted that he had sent a copy of the letter of 12 March 2010 to the Club was a Mr Nigel Burke, its author, who is unfortunately no longer with the department, but Mr Sellers gave evidence of what would have happened from his own experience of using the system which Mr Burke had used.

7 The procedure is for outgoing letters to be "captured" to the electronic folder, which means that they are saved to the computer system and retrievable from it. Mr Burke had done that with his letter and had added a note on the system: "copy sent to John O Gaunt on 12/03/2010". Mr Sellers accepted that it would have been normal in such circumstances for a covering letter to be sent to the Club with the copy of the letter to Streets, but there was no evidence that that had been done because there was no letter of this kind captured to the electronic folder. Mr Davis was categorical that the Club had not received a copy of the letter of 12 March 2010, and Streets did not inform their clients of the letter when they received it.

8 Mr Davis explained the procedure at the Club for dealing with incoming post, which was that Mr Davis himself dealt with incoming mail if he was present, failing which a Ms Wendy Ashcroft "a key member of staff for over thirty years" would keep it for him when he was in and it would be waiting in a folder for him to see. Moreover, the Club treasurer with whom Mr Davis would have a daily meeting would see incoming post of this sort too.

9 Mr Davis emphasised that it was not in the Club's interest to ignore mail coming in from the Revenue and that he was quite satisfied that no copy of this letter had been received. He added that he was, in any event, under the impression that nothing would happen until the underlying legal issue had been decided by the Court of Justice of the European Union, to which it had been referred. The trail then goes dead for four years until, on 13 March 2014, Mr Davis wrote to the Revenue about a further possible claim for the refund of overpaid tax for 2009 to 2013, asking for procedural guidance on it – and on the 2009 claim which is the subject of this application.

10 On 26 March, Streets submitted the further claim and said that "we confirm the claim submitted on 24 March 2009 . . . still stands". On 17 April, the Revenue replied to Mr Davis about the further claim he wished to make, referring to Streets' submission of it, and added "In the absence of your written authority to correspond with Streets, I cannot send a copy of this letter to them. You may wish to give me your authorisation by completing form 64-8". The form was completed by the Club and submitted by Streets to the Revenue on 1 May 2014.

11 It then became clear that matters were amiss. The Revenue replied to Streets on 7 May pointing out that the 2009 claim had been rejected on 24 August 2009 and had not been the subject of a review request or an appeal to the tribunal. Streets did not reply to the Revenue until 19 June, lodging a late appeal with them, and denying that they had ever received the letter of 24 August 2009. Streets added that the rejection letter should in any event have been sent to the Club direct, since no form 64-8 had been in place at the time, and that the reply should not have been sent to them.

12 On 30 June, the Revenue replied pointing out that it was not for them to accept or reject a late appeal and that Streets should approach the tribunal. They did so on 4 July, stating that they had never received the rejection letter of 24 August 2009 and they went on: "at the time we had no 64-8 in place and, as you say in your letter, you therefore cannot correspond with us and should have written to our client about your decision". (No explanation has been given of why Streets addressed the tribunal in these terms, as though they were writing to the Revenue.) Streets added that "there are many other golf clubs who have submitted similar claims and their claims have not been rejected".

13 The law relating to claims of this kind was clarified by the Court of Justice in *RCC v Bridport and West Dorset Golf Club Ltd* [2014] STC 663 in December 2013 which, in essence, held that such claims were in principle well founded. The related litigation continues at national level, where issues such as unjust enrichment remain to be determined.

Legislation

14 The Value Added Tax Act 1994 provides in so far as material:

> 83G *Bringing of appeals*
> (1) An appeal under section 83 is to be made to the tribunal before–
> (a) the end of the period of 30 days beginning with–
> (i) in a case where P is the appellant, the date of the document notifying the decision to which the appeal relates…
> (6) An appeal may be made after the end of the period specified in subsection (1)…if the tribunal gives permission to do so.
>
> 98 *Service of notices*
> Any notice, notification, requirement or demand to be served on, given to or made of any person for the purposes of this Act may be served, given or made by sending it by post in a letter addressed to that person or his VAT representative at the last or usual residence or place of business of that person or representative.
> *(A 'VAT representative' is a person appointed to act on behalf of a taxable person whose business has some foreign connection: s 48. The Club had and has no VAT representative within the meaning of s 48.)*

15 Section 18 of the Commissioners for Revenue & Customs Act 2005 provides in so far as material:

> 18 *Confidentiality*
> (1) Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.
> (2) But subsection (1) does not apply to a disclosure—
> (a) which—
> (i) is made for the purposes of a function of the Revenue and Customs, and
> (ii) does not contravene any restriction imposed by the Commissioners,
> . . .
> (h) which is made with the consent of each person to whom the information relates.

16 The Revenue's manual IDG30210 dealing with confidentiality provides with respect to the use of form 64-8:

> The use of official forms e.g. a 64-8 are (sic) not mandatory and you can accept a letter provided it includes:
>
> - whom the customer is authorising to receive the information from HMRC
> - the nature of the information to be disclosed e.g. for specific types of taxes
> - the period for which the consent is given, where consent is time limited
> - the customer's signature. This should be an original (or 'wet') signature rather than a photocopy.

Submissions for the Crown

17 Under section 83G(1) of the 1994 Act, notification of an appeal is to be made to the tribunal within 30 days of the date of the document notifying the decision. In this case the rejection of the claim was dated 24 August 2009 and clearly gave review and appeal rights. The time limit for notifying an appeal to the tribunal therefore expired on 25 September 2009. Although Streets deny receiving the rejection letter, and it was not sent to the Club, the Revenue's records show that they reissued the rejection letter to Streets' Cambridge office and to the Club on 12 March 2010, so any appeal needed to be made by 11 April 2010 – but nothing was done.

18 After the initial claim was made, Streets followed it up some 11 months later, but there was no further follow-up after the copies of the rejection letter were issued on 12 March 2010 to both Streets and the Club, and the letters were not returned as undelivered.

19 Under Rule 20(4) of the Tribunal Rules, the tribunal has discretion as to whether to admit a late appeal, and the relevant considerations to be addressed when considering whether to admit a late appeal have been set out by the Upper Tribunal in the following terms in *Data Select Ltd v RCC* [2012] STC 2195, at [34]:

> Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be the consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions.

20 Then there was the more recent decision in *Assaf Ali Butt v RCC* [2014] UKFTT 955 (Decision TC04068), which refers to the test and general approach, and to various authorities on time limits and late appeal applications. The decision notes that whilst tribunals are not required to follow the full requirements of the latest guidance given to the higher courts in seeking to ensure much stricter adherence to the time limits and other directions, it accepts the conclusion of the earlier decision in *Aeron Mathers v RCC* [2014] UKFTT 893 that "we must certainly pay some regard to that intended stricter adherence to such matters".

21 Factor (1) in *Data Select* is the purpose of the time limit for an appeal to the tribunal. It is designed to provide certainty and it is not in the interests of justice to permit appeals after long periods of delay. There is a public interest in the finality of decisions of the commissioners. Factor (2) is the delay: the decision under appeal was issued on 24 August 2009 and the time limit for notification of an appeal expired 30 days thereafter i.e. on 25 September 2009, whereas the Notice of Appeal was not served until 4 July 2014. The delay therefore amounts to a period of 4 years and 10 months. If the date of the duplicate rejection letter is used, the delay in the notification of the appeal amounts to 4 years and 3 months. Such an inordinate delay must weigh very heavily against the granting of an extension of time to appeal.

22 Factor (3) relates to the reason for the delay. Plainly this application has not been made promptly: the appellant has waited for over four years to raise concerns with the decision to the Revenue, and during that period no contact was received either in writing or otherwise raising disagreement with the rejection of a claim made as long before as March 2009. The reasons given in the grounds of appeal are, firstly, that the rejection letter was not received and, secondly, that the Revenue had no authority under which they could notify the rejection to Streets. Neither of these points establishes a good reason for a delay of over four years.

23 Firstly, neither the original rejection letter, nor the duplicate issued 9 months later, were returned undelivered. Anyone making a significant claim might be expected to have taken steps to follow it up if they had received no communication about it. In this case, the appellant did not follow up the claim, even after the duplicate rejection letter was issued.

24 The second point claims that the commissioners held no authority under which they were able to communicate with Streets. While it is true that no form 64-8 "authorising your agent" was in place at the time the claim was made, or when the rejection letter was issued, the commissioners were entitled to believe that Streets were acting for the Club and that they would, at the least, pass the information to their clients. Alternatively, if Streets never received the letter of 12 March 2010, they should have questioned why. Although the use of 64-8 is mandated by the Revenue's practice manual of instructions to officers, it is not a legal obligation under section 18 of the 2005 Act, and the failure to put the form in place earlier did not invalidate the Revenue's actions.

25 In so far as the effect of the failure to comply with the time limits on each party is concerned, the commissioners would suffer prejudice if appeals were, where there has been such gross delay, allowed to be brought out of time: there is prejudice to the government (and also to the general body of taxpayers) in having to meet large unexpected claims, since they are potentially disruptive of the government's planning of its income and expenditure. There is a desirability of not re-opening matters after a lengthy interval where one or both parties were entitled to assume that matters had been finally fixed and settled.

26 If the appeal is not admitted the taxpayer would potentially lose its entitlement to the claim, but this should not outweigh the other considerations. It should be noted that the claim as it was submitted was not checked. The Club refers to this as a protective claim, but we point out that there is no provision within VAT legislation for a protective claim. It is therefore submitted that the appeal should be struck out.

27 The commissioners note that the quantum of the claim still requires checking and that further information would be required before the claim could be considered. Thus, at the time the claim was submitted, it was not quantified in terms of VAT periods, but in terms of years; the commissioners consider that the years ending December 1997 to December 2006 were capped, and should therefore be struck out on the basis that the period of claim has no merit.

Submissions for the taxpayer

28 We agree that the *Data Select* approach remains the correct one to apply: *Leeds City Council v RCC* [2014] UKUT 350 (TCC), [2015] STC 168 at para 19; *Butt v RCC* [2014] UKFTT 955 (TC), at [4]. In assessing the consequences of allowing an appeal to be brought out of time – *Data Select* factor (4) – any prejudice to HMRC will be significantly lessened where there are outstanding appeals before the tribunal on the same point that the taxpayer wishes to appeal out of time on: *North Wiltshire DC v RCC* [2010] UKFTT 449 (TC); *PB Golf Club Ltd v RCC* [2012] UKFTT 675 (TC).

29 Mr Davis's unchallenged evidence is that the Club did not receive a copy of the letter of 12 March 2010; correspondence relating to the Club's VAT reclaim would have been treated with special attention, and had the letter of 12 March 2010 been received, it would have been filed in Mr Davis's office. The Revenue cannot adduce any evidence to the contrary and cannot positively show that the letter was in fact copied to the Club.

30 The only evidence adduced on this is a print-out of a computer note made by Mr Nigel Burke, the officer who wrote the letter of 12 March 2010, which reads: 'Copy sent to John O'Gaunt on 12/03/2010', but the Revenue have been unable to produce any copy of the letter they say was sent to the Club, and the letter of 12 March 2010 sent to Streets contains no indication that it was copied to the Club. It is more likely than not that the letter was not actually posted.

31 The letter of 12 March 2010 was not a 'document notifying the decision' within the meaning of section 83G(1)(a)(i), because the Revenue never sent it to the Club. Alternatively, if (which is denied) it was sent to the Club, it was still not a 'document notifying the decision' because the Club never received it. Thus the only 'document notifying the decision' was the letter of 7 May 2014. Alternatively, if (which is denied) the letter of 12 March 2010 was a 'document notifying the decision', the Club plainly has a reasonable explanation for the delay up until 7 May 2014, because it had neither received the letter nor been informed in any other way that the decision had been made.

32 On any of these three bases, there was then a period of 43 days from 7 May 2014 to the letter to HMRC of 19 June 2014 indicating the Club's intention to appeal (i.e. 13 days in excess of the normal 30-day time limit). It is submitted that the tribunal should allow the appeal to be brought, despite this delay for the following reasons in particular:

(i) The delay of 13 days is on any view a short one – *Data Select* factor (2).

(ii) Refusal to extend time would operate very harshly on the Club given that, following the final decision in *Bridport*, its claim is *prima facie* good - *Data Select* factor (5).

(iii) By contrast, there is no evident prejudice to the Revenue in extending time, since it is clear that there are a large number of appeals outstanding on the same point – *Data Select* factor (4).

33 For these reasons, the application to strike the appeal out should be dismissed and the appellant be given leave to pursue its appeal.

Conclusions

34 As our recitation of the facts established by the evidence indicates, we are satisfied that the Revenue's rejection letter of 24 August 2009 was not sent to the club. In the absence of evidence on behalf of Streets, we cannot make a finding about whether that letter to them was or was not received by them. But we note that, while the 2009 correspondence was from and to the firm's Newmarket office, there may have been significance in the fact that it was their Cambridge office which wrote on 17 February 2010 asking why no reply had been received to the claim.

35 However that may be, there was a basic failure by the Revenue in 2009 in not notifying the taxpayer of their rejection of the claim. Although, at first sight, it might appear that the Revenue could be forgiven for being misled by Streets' implied representation in their letters in 2009 and 2010 that they were acting on behalf of the Club, there was no clear authority in place to correspond with Streets about the Club's claim.

36 The circumstances were such that neither section 18(2)(a) nor section 18(2)(h) of the 2005 Act was satisfied, bearing in mind the formal instructions to officers we have cited in the Revenue's own Manual, which required either the use of form 64-8 or an explicit signed authorisation by the taxpayer.

37 The action was within section 18(1) as being "in connection with a function of the Revenue and Customs" but it could not be said, in the words of section 18(2)(ii), that it did "not contravene any restriction imposed by the commissioners". Since there is no question of the Revenue's letter of 24 August 2009 being sent to the Club itself, the letter cannot therefore count towards the running of the time limit. The letter of 12 March 2010, in so far as Streets' involvement is concerned, suffers from the same defect, and it is not for the tribunal to enquire into their apparent failure to inform their clients of the letter, which it seems they did receive.

38 In so far as the club is concerned, we accept Mr Davis's evidence that the copy of the letter was not received. It is indeed curious that the copy noted as sent should not have been received, but the Club – as Mr Davis pointed out – had every interest in receiving the copy letter and knowing where it stood. We saw Mr Davis as an honest witness and see no reason why he should not have been telling the truth. Given the effect of section 18 on these facts, the relationship between the Club and Streets is not a matter for the tribunal to investigate.

39 Turning to the *Data Select* criteria –which were adopted in similar terms by Lord Drummond Young in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2006] STC 1218 – we see the position as follows. In regard to the first factor, there is no dispute that the time limits laid down by parliament are there in the public interest to promote legal certainty and security, and that the default position is that they are to be respected unless there is good reason to the contrary.

40 On the second matter, the extent of the effective delay, we conclude that the Revenue's rejection of the Club's claim was not communicated to them consistently with the requirements of section 18 until 7 or 8 May 2014, when the Club received a copy of the letter of that date addressed to Streets. The relevant period therefore ran from 8 May to 4 July 2014 when Streets lodged an appeal to the tribunal – though curiously worded and not in the correct form – thus, a period of 57 days in all, and 27 days late. That delay need not have occurred had Streets acted within the time limit and used the correct appeal procedure, and for which failures no excuse has been proffered. There is no evidence that the Club themselves contributed to this delay, but they had by then clearly authorised Streets to act for them and responsibility for it must therefore be attributed to them.

41 That takes us to factors (4) and (5) in the *Data Select* list, the consequences for each party of extending, or not extending, time. For the taxpayer, there is the loss of a right to pursue a claim which appears in law to be well founded, albeit that there are hurdles yet before them and that there may be other remedies open to them if an extension is refused. To lose such a right on account of errors made by others would be a harsh outcome, but it cannot be that appellants represented at a responsible professional level can always escape the consequences of their representatives' failures.

42 For the Revenue, and the public interest which they represent, an extension of time would be vexatious when in their books this claim has already, and correctly, been discounted; and the unexpected costs to the public administration are not negligible, though it is true that the existence of many like claims means that in terms of the revenue expectations of the exchequer the impact will be limited.

43 Finally, in terms of the availability of evidence, there seems little likely to be lost in a case where most of what is at issue will in the nature of the claim depend on documentary sources which are likely to remain available; and if they are not, it will be to the prejudice of the taxpayer. Although we have received no evidence on this specific point, it has not been urged by the Revenue as a possible problem and we think it fair to conclude that it would not be.

44 It should be added that, although Mr Sellers's skeleton raised the issue of the underlying merits of the claim, no argument was addressed to us on this and no evidence on it was led. We have not therefore taken that factor into account.

45 As we have indicated, respect for the time limits laid down by parliament must be the assumed outcome of a case like this and no excuse has been put forward for the 27 days' delay we have identified. That it is a short delay is not a reason necessarily to disregard it, and we would not be inclined to do so were it not for the Revenue's own repeated failings in regard to respect for the prohibitions in section 18 of the 2005 Act and the directions of the commissioners. Those failings clearly contributed to the overall time it has taken for this issue to come before the tribunal.

46 In circumstances of significant fault on both sides, we conclude that in the circumstances the balance of justice slightly favours the taxpayer, and we accordingly refuse the Revenue's application and give leave to proceed with the appeal.

Appeal rights

47 This document contains the full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply in writing for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application for permission to appeal must be received by the tribunal no later than 56 days after full written findings and reasons are 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.

Malachy Cornwell-Kelly
Tribunal Judge

RELEASE DATE: 8th May 2015