TC02252

Appeal number: TC/11/09987

Gaming machine – RANK case – late claim – Strike out

FIRST-TIER TRIBUNAL
TAX CHAMBER

KIRKSHAWS NO. 1 SOCIAL CLUB **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE SCOTT, LLB, NP
CHARLOTTE BARBOUR, CA, ATII

Sitting in public at George House, 126 George Street, Edinburgh on Thursday 6 September 2012

Mrs Margaret McCarroll for the Appellant

Mrs Elizabeth McIntyre, HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant appealed the decision of HMRC dated 26 July 2011. That decision was to the effect that the voluntary disclosure in the amount of £26,777.00 VAT in relation to Gaming Machine income for the periods 1 November 1998 to 5 December 2005 inclusive was rejected since the claim had not been submitted within the statutory time limit.

2. In summary, the basis of the appeal was that the Appellant believed that they had not received appropriate guidance and assistance from the Debt Management Unit (DMU) of HMRC in India Street, Glasgow when they had approached them for assistance in approximately 2006-07. Following consultation with DMU the Appellant had decided that there appeared to be no basis on which to make a claim and therefore had not done so at that juncture. The Appellant had found it expensive and difficult to source appropriate advice and believed that HMRC should have known the law and advised them appropriately. The Appellant also alleged that they had suffered from errors made by HMRC and the two matters should be offset.

3. HMRC submitted an Application in terms of Rule 8(3)(c) of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. They requested that the proceedings be struck out.

4. Rule 8 (3)(c) reads:

> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

5. This Hearing addressed that Application and also the Appellant's request for a postponement of the Hearing. The basis for the request for postponement was that having sought professional advice they needed additional time to compose the case and call for evidence and witnesses. The Appellants were unrepresented and at the outset of the Hearing, which was informal, the Tribunal explained their Inquisitorial function, the limits of their jurisdiction and specifically that they could only consider the decision under appeal and the current applications for strike out and postponement. Extraneous matters such as offset of tax debts and HMRC 's approach to taxpayers could not be considered in this forum.

6. Mrs McCarroll, for the Appellants, was a clear, good and credible witness. In good faith, she had obviously done what she could for the Appellants. The Tribunal accepted her evidence, which was that she had heard "on the grapevine" that it was possible that she should make a claim, for the non-profit making club for which she was a bookkeeper, and thereby recover VAT on gaming machine income. In approximately 2006-07, she had asked accountants for advice and they had said that a claim was not possible. She had also contacted the DMU with whom she had had

dealings on a regular basis: she believed that she could rely on their advice and assumed that they would know the true legal position. They told her verbally that they knew nothing about the possibility of such a claim, so she did nothing. In September 2010, she again asked DMU about this matter and again was told that they knew nothing about it. The Appellants could not afford to seek specialist advice. Ultimately, in 2011, she sought to reclaim VAT paid on gaming Machine Income on the basis that that should have been exempt from VAT since May 1997. These are known colloquially as Linneweber claims and referred to as such by HMRC. Her core argument was that DMU should have been aware of Linneweber and given her advice on that at a much earlier stage.

7. HMRC pointed out that Revenue and Customs Brief 40/09 issued on 14 July 2009 and the Brief 11/10 issued on 16 March 2010 dealt specifically with claims in relation to gaming machines and identified the time limit for such claims. The Tribunal accepts that there was information available in the public domain long before the claim in this case was submitted.

8. The crux of the problem here is that it is not disputed that the claim in this case was received on 1 July 2011 and that it related to the period ending 5 December 2005. As indicated in paragraph 1 above, that claim was rejected by HMRC because it was "out of time".

9. The legislation covering the time limit for such a claim is to be found in section 80 Value Added Tax Act 1994. That reads:-

"80 (1) Where a person—

(a) has accounted to the Commissioners for VAT for a prescribed accounting period (whenever ended), and

(b) in doing so, has brought into account as output tax an amount that was not output tax due, the Commissioners shall be liable to credit the person with that amount.

….

(4) The Commissioners shall not be liable on a claim under this section—

(a) to credit an amount to a person under subsection (1) or (1A) above, or

(b) to repay an amount to a person under subsection (1B) above,

if the claim is made more than [4 years] after the relevant date.

(4ZA) The relevant date is—

(a) in the case of a claim by virtue of subsection (1) above, the end of the prescribed accounting period mentioned in that subsection, unless paragraph (b) below applies;

(b) in the case of a claim by virtue of subsection (1) above in respect of an erroneous voluntary disclosure, the end of the prescribed accounting period in which the disclosure was made;"

10. In summary, what this means is that HMRC can never be liable to credit or repay tax if a claim is not received within four years of the end of the accounting period in question. Accordingly, since this claim was received on 1 July 2011, HMRC are correct in stating that the earliest accounting period it could relate to is 06/07. Of course, that is long after the periods covered by the voluntary disclosure. The fact that the Appellant was not aware of the possibility of making a claim before she did so cannot assist her since a statutory time limit cannot be extended on the basis that a taxpayer was ignorant of the law.

11. Unfortunately for the Appellant, in simple terms, the claim is indeed "out of time" and therefore the merits of the claim cannot be considered by either HMRC or the Tribunal.

12. Accordingly, for the reasons set out above, the Tribunal finds that there is no reasonable prospect of the Appellant's case, or part of it succeeding and therefore refuses the request for postponement and strikes out the case.

13. 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.

ANNE SCOTT, LLB, NP
TRIBUNAL JUDGE
RELEASE DATE: 10 September 2012