Neutral Citation: [2024] UKFTT 1031 (TC)

Case Number: TC09354

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2022/13388

VAT – application to bring late appeal – Martland considered – appeal more than nine years late – claim for overpaid VAT on gaming machine takings – HMRC made protective assessment in the context of the Rank Group litigation – effect of the wording of the protective assessment – previous appeal was subsequently withdrawn – strong underlying case and limited prejudice to HMRC outweighed by need to respect statutory time limits and lack of good reason lasting for duration of the delay – application refused

Heard on: 14 October 2024
Judgment date: 14 November 2024

Before

TRIBUNAL JUDGE RACHEL GAUKE
MICHAEL BELL

Between

JEFFRIES & SONS

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Chris Poston of Royce Peeling Green Ltd

For the Respondents: Colin Williams, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. Jeffries & Sons (the Appellant) apply for permission to bring a late appeal against an assessment for £103,009 of VAT, plus interest.

2. The dispute arose in the context of the long-running Rank Group litigation concerning the VAT treatment of gaming machines. This litigation included a judgment of the Supreme Court, which was released in July 2015: *HMRC v Rank Group plc* [2015] UKSC 48 ("*Rank Group SC*").

3. The Appellant first made a claim for overpaid VAT in 2006. Reflecting the different stages of the Rank Group litigation, HMRC first refused the claim, then (in 2013) paid the amount claimed. At the same time as making this payment, HMRC issued a "protective assessment" that was intended to enable them to recover that sum if the Rank Group litigation went in HMRC's favour in the higher courts.

4. The Appellant repaid the disputed VAT to HMRC in 2014, following the Court of Appeal's judgment in favour of HMRC in the Rank Group litigation (*HMRC v Rank Group plc* [2013] EWCA Civ 1289 ("*Rank Group CA*")). The Appellant now applies to the Tribunal for permission to bring a late appeal against the assessment that was issued in 2013.

5. Having considered the evidence and the arguments from both parties, we have decided that we should refuse permission to bring a late appeal, for the reasons set out below.

HEARING AND EVIDENCE

6. The hearing was conducted by video link on Microsoft Teams. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely to observe the proceedings. As such, the hearing was held in public.

7. We had a 188-page document bundle which included HMRC's notice of objection to the application, and the Appellant's response to this notice of objection. The bundle included a number of documents provided by the Appellant, and relevant legislation and case law. We had no witness evidence.

FINDINGS OF FACT

8. The Appellant is a partnership and has been registered for VAT since 1985. Its activities include (or at the relevant times included) operating gaming machines.

9. On 5 September 2006, the Appellant, acting through their agents Crawfords, sent HMRC what was described as a "protective claim" for £104,122 in respect of VAT which they believed had been overpaid between August 2003 and December 2005. The letter from Crawfords said that the claim was being made on the basis that certain gaming machines should have been treated as exempt from VAT rather than standard rated.

10. On 18 December 2006, HMRC wrote to Crawfords asking them to provide further evidence to substantiate the claim. We had no evidence that Crawfords replied to this letter.

11. On 15 December 2010, Crawfords wrote to HMRC, referring to their letter of 5 September 2006 and asking what progress had been made on the claim. HMRC replied on 21 April 2011 enclosing a further copy of their letter dated 18 December 2006.

12. On 12 May 2011, Crawfords wrote again to HMRC, referring both to the Appellant, and to another of their clients, Jeffries Leisure Ltd ("JLL"). JLL is a company under common ownership with the Appellant which had made a similar "protective" claim to that made by the Appellant. The letter queried why HMRC appeared to be treating the Appellant and JLL differently, when in Crawfords' view the two claims were identical.

13. HMRC responded to this letter on 9 June 2011. They wrote to the Appellant stating "your claim has already been rejected and was not appealed". In subsequent correspondence, HMRC said that it was too late for them to reconsider the claim, but that the Appellant could apply to the Tribunal for permission to bring a late appeal.

14. On 29 January 2013, the Appellant made a late appeal to the Tribunal against HMRC's refusal of its initial claim. The appeal was given a Tribunal reference number of TC/2013/00867. We did not see the notice of appeal or any other contemporaneous correspondence referring to this appeal, but Mr Poston did not dispute HMRC's assertion that the Appellant had made an appeal in January 2013, and we did have the correspondence between Crawfords and the Tribunal dating from September 2016 (referred to below). We therefore find it to be established as a fact that the Appellant made an appeal to the Tribunal on 29 January 2013.

15. On 25 July 2013, HMRC sent the Appellant a letter headed "notification of assessment/gaming machine claim". This stated that the amount of £103,009 had been repaid to the Appellant's account, together with statutory interest of £17,824.55, in line with the judgment of the High Court in *HMRC v Rank Group plc* [2009] EWHC (Ch) 1244 ("*Rank Group HC*"), and a decision of the First-tier Tribunal in December 2009.

16. The letter of 25 July 2013 continued as follows:

> "HMRC has appealed against the judgment of the High Court to the Court of Appeal and appealed against the decision of the First-tier Tribunal to the Upper Tribunal. [I/we] have raised an assessment under section 80(4A) VAT Act 1994 in the amount of £103009 [and an assessment under s78(A) VAT Act 1994 in the sum of £17824.55 which relate to the tax and associated statutory interest under consideration by the Court and Upper Tribunal. If the Court of Appeal overturns the earlier decisions, we will expect you to pay the amount[s] of £103009 and £17824.55 charged by the assessment(s), together with interest.
>
> We will not take any action to collect the tax charged by these assessments until the Court of Appeal and the Upper Tribunal have given their judgements. When that happens we will write to you and tell you what action we intend to take.
>
> In the event that we do ask you to pay the amounts charged by these assessments, you must do so within 30 days of the letter asking for payment. If you do not, we will raise an additional assessment under section 74 of the VAT Act 1994 charging interest on the unpaid amounts from the date of the repayment to you until the date the amount is repaid to HMRC.
>
> If you do not agree with the assessment(s), you can
>
> - ask for it/them to be reviewed by an HMRC officer not previously involved in the matter, or
> - appeal to an independent tribunal
>
> If you opt for a review you can still appeal to the tribunal after the review has finished.

> If you want a review you should write to the address below within 30 days of the date of this letter, giving your reasons why you do not agree with the assessment(s). [*The letter then set out the relevant address*.]
>
> If you want to appeal to the tribunal you should send them your appeal within 30 days of the date of this letter."

17. There followed some wording about direct tax implications and statutory interest, after which the letter continued:

> "I understand you have appealed to the First-tier Tribunal against the previous decision not to allow this claim. However, in light of this repayment, you may want to reconsider your position in respect of this appeal. If you decide one is no longer necessary, please write to the tribunal and quote your appeal reference number in the correspondence."

18. On 6 August 2013, HMRC sent the Appellant a duplicate of the letter dated 25 July 2013. We do not know why this happened. It is not material and we mention it only because it caused some confusion in the hearing. Neither party directed us to any differences between the two letters other than the date, and we find that in other respects they are identical.

19. The Court of Appeal overturned the High Court's judgment in *Rank Group HC*, in a judgment released on 30 October 2013 (*Rank Group CA*). The Supreme Court released its judgment in *Rank Group SC*, dismissing HMRC's appeal, on 8 July 2015.

20. On 17 September 2014, Crawfords wrote to HMRC on behalf of the Appellant, stating that even though no request had been received for repayment of the £103,009 and associated interest, they were enclosing a cheque from the Appellant for £121,000, to "mitigate any possible interest charges". The letter also stated:

> "Can you also please acknowledge that, should the appeal lodged against the recent Court of Appeal hearing be allowed that any repayment as now has been refunded to you, will in fact be repaid to our client forthwith."

21. On 7 July 2015, Crawfords wrote again to HMRC, stating:

> "In the case of Jeffries & Sons, we wrote to you on 17 September 2014 enclosing a cheque for £121,000 and asked for confirmation of receipt of this sum an submitted our formal appeal that should the appeal hearing be in the taxpayers favour, any such repayment should then be refunded to our client in full.
>
> "Unfortunately, we do not seem to have received a response to this letter but have now confirmed that these funds are being held, apparently in a suspense account."

22. On 24 July 2015, HMRC wrote to Crawfords with a letter headed "Jeffries Leisure Ltd". The letter referred to *Rank Group SC* and stated that as there is no right of appeal of the Supreme Court's judgment, "no further appeals can be made".

23. On 9 September 2015, HMRC sent the Appellant a letter headed "VAT Assessment for accounting periods 00/00 Bulk Assessment". The letter referred to the payment made by HMRC in 2013 for overpaid VAT on gaming machine takings. HMRC stated that following recent decisions of the UK courts, it had now been established that no liability for payment by HMRC existed. The letter continued that when HMRC made the payment they also issued a protective assessment, dated 25 July 2015, and that they now required this sum to be repaid.

24. We find that the reference in this letter to 25 July 2015 was a typographical error and that the reference should have been to the letter dated 25 July 2013, described above.

25. HMRC's letter of 9 September 2015 set out the amount of the assessment (£103,009 plus statutory interest), and described an additional amount of default interest due from the Appellant.

26. The letter of 9 September 2015 included a section headed "What you can do if you disagree with this demand". This stated that there was no right of appeal against the collection of previously assessed amounts, and that no statutory review could be offered, but that HMRC may accept a late request for review if there was a reasonable excuse for not having asked for a review within the time limit.

27. The letter then informed the Appellant that they had the right to ask the Tribunal to accept a late appeal against the original assessments, and that if the Appellant wanted to do this they should write to the Tribunal within 30 days. The Appellant was directed to various sources of information on appeals and reviews, independent tribunals, and how to contact HMRC.

28. On 30 August 2016, Crawfords wrote to the First-tier Tribunal (Tax Chamber), quoting the appeal reference number TC/2013/00867 and stating:

> "We refer to your letter of 12 July and now enclose our appeal withdrawal on behalf of our client."

29. The enclosure to this letter was a one-page pre-printed form headed "Expired Rank Stays in the First Tier Tribunal (Tax Chamber)". We find, on the balance of probabilities, that this form was produced by the Tribunal.

30. At the top of this form is a section headed "Appellant Details". Here the Appellant's appeal reference number (TC/2013/00867), name and representative (Crawfords) have been entered in manuscript. The remainder of the form is headed "Nature of Appeal", with appellants being instructed to complete one of the sections below. The only section containing a response by the Appellant is titled "Section 1 Slot Machines (known as Rank Part 1)".

31. This section contains a table in which the first line reads "I confirm that this appeal related to the treatment of 'slot machines' and has been finally determined by the Supreme Court decision". There is then an instruction to "choose one", offering two alternatives: "I wish to withdraw the appeal" or "I DO NOT wish to withdraw an appeal". A cross has been entered by hand next to the option "I wish to withdraw the appeal".

32. The form then instructs appellants with appeals against a decision on slot machines who do not wish to withdraw their appeal to provide fully particularised grounds of appeal, listing the periods of the disputed decisions and explaining why they think their appeal is not bound by the decision of the Supreme Court.

33. On 15 April 2020, the Upper Tribunal released its decision in *HMRC v Rank Group and Done Brothers* [2020] UKUT 117 (TCC), finding that UK legislation breached the principle of fiscal neutrality because of the similarity of taxed supplies to exempt supplies.

34. On 21 July 2021, Royce Peeling Green Ltd ("RPG") wrote to HMRC explaining that they had become the agents for both the Appellant and JLL following a merger between RPG and Crawfords. The letter stated that RPG understood that, in connection with their clients' VAT repayment claims in respect of the Rank case, HMRC had indicated that they cannot locate any valid appeals. The letter enclosed various documents including some of the correspondence referred to above, and looked forward to receiving the "relevant repayments" as soon as possible.

35. HMRC's response was that as they had been unable to locate a valid appeal, they did not consider any amounts to be repayable.

36. The Appellant appealed to the Tribunal on 4 November 2022. The grounds of appeal stated that the appeal is "in respect of a protective assessment issued by HMRC on 6 August 2013". As described above this protective assessment was a duplicate of the letter sent on 25 July 2013.

RELEVANT LAW

37. Section 80(1) of the Value Added Tax Act 1994 ("VATA 1994") provides that where a person has accounted to HMRC for a prescribed accounting period for output tax that was not due, HMRC are liable to credit the person with that amount.

38. VATA 1994, s 80(4A) provides that where a person has been credited under s 80(1) with an amount that exceeded the amount which HMRC were liable to credit to that person, HMRC may "assess the excess credited to that person and notify it to him".

39. VATA 1994, s 83(1)(t) provides a right of appeal to the Tribunal against an assessment under VATA 1994, s 80(4A).

40. Under VATA 1994, s 83G, unless an extension of time applies, an appeal is to be made to the Tribunal within 30 days of the date of the document notifying the decision to which the appeal relates. Various extensions apply if HMRC offer a review of their decision and the taxpayer either accepts this offer or requests a review out of time.

41. VATA 1994, s 83G(6) provides that an appeal may be made after the end of the 30-day period if the Tribunal gives permission to do so.

42. In *William Martland v HMRC* [2018] UKUT 178 (TCC) ("*Martland*"), the Upper Tribunal provided guidance to the First-tier Tribunal (FTT) on the approach to adopt when considering whether to admit a late appeal. The Upper Tribunal said:

> "[44] When the FTT is considering applications for permission to appeal out of time, therefore, it must be remembered that the starting point is that permission should not be granted unless the FTT is satisfied on balance that it should be. In considering that question, we consider the FTT can usefully follow the three-stage process set out in [*Denton v TH White* [2014] EWCA Civ 906]:
>
> > (1) Establish the length of the delay. If it was very short (which would, in the absence of unusual circumstances, equate to the breach being "neither serious nor significant"), then the FTT "is unlikely to need to spend much time on the second and third stages" – though this should not be taken to mean that applications can be granted for very short delays without even moving on to a consideration of those stages.
> >
> > (2) The reason (or reasons) why the default occurred should be established.
> >
> > (3) The FTT can then move onto its evaluation of "all the circumstances of the case". This will involve a balancing exercise which will essentially assess the merits of the reason(s) given for the delay and the prejudice which would be caused to both parties by granting or refusing permission.
>
> [45] That balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. […]
>
> [46] In doing so, the FTT can have regard to any obvious strength or weakness of the applicant's case; this goes to the question of prejudice – there is obviously much greater prejudice for an applicant to lose the opportunity of

> putting forward a really strong case than a very weak one. It is important however that this should not descend into a detailed analysis of the underlying merits of the appeal."

43. In *HMRC v Websons (8) Ltd* [2020] UKUT 154 (TCC), the Upper Tribunal observed that it was common ground that the principles to be adopted in deciding whether to admit a late appeal were those set out in *Martland*, and went on to comment (at [45]) on the importance of observing statutory time limits, as follows:

> "[45] The need to give particular importance to the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected was emphasised by the Upper Tribunal in *HMRC v Hafeez Katib* [2019] UKUT 189 (TCC) where it found at [17] that the FTT made an error of law in that case "in failing to…give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected was a matter of particular importance to the exercise of its discretion".

44. In *Ashington & Ellington Social Club, Ashtead Village Club and Darfield Road Working Men's Club v HMRC* [2017] UKFTT 612 (TC) ("*Ashington*"), the Tribunal considered applications by HMRC for the striking out of appeals against HMRC's decisions on claims for overpaid VAT on gaming machine takings.

45. That case involved three appellants (Ashington, Ashtead and Darfield). Ashtead and Darfield had appealed against HMRC's rejection in 2006 of their original claims for repayment of VAT. In 2010/11, HMRC repaid the VAT claimed and issued protective assessments. Ashington had made a similar repayment claim in 2006 but it had not been formally refused, and no appeal had been lodged against any HMRC decision. HMRC had repaid VAT to it in 2013 and issued a protective assessment. None of the three appellants had appealed in time against the protective assessments, so all applied for permission to bring appeals out of time. The case also considered HMRC's application to strike out the appeals by Ashtead and Darfield against HMRC's decision on their original claims.

46. The Tribunal did not grant Ashington permission to make a late appeal against its protective assessment, but it refused HMRC's application to strike out the appeals of Darfield and Ashtead and allowed them to amend their earlier appeals to include an appeal against the protective assessments.

47. At [29] the Tribunal said:

> "[29] …I consider that Ashtead and Darfield are in a different position to Ashington. They both have existing appeals against the initial refusals of their claims which have never been withdrawn. Their mistake was in failing to recognise that repayments were effectively a concession by HMRC that the Appellants were entitled to succeed in their original appeals and the protective assessments were new appealable events that required separate appeals. Although the letters that formed the protective assessments contained wording to alert the Appellants to the need to appeal, I consider that they also contained mixed messages that had the potential to confuse. The letters stated that HMRC would not take any action to collect the tax charged by the assessments and would write to the Appellants to notify them if that changed and only at that point ask them to pay the amounts charged within 30 days. It might reasonably have appeared to the reader that the Appellants did not need to take any action until notified by HMRC. Indeed, why would persons who had been paid the amount claimed with interest think that they should appeal? HMRC point to the paragraph stating (emphasis supplied):

> "If you want to appeal to the tribunal you should send them your appeal within 30 days *of the date of this letter*."
>
> [30] However, that paragraph does not say that the Appellants were required to notify new appeals. Similarly, the reference in the final paragraph to the Appellants' existing appeals only suggests that the Appellants may want to reconsider their position in respect of the appeals and does not make clear that HMRC had conceded them, subject to further developments in the Rank litigation. I consider that the Appellants could have reasonably gained the impression that they had an option to continue their existing appeals and those would embrace the later protective assessments. In fact, for reasons I have discussed, that was not the correct analysis."

DISCUSSION

48. Our consideration of this case has been made more difficult because we had only a limited amount of evidence. Mr Poston, who appeared before us, did not represent the Appellant at the relevant times so had no direct knowledge that might help to explain actions that were taken, or not taken, by the Appellant in connection with the claim. Mr Poston explained that unfortunately the accountant at Crawfords who was dealing with this matter has since passed away. We also had no witness evidence from HMRC.

49. We have therefore had to rely, for evidence, on the documents in the bundle, and here too we have been hampered by missing information and mistaken dates. We do not know, for instance, when and how HMRC refused the claim originally made by the Appellant in September 2006; all we know is that by June 2011 HMRC were referring to the claim as having already been rejected. We also had no information relating to the circumstances in which the Appellant withdrew their previous appeal in September 2016. We have therefore drawn such conclusions as we can from parties' submissions and from the evidence before us.

50. The parties submitted that we should adopt the three-stage analysis set out by the Upper Tribunal in *Martland*, and we agree that this is the correct approach.

The length of the delay

51. The first stage is to establish the length of the delay. The duplicate letters dated 25 July 2013 and 6 August 2013 notified the Appellant that HMRC had raised an assessment under VATA 1994, s 80(4A) in the amount of £103,009. This was a "protective" assessment in the sense that HMRC did not intend to take any action to collect the assessed tax until they knew the outcome of the next stage in the Rank Group litigation.

52. The Appellant had the right, under VATA 1994, s 83(1)(t), to appeal to the Tribunal against the protective assessment. Under VATA 1994, s 83G, the appeal had to be brought within 30 days of the date of the document notifying the decision to which the appeal relates. In this case, this document was the letter sent on 25 July 2013 and its duplicate sent on 6 August 2013. The letter included an offer of a statutory review by HMRC, but Mr Poston did not suggest that the Appellant had accepted this offer, or requested a review out of time.

53. The time limit for appealing the protective assessment to the Tribunal therefore expired (taking the date of the later of the two notification letters) on 5 September 2013. The current appeal was made to the Tribunal on 4 November 2022, more than nine years late. By any measure this is a serious and significant delay, and Mr Poston acknowledged that this was the case.

The reasons for the delay

54. Under the second stage of the *Martland* test, we must establish the reason(s) for the delay.

55. The Appellant's notice of appeal to the Tribunal states, as the reason for the late appeal, that "the agent dealing with this matter at the time thought that the previous protective appeals issued in connection with this liability remained valid and given the detailed ongoing correspondence did not believe that a formal appeal was necessary".

56. Mr Poston made the following additional submissions on behalf of the Appellant in relation to the reasons for the delay.

(1) It is clear from the correspondence that the requirement for a formal appeal to the Tribunal was overlooked.

(2) A typical chartered accountant in general practice will deal with the Tribunal only infrequently, and the procedural processes involved are very formal. Although these appear straightforward from the Tribunal's perspective, a process which one is involved with only once every several years is far from straightforward, however well qualified a professional may be.

(3) Alongside this case, the accountant dealing with this matter was also acting for JLL, which was pursuing an identical case. The correspondence for the two cases ran along similar lines although slightly out of sync from a time basis. There was a similar fact pattern in the JLL case and a late appeal was submitted on that case, also on 4 November 2022. That appeal was accepted and the amounts involved have since been refunded.

(4) Mr Poston understood that HMRC had accepted JLL's late appeal because of the letter from HMRC (referred to above) dated 24 July 2015, which HMRC considered to be potentially misleading to the taxpayer, and so they did not feel it appropriate to object to the late appeal in that matter.

(5) Given that the cases were running in tandem, it is difficult to see how this correspondence would not be considered to have similarly prejudiced the Appellant's case.

(6) This point is reinforced because HMRC have failed to correctly distinguish between the Appellant and JLL. For instance, the name given by HMRC to the pdf document containing HMRC's notice of objection to the Appellant's late appeal mistakenly uses the name "Jeffries Leisure", rather than the Appellant's name, which is Jeffries & Sons.

(7) The Appellant therefore contended that although they did not consider the failure to submit the appeal to be a satisfactory position, it is not difficult to see how this has arisen.

57. We have considered Mr Poston's submissions concerning JLL separately below.

58. On the reasons for the delay, we accept Mr Poston's submission that the need to make an appeal was overlooked. Mr Poston suggested that the reason for this was that the previous accountant felt that the Appellant had made an appeal through the letter from Crawfords dated 17 September 2014, and did not appreciate that it was necessary to make a formal appeal to the Tribunal. He submitted that it is unusual for accountants in general practice to have dealings with the Tribunal, and that this explains the misunderstanding.

59. The letters from Crawfords dated 17 September 2014 and 7 July 2015 reveal a degree of confusion as to the true legal position, but provide some support for the proposition that at this time the accountant believed that there was an ongoing live dispute. The letter dated 7 July 2015 appears to refer to the letter of 17 September 2014 as a formal appeal. While this letter is clearly not an appeal (and we deal with this further below), this correspondence indicates that in 2014 and 2015 the accountant believed both that an appeal had been made, and that this appeal remained unresolved.

60. We find, on the balance of probabilities, that the appeal was late because the Appellant's agent did not appreciate that, if HMRC were ultimately unsuccessful in the Rank Group litigation, his client would only be able to claim the overpaid VAT if there were a live appeal against the protective assessment. The reason the agent was under this misapprehension was partly that he had limited experience of making appeals to the Tribunal, and partly because the Appellant had already brought an appeal on 29 January 2013, some six months before the protective assessment was made.

61. We have mentioned above the difficulty we have had in this case because of the limited amount of evidence. Our finding that the appeal made in January 2013 was part of the reason for the agent failing to appreciate the need to appeal against the protective assessment is made on the balance of probabilities, based on the timing of the events and correspondence set out in our findings of fact above, and on the wording of the letter notifying the Appellant of the protective assessment.

62. As regards the wording of the letter, we observe that this was very similar to the wording of the letters sent to the appellants in the *Ashington* case set out above, in which HMRC notified the appellants in that case of the protective assessments. We agree with the comments of the Tribunal at [29] and [30] of that decision, including that the letter "contained mixed messages that had the potential to confuse". We find that it was more likely than not that having read the letter notifying the Appellant of the protective assessment, the agent concluded that he did not need to make a fresh appeal.

63. We have evaluated the merits of this reason below, as part of our consideration of the third stage of the *Martland* approach.

64. We have set out above that the Appellant's notice of appeal stated that the agent dealing with this matter at the time thought that a formal appeal was not necessary because he believed the "previous protective appeals" remained valid. Mr Poston did not explain, at the hearing, what the Appellant meant by the "protective appeals", but suggested that the agent may have believed the letter from Crawfords of 17 September 2014 was an appeal.

65. We do not accept this submission because there is nothing in the letter of 17 September 2014 that a reasonable professional could regard as an appeal: the letter simply states that a payment is being made to mitigate interest payments, and seeks assurance that this will be repaid if the appeal to the Court of Appeal (in the Rank Group litigation) is allowed. The word "appeal" is only used in the context of the Rank Group litigation. The Appellant, or the Appellant's agent, clearly knew how to appeal to the Tribunal because they had done so successfully in January 2013. In addition, a letter written on 17 September 2014 cannot be part of the reason for a failure to appeal within a time limit that expired on 5 September 2013, more than a year earlier.

66. The letters from Crawfords dated 17 September 2014 and 7 July 2015 do, however, help to explain why no late appeal was made in 2014 or 2015, and we consider this further below.

Evaluation of all the circumstances of the case

67. Under the third stage of the *Martland* approach, we should evaluate all the circumstances of the case, using a balancing exercise to assess the merits of the reasons for the delay and the prejudice to both parties of granting or refusing permission. This balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected. In doing so we can have regard to any obvious strength or weakness of the applicant's case, but this should not descend into a detailed analysis of the underlying appeal.

68. The protective assessment was made just a few months after the Appellant had made a late appeal against the original rejection of their claims. In our view, at this stage the Appellant was in a very similar position to Ashtead and Darfield, two of the appellants in the *Ashington* case described above. We have already stated that we agree with the comments of the Tribunal at [29] and [30] of that decision, and find that in this case too, "it might reasonably have appeared to the reader that the Appellants did not need to take any action until notified by HMRC". In this case, as with Ashtead and Darfield, the reference to the Appellant's existing appeal "only suggests that the Appellants may want to reconsider their position in respect of the appeals and does not make clear that HMRC has conceded them."

69. While the correct position was that the repayment by HMRC was a settlement by HMRC of the original appeal (albeit that that appeal had been made late), and the protective assessment was a new appealable decision requiring a fresh appeal, the Appellant could reasonably have concluded that their existing appeal would continue without a need for a new appeal against the protective assessment.

70. The critical distinction between this case and those of Ashtead and Darfield is that in August 2016, the Appellant withdrew their earlier appeal (TC/2013/00867 made in January 2013). We consider it unfortunate that we did not have enough evidence to enable us to understand why this appeal was withdrawn. Nonetheless, it was withdrawn, and in doing so the Appellant indicated their assent to the statement that their appeal had been finally determined by the judgment of the Supreme Court.

71. It follows that while we consider that there was a good reason for the Appellant's original failure to appeal against the protective assessment, this reason ceased in August 2016 when they withdrew their appeal against the refusal of their original claim.

72. We acknowledge that our observations here about the appeal made in January 2013, and its withdrawal in August 2016, have been made in the absence of detailed submissions on this point by either party. However, we decided it would not be in the interests of justice to invite further submissions after the hearing. This was firstly because these observations have not affected the outcome of the application to make a late appeal: if we had disregarded the appeal made in January 2013, we would have found that there was no good reason for the initial failure to appeal against the protective assessment.

73. Lack of familiarity with Tribunal procedures is not a good reason because information on how to make an appeal is readily available, and the Appellant was directed to sources of such information in the letters from HMRC dated 25 July 2013 and 6 August 2013. These letters also informed the Appellant that they should appeal to the Tribunal within 30 days "of the date of this letter". In our view, if there had been no pre-existing appeal, there was no good reason why the Appellant could not have appealed within the 30-day time limit.

74. The second reason that we have not invited further submissions about the appeal made in January 2013, and its withdrawal in 2016, is that neither party suggested they had any more

evidence relating to the circumstances pertaining in 2013 to 2016. We therefore considered that further submissions would be of limited value.

75. We now turn to the prejudice to both parties of granting or refusing permission to bring the late appeal.

76. If we refuse permission, the Appellant will lose the opportunity to recover the overpaid VAT that they have claimed. While this is a significant prejudice, it is the inevitable consequence of being unable to bring a late appeal, and cannot of itself be a reason for us to allow the application.

77. If we grant the Appellant permission to bring a late appeal, HMRC submit that they will suffer prejudice because some of the decisions relate to tax years that are now 20 years in the past, and as such, under data protection laws, the vast majority of the documentation relating to this period has been destroyed. They further submit that they will have to divert resources to defend an appeal which they were entitled to consider closed, and that other taxpayers would be prejudiced because HMRC's and the Tribunal's resources would be diverted to the Appellant's appeal. According to HMRC, appeals that are made after an excessive delay are normally more resource heavy to defend and otherwise create issues in obtaining appropriate evidence.

78. Mr Poston challenged HMRC's position, submitting that the Appellant has a very strong case: the legal position has been established by other litigation, and all that HMRC would have to do is to process the repayment. According to Mr Poston, HMRC have set up a team to process claims similar to that of the Appellant, and would have verified the Appellant's claim before they made the repayment in 2013. In these circumstances it would be reasonable to assume that the process involved in making a further repayment would not be onerous or time-consuming.

79. On the question of the potential prejudice to HMRC, we prefer the Appellant's submissions to those of HMRC. Mr Williams agreed that HMRC have a team assigned to deal with appeals similar to that of the Appellant, and did not dispute that HMRC had already verified the amount of the claim.

80. In the absence of any submissions from HMRC to the contrary, we find that the point of principle in the Appellant's case was resolved in the Appellant's favour in the Rank Group litigation (and in particular, the decision of the Upper Tribunal in 2020), and that HMRC would already have considered the quantum of the Appellant's claim before making the repayment in 2013. Although HMRC would need to expend some resources in reviewing this appeal anew, we do not consider that the resource involved would be significant, given the previous repayment and the existence of a team within HMRC that has been set up to deal with appeals of this type.

81. In summary, therefore, the Appellant seeks to bring an appeal that is over nine years late, while having a strong underlying case. They initially had a good reason for failing to make an in-time appeal, but this reason ceased to apply in 2016, some six years before the date of the current appeal.

82. Having evaluated all the circumstances, we have decided that the strength of the Appellant's case is not a sufficient reason to allow this appeal to be made after such a long delay. Parliament has decided that appeals must be brought within 30 days of the date of the document notifying the appealable decision, and we must have particular regard to the need for statutory time limits to be respected. It is not enough for the Appellant to have a strong case.

83. We are reinforced in our view by the previous decisions of this Tribunal in cases involving similar applications to those of the Appellant, including *York Burton Lane Club and Institute Ltd and others v HMRC* [2022] UKFTT 406 (TC) ("*York Burton Lane*") and *Little*

Lever Working Mens Club [2023] UKFTT 714 (TC). In both of those cases the Tribunal found that the appellants had a strong case, but nonetheless refused to grant permission for late appeals. We agree with the comments of the Tribunal in *York Burton Lane* at [69] where it was said:

> "I start by reminding myself that there is nothing controversial or novel in the idea that there is more to prevailing in litigation than simply having a good claim, and that a claim must be brought in time and properly prosecuted. […] I am also mindful that the core 30 day time period for commencing an appeal is contained in primary legislation; Parliament's starting point is that 30 days is long enough to bring an appeal. I consider that, if I were to give permission for these appeals to proceed, so long after the 30 day period expired and without there being any justification for the inordinate delay, I would be "failing to acknowledge or give proper force to the position that, as a matter of principle, the need for statutory time limits to be respected [is] a matter of particular importance to the exercise of [my] discretion" (*HMRC v Muhammed Hafeez Katib* [2019] UKUT 189 (TCC))."

84. We have therefore decided that the length of the delay, combined with the absence of a good reason that lasted for the whole of the period that delay, outweigh the Appellant's strong underlying case and the limited prejudice to HMRC, and that we should refuse the application to bring a late appeal.

Parallel proceedings involving JLL

85. We considered carefully Mr Poston's submissions relating to the "parallel" proceedings brought by JLL, but decided that we should not take these submissions into account in our application of the *Martland* approach. Our reasons for this are as follows.

86. Mr Poston directed us to the letter from HMRC dated 24 July 2015 relating to JLL, in which HMRC stated that no further appeals could be made. We understood Mr Poston to be suggesting that if the accountant at Crawfords who received this letter had been misled in relation to JLL, he would have been equally misled in relation to the Appellant.

87. However, we are unable to make a finding as to what role this letter may have played in misleading the accountant, or in causing him to withdraw the Appellant's original appeal in August 2016. The form which the Appellant completed when they withdrew their appeal gave appellants the option to state why they considered their appeal was not bound by the decision of the Supreme Court, which should have alerted the Appellant to the fact that they were not bound to withdraw. It was open at any time to the Appellant, or to the accountant on the Appellant's behalf, to seek legal advice as to the most appropriate course of action.

88. We do not consider that we should use the letter of 24 July 2015, which related to another of the accountant's clients, as the basis for a finding that the Appellant had a good reason for withdrawing the appeal in August 2016, and then taking no further action until RPG sent their letter in July 2021.

89. The task of the Tribunal in this case is to consider the application brought by the Appellant. JLL is a separate legal entity and is not a party to these proceedings. Even if we accept Mr Poston's submission that the letter dated 24 July 2015 is the reason that HMRC did not object to the late appeal by JLL, our task is not to evaluate HMRC's decision-making in those separate legal proceedings.

90. Mr Poston was effectively inviting us to find that, whatever HMRC's reasons were for allowing the claim by JLL, the same reasons must apply to the Appellant. However, the question before us is not why HMRC allowed JLL's late appeal, but whether it is right to permit

the Appellant to bring a late appeal. We must decide this on the basis of the evidence relating to the Appellant, and not the circumstances of any other taxpayer, however similar their cases may appear.

91. As regards HMRC mistakenly naming a pdf document with the name of JLL rather than that of the Appellant, we consider this to be in the nature of an administrative error and do not view this as a matter to be taken into account when deciding whether to permit the application for a late appeal.

92. We appreciate it is frustrating for Mr Poston that his two clients appear to have been treated differently, but reiterate that we can only consider the submissions and evidence before us, as they relate to the Appellant.

DISPOSITION

93. The application for permission to bring a late appeal is refused.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

94. 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.

RACHEL GAUKE
TRIBUNAL JUDGE

Release date: 14th NOVEMBER 2024