[2018] UKFTT 0257 (TC)

TC06487

Appeal number: TC/2017/01320

VAT – application to strike-out – jurisdiction – whether letter from HMRC constitutes an appealable decision – alternatively application to amend appeal so it is against earlier decision – whether Tribunal should allow a late appeal - Rules 2 and 8, Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 - s83G(6) Value Added Tax Act 1994

FIRST-TIER TRIBUNAL
TAX CHAMBER

BUCKINGHAM BINGO LIMITED	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

TRIBUNAL: JUDGE ALEKSANDER

Sitting in public at Taylor House, London on 10 November 2017

Geoffrey Tack, solicitor, of DLA Piper LLP, for the Appellant

Peter Mantle, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. This is an application by HMRC that the Appellant's ("BBL") appeal be struck out on the grounds that the Tribunal has no jurisdiction in respect of these proceedings, or alternatively that the Tribunal should not exercise its discretion to allow BBL to amend its Notice of Appeal to allow them to make an appeal out of time.

2. BBL were represented by Mr Tack of DLA Piper LLP, HMRC were represented by Mr Mantle. An agreed bundle of documents was put before me in evidence.

Background

3. The background facts (insofar as are relevant to this decision) are not in dispute, and I find them to be as follows.

4. BBL is a bingo operator. The fact pattern relating to the supplies in issue in this appeal is similar to the fact pattern considered by this Tribunal in *Carlton Clubs PLC v HMRC* [2011] UKFTT 542 (TC). The decision in *Carlton Clubs* was issued on 9 August 2011.

5. Between November 2011 and January 2012 there was correspondence between KPMG (who were the Appellant's representatives at the time) and HMRC notifying HMRC of BBL's intention to make an adjustment to its VAT returns under Regulation 38, VAT Regulations 1995. BBL issued an "internal credit note" in order to adjust the amount of consideration for bingo session income for the period from 1 January 1997 to 30 September 2004, which was recognised in the 12/11 VAT return. On 21 January 2012, the Appellant filed its 12/11 VAT return electronically, which included a claim for a refund of £1,616,384.44 output VAT that had been overpaid.

6. On 3 July 2012, HMRC issued a decision letter rejecting the claim. The decision letter set out BBL's rights of appeal.

7. On 14 September 2012, KPMG (who then represented BBL) wrote to HMRC confirming that BBL did not intend to appeal against the decision. In its letter KPMG stated:

> Whilst [BBL] accepts that the decision in *Carlton Clubs Plc* does not create any binding precedent, the rejection of this claim is clearly at odds with the Tribunal's reasoning in their decision which HMRC chose not to appeal. Indeed, it was on this basis that [BBL] proceeded to make the adjustment which you now challenge. However, our client recognises that other subsequent challenges have been made in other areas and other ongoing challenges. In the light of further costs involved, our client has decided not to challenge your decision on this specific matter.

8. On 19 September 2016, DLA Piper (who are now representing BBL) wrote to HMRC referring to the Regulation 38 adjustment made in the 12/11 VAT return, and seeking "repayment of the balance of the 12/11 return" (namely £1,616,384.44), and referring to the decision of the First Tier Tribunal in *KE Entertainments Limited* [2016] UKFTT 508 (TC). On 5 October 2016 HMRC replied, noting KPMG's letter of 14 September 2012 and BBL's decision not to appeal the 3 July 2012 decision letter. HMRC invited submissions for a possible late statutory review. Further correspondence between DLA Piper and HMRC followed, including a letter from DLA Piper to HMRC dated 7 November 2016 asking HMRC to make a decision on whether the Regulation 38 adjustment reflected in its 12/11 return "remains extant".

9. On 5 January 2017, HMRC wrote to DLA Piper stating that their letter of 3 July 2012 had ruled on the Regulation 38 adjustment. HMRC also declined to undertake a late statutory review. The letter went on as follows:

> For the avoidance of doubt this correspondence does not itself contain a decision. It serves only to reaffirm that a decision was made on 3 July 2012.

10. On 3 February 2017, a Notice of Appeal was filed with this Tribunal appealing against the decision made by HMRC in their letter of 5 January 2017.

11. HMRC have applied to strike out BBL's appeal on the grounds that the Tribunal has no jurisdiction in relation to the matters set out in the Notice of Appeal.

12. BBL's skeleton argument filed in relation to this hearing includes a submission that – if I am minded to strike out their appeal – they should be allowed to amend their Notice of Appeal so that it takes effect as an appeal against HMRC's 3 July 2012 decision, and that the Tribunal exercises its discretion under s83G(6) Value Added Tax Act 1994 ("VAT Act") to allow BBL to make the appeal out of time.

Issues before the Tribunal

13. HMRC acknowledge that BBL's circumstances are on all fours with those of the appellants in both the *Carlton Clubs* and the *KE Entertainments* cases.

14. HMRC's case is that its letter of 5 January 2017 does not contain an appealable decision, and therefore no appeal can be made against it. The Tribunal therefore has no jurisdiction to entertain an appeal in respect of that letter. HMRC therefore apply for BBL's appeal to be struck-out under Rule 8, Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Rule 8(2) requires the Tribunal to strike out an appeal if does not have jurisdiction in relation to proceedings.

15. HMRC acknowledge that BBL has a right of appeal against its decision letter of 3 July 2012, but that the time limit for lodging any appeal has long expired. HMRC submit that the Tribunal should not exercise its discretion to extend time to allow a late appeal under s83G(6) VAT Act, especially given that BBL's decision not to lodge any appeal was made with the benefit of KPMG's professional advice.

16. BBL's case is that the adjustment made under Regulation 38 and reflected in its 12/11 VAT return is correct in the light of the decisions of this Tribunal in *Carlton Clubs* and *KE Entertainments.*

17. BBL submits that as VAT is a self-assessed tax, HMRC have a duty to process VAT returns, and that its return of 12/11 remains unprocessed. BBL submits that there are no applicable time limits that prevent HMRC from processing adjustments under Regulation 38.

18. Further, BBL submits that HMRC's letter of 5 January 2017 constitutes an appealable decision, and that the Tribunal can entertain an appeal in respect of it.

19. Finally, and alternatively, if the Tribunal should decide that the 5 January 2017 letter does not contain an appealable decision, BBL's skeleton argument requests that the Tribunal grant an extension of time to bring an appeal against the original decision letter of 3 July 2012.

Unprocessed VAT return and Regulation 38 adjustment - submissions

20. BBL submits that HMRC have a duty to process VAT returns pursuant to s58 VAT Act. Section 58 gives effect to schedule 11 of the VAT Act. Paragraph 2, schedule 11, VAT Act gives HMRC power to make regulations governing the keeping of accounts and the making of VAT returns.

21. BBL submits that (unlike direct tax returns which can be amended by HMRC or this Tribunal) VAT returns can only be amended by the taxpayer – accordingly BBL adjusted their VAT return for 12/11 in order to make an amendment to reflect the VAT overpaid in earlier periods. BBL submits that HMRC have refused to process the adjusted return on two occasions – first by their letter of 3 July 2012, and secondly by their letter of 5 January 2017. BBL submits that by failing to process the 12/11 return, HMRC are failing in their duties under paragraph 2, schedule 11 to collect and manage VAT.

22. Regulation 38, VAT Regulations 1995 applies where there is a decrease in the consideration given for a taxable supply, and the decrease occurs after the end of the accounting period in which the original supply took place. In BBL's case, an internal credit note (which the Tribunal considered to be appropriate in its decision in *Carlton Clubs*) was issued to evidence the decrease in the amount of the consideration for bingo session income relating to VAT periods 03/1997 to 09/2004. This was recorded in the 12/11 VAT return.

23. Paragraphs (1A) and (1B) of Regulation 38 used to include time limits, but these paragraphs were repealed with effect from 1 April 2009. BBL notes that these time limits were not replaced, and submits that this indicates that it was the intention of Parliament that time limits should not apply to adjustments under Regulation 38.

24. BBL submits that the adjustment made in the 12/11 VAT return under Regulation 38 remain unprocessed. As there are no time limits that prevent HMRC

from processing those adjustments, HMRC should proceed to process them, and make an appropriate refund of VAT to BBL.

25. HMRC submit that there is no merit in BBL's arguments relating to unprocessed VAT returns. The scheme of returns for VAT is different to the scheme that applies to income tax and corporation tax self-assessment. In contrast to the provisions for direct taxes, there is no mechanism as regards VAT for amendment to VAT returns. BBL's 12/11 VAT return has been processed, and a decision to refuse BBL's claim in respect of any overpaid VAT was made in HMRC's letter of 3 July 2012.

26. HMRC acknowledge that it is open to taxpayers to make repeat claims in respect of the same underlying facts (see the decision of Laws LJ in *Wilkins et al v HMRC* [2010] EWCA Civ 923 at [70] to [79]) - subject to the time limits provided in the legislation. But, even if time limits were not in issue, repeat claims with nothing new to say would be abusive, and should be rejected by HMRC and the courts (see Laws LJ in *Wilkins* at [76]). HMRC submit that nothing has changed since the original claim was made by BBL that would provide a proper basis for a fresh claim to be made (and that the decision of this Tribunal in *KE Entertainments* does not represent any new development in the law beyond *Carlton Clubs*).

27. HMRC submit that there is effectively a time limit on Regulation 38 adjustments because of the interaction of those provisions with Regulation 35. Regulation 38(5) provides as follows:

> Every entry required by this regulation shall, except where paragraph (6) below applies, be made in that part of the VAT account which relates to the prescribed accounting period in which the increase or decrease is given effect in the business accounts of the taxable person.

28. Accordingly, submit HMRC, the decreases in the consideration must be reflected in BBL's VAT account in the prescribed accounting period – namely the accounting period in which the decrease was given effect in BBL's accounting records. In other words, if the relevant decreases were given effect in BBL's accounting records in period X, the Regulation 38 entry in BBL's VAT account has to be made in the part relating to period X, and should have been reflected in BBL's VAT return for period X.

29. HMRC submit that if a taxpayer, being required to make a Regulation 38 adjustment in period X, does not make the required adjustment in its VAT account for period X, or has not reflected that adjustment in its VAT return for period X, then taxpayer would have made an error in accounting for VAT and in its VAT return. Correction of such errors is governed by Regulation 35, VAT Regulations 1995, which requires that corrections are made within such time as HMRC may require. HMRC Public Notice 700/45 provides for a four-year time limit for correcting errors. Where the error gives rise to an overpayment of VAT, then s80(7) VAT Act provides that any claim for credit or repayment must be made under s80 VAT Act, and claims under s80 are subject to the four-year time limit in s80(4).

30. In this case, the relevant period was (at the very latest) BBL's 12/11 prescribed accounting period, and it is not in dispute that the VAT in dispute was reflected in BBL's VAT return for that period. Therefore, submit HMRC, BBL's Regulation 38 claim is specific (at the latest) to the 12/11 accounting period, which had ended more than five years prior to the commencement of this Appeal.

Unprocessed VAT return and Regulation 38 - discussion

31. I agree with HMRC, and find that there is no merit in relation to BBL's submissions that their 12/11 VAT return has not been processed. The provisions of s58 VAT Act and Schedule 11 are plainly not relevant to this appeal. The schedule deals with VAT records and accounts, and the manner in which VAT returns are made, and these are simply not in issue here.

32. Nor is it the case that the 12/11 return is unprocessed, and I so find. HMRC's letter of 3 July 2012 clearly rejects the claim for input tax credit made in that return. Although BBL could make another claim for the input tax credit, that claim would be subject to the time limits in the legislation, and would require consent for the appeal to be made out of time (which I address below).

33. I agree with HMRC's submissions and find that the structure of Regulation 38 includes its own inherent time limit – and that

> … the relevant reduction in consideration marches hand-in-hand with the accounting period in which the reduction is reflected in the taxpayer's business accounts. (*Iveco v HMRC* [2016] UKUT 263 (TCC) at [76])

34. I also referred the parties to the decision of the First-tier Tribunal in *Leigh Day* [2014] UKFTT 425 (TC) (although not cited to me), where a similar issue arose as to time limits applicable to Regulation 38 claims.

35. I therefore find that the four-year time provided by Regulation 35 and s80(4) VAT Act applies to any adjustment made under Regulation 38.

5 January 2017 letter - submissions

36. BBL submits that HMRC's letter of 5 January 2017 contains a decision against which an appeal can be lodged under s83(1) VAT Act. HMRC submit that the letter merely reaffirms their original decision of 3 July 2012. Consequentially, any right of appeal subsists only against the decision made in the 3 July 2012 letter, but not in respect of the 5 January 2017 letter.

37. BBL submits that by the letter dated 7 November 2016, it sought a decision as to whether the Regulation 38 adjustment reflected in its 12/11 return "remains extant", and *Wilkins* (cited previously) is authority for a taxpayer to be allowed to make multiple claims in respect of the same subject matter. BBL submits that HMRC's letter of 5 January 2017, in stating that BBL did not have any extant matters, is itself a decision against which an appeal lies under s83(1).

38. I was referred to the decision of the VAT Tribunal in *Olympia Technology v HMRC (No 3)*(2006) VAT Decision 19984 which stated:

> The Tribunal is not in the position of umpire in a game of cricket to whom a bowler appeals for a catch. The Tribunal exists to adjudicate on a dispute following a ruling or determination by Customs.
>
> […]
>
> In my judgement in order for the Tribunal to have jurisdiction there must be an issue between the parties which has been sufficiently crystalised to constitute a decision falling within one of the paragraphs of section 83. Such decision will normally be in writing and be clearly expressed as a decision subject to appeal whether or not the word decision is used. Where a determination is not expressed as an appealable decision it may nevertheless constitute such a decision in the light of its contents and the surrounding circumstances. There may on analysis be a clear determination although there is no mention of a right of appeal. On the other hand a letter by the Commissioners may clearly be intended not to give rise to a right of appeal as with the letters in this case. I adhere to the view which I expressed in *Colaingrove v CEE* that in some circumstances the failure to give a decision or the refusal to give a decision may amount to a decision. However I consider that the refusal to give a decision will only be a decision if, on a proper analysis, it amounts to a determination of the issue which is in dispute. (at [11]-[12])

39. In its decision in *Adam Mather v HMRC* [2014] UKFTT 1062 (TC), the Tribunal had to consider whether a letter from HMRC constituted a decision, and BBL submits that the Tribunal (in reaching its decision that the letter did not constitute a decision) weighed up the following factors:

(a) Whether, in its original letter to HMRC, the taxpayer had asked for a decision;

(b) Whether HMRC's reply stated that it was (or was not) a decision;

(c) Whether HMRC's reply stated that it was providing an answer to the taxpayer; and

(d) Whether there was any decision on the substantive issue in relation to the question raised.

40. BBL applied these criteria to DLA Piper's letter of 7 November 2016 and HMRC's letter of 5 January 2017. As regards (a) and (b), BBL submits that the letter of 7 November 2016 requested a decision, but BBL acknowledges that the HMRC letter of 5 January 2017 states in terms that it does not contain any decision. As regards (c), HMRC's letter includes the following statement:

> The Commissioners' view is that [BBL] does not have any matters which are extant in respect of the VAT period ending 31 December 2011.

41. As regards (d), BBL submits that the 5 January 2017 letter made a decision, notwithstanding the statement to the contrary in the letter. By its letter dated 7 November 2016, BBL asked HMRC whether their original claim was extant, and by their letter dated 5 January 2017, HMRC stated that it was not. BBL submits that this amounts to a decision by HMRC not to process BBL's 12/11 return, and is an appealable decision.

42. BBL argues that this appeal is not against any decision made on any claim in respect of overpaid VAT. Rather it is an appeal against a decision of HMRC not to process the adjusted VAT return that remains extant.

43. BBL made submissions in their skeleton argument that they were not prevented by any doctrine of *res judicata* or *issue estopple* from pursuing their claim, but these points were not pursued at the hearing. For HMRC, Mr Mantle acknowledged (during the course of his submissions relating to the *Wilkins* case – see [26] above) that a taxpayer was not prevented from making multiple claims in respect of the same subject matter. But he submitted that such claims were subject to the relevant time limits, and repeat claims with nothing new to say were abusive, and should be rejected by HMRC and the courts.

44. HMRC submit that the letter of 5 January 2017 contains no appealable decision. Rather, the 5 January 2017 letter merely reaffirms HMRC's original decision of 3 July 2012. HMRC submit that the cases cited by BBL do not address repeat applications, where a decision has already been made by HMRC – and that this is not a case where no decision has been made by HMRC. Rather this is an attempt by BBL to skirt around the 30-day time limit that applied to the original appeal.

5 January 2017 letter – discussion

45. I agree with HMRC that their letter of 5 January 2017 did not include any appealable decision, and so find. Just because BBL wanted HMRC to make a fresh decision, it does not follow that HMRC had made such a decision.

46. Nor do I accept BBL's formulation that this appeal is against a decision of HMRC to refuse to process an extant adjusted VAT return. I have already addressed the question of whether the 12/11 VAT return is extant or unprocessed – and found that it has been processed by HMRC.

47. This is not a case where HMRC had not previously given any consideration to the issues that are the subject of this appeal. On 3 July 2012, HMRC had given their decision in respect of the refund claimed in the 12/11 VAT return. I therefore find that the cases cited by BBL to be of limited relevance, as they dealt with circumstances where no previous decision had been made by HMRC.

48. But even if I take into account the factors listed by BBL as material to the Tribunal's decision in *Mather* (and I am by no means persuaded of the merits of BBL's submissions in this regard), of particular relevance is the fact that HMRC state in terms that the 5 January 2017 letter does not make a decision in respect of BBL's

claim. HMRC's statement in their letter, that they consider that there are no extant issues, is not an appealable decision under s83(1); it is merely a statement that HMRC consider that there are no outstanding issues between themselves and BBL. That statement (even if it is a "decision") does not fall within any of the categories set out in s83(1) in respect of which an appeal lies to this Tribunal.

49. I therefore find that HMRC's letter of 5 January 2017 does not contain any appealable decision.

50. Given these findings, I do not need to address BBL's submissions relating to *res judicata* or *issue estopple*.

Unjust treatment - submissions

51. It is not in dispute that the cases of *Carlton Clubs* and *KE Entertainments* are exactly on point with BBL's position. In consequence, submits BBL, it has been treated unjustly. BBL refers to the Tribunal's procedure rules, and the overriding objective of the Tribunal to deal with cases fairly and justly.

52. BBL submits that it is manifestly unfair and unjust for a taxpayer in the same position as *Carlton Clubs* and *KE Entertainments* to be dealt with differently, or to be denied a hearing. Accordingly, BBL's appeal should be entertained by the Tribunal in the interests of fairness and justice.

53. HMRC submit that this is in substance a general complaint that HMRC is administering VAT unfairly. To the extent that it has any merit (which HMRC deny), it is not justiciable by the Tribunal, and could only be addressed in an application for judicial review.

Unjust treatment – discussion

54. The overriding objective in Rule 2 of the Tribunal's procedure rules addresses the manner in which the Tribunal deals with cases before it, and the manner in which the Tribunal exercises its discretion. The overriding objective in the Tribunal's procedure rules does not create a freestanding justiciable right in relation to the manner in which HMRC has dealt with taxpayers prior to any appeal being made.

55. Indeed, there is no evidence before me that suggests that HMRC has not dealt with BBL in any way that is unfair or unjust. HMRC made a decision in relation to BBL's VAT claim in July 2012. BBL decided, having taken professional advice, not to appeal against that decision. They cannot now complain, having decided not to appeal, that the consequences of their own decision are unfair or unjust.

56. I find that the overriding objective in the Tribunal's procedure rules does not give rise to any right of appeal independent of any right conferred by s83 VAT Act. I find that the Tribunal has no power to entertain an appeal by BBL merely because it may be in the interest of fairness and justice so to do.

Application to allow an appeal out of time

57. It is not in dispute that the Tribunal has discretion under s83G(6) VAT Act to allow appeals to be made after the time limit specified in s83G(1).

58. In his skeleton argument and in his oral submissions at the hearing, Mr Tack submitted that if HMRC succeed in their application to strike out their appeal in its current form, then BBL should be given leave to amend its Notice of Appeal to allow an appeal out of time against HMRC's decision in their 3 July 2012 letter.

59. HMRC do not object to BBL amending its Notice of Appeal in order to appeal against HMRC's original decision of 3 July 2012. However, if such an amendment were made, HMRC would oppose the application for an extension of time.

60. There have been a number of decisions of the courts over the last few years relating to the exercise by the Tribunals and the Courts of their discretion in relation to time limits. I was referred by BBL to the decisions of the Upper Tribunal in *HMRC v McCarthy & Stone (Developments) Limited Monarch Realisations No I Plc (In Administration)* [2014] UKUT 0196 (TCC) and in *Leeds City Council v HMRC* [2014] UKUT 350 (TCC). I was referred by HMRC to the decisions of the Upper Tribunal in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) and *Wilkins,* to the decision of the Outer House of the Court of Session in *Advocate General for Scotland v General Commissioners for Aberdeen City* [2005] CSOH 135, and to the decision of the Supreme Court in *HMRC v BPP Holdings* [2017] UKSC 55 (and below in the Court of Appeal [2016] EWCA 121).

61. Many of these decisions relate to breaches of time limits given in directions, and sanctions for such breaches – particularly in cases where there had been a history of non-compliance. Only *Data Select* addresses the Tribunal's discretion to allow an appeal out of time. In this context I note the statement given by the Senior President in his decision in *BPP Holdings* in the Court of Appeal:

> This is not an appropriate case to analyse the decision in *Data Select*. Suffice it to say that the question in that case was the principle to be applied to an application to extend time where there had been no history of non-compliance. (at [44])

I therefore treat the other authorities relating to time limits with some caution.

62. I draw out the following principles from the cases cited to me in relation to an application to extend time for an appeal:

(1) My primary consideration is to the overriding objective in Rule 2 of the Tribunal's procedure rules, and I must consider all the circumstances of the case.

(2) The list of matters set out in the original rule 3.9 of the Civil Procedure Rules is a helpful checklist of potentially relevant circumstances – but it is nothing more than that, and carries no special authority. The factors listed in the original CPR 3.9 are:

(a) the interests of the administration of justice;

(b) whether the application for relief has been made promptly;

(c) whether the failure to comply was intentional;

(d) whether there is a good explanation for the failure;

(e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol;

(f) whether the failure to comply was caused by the party or his legal representative;

(g) whether the trial date or the likely trial date can still be met if relief is granted;

(h) the effect which the failure to comply had on each party; and

(i) the effect which the granting of relief would have on each party.

(3) Extensions of time for commencing an appeal should not be routinely given – although the grant of an extension should not be confined to exceptional circumstances. The changes made to CPR 3.9 reflect an increased emphasis on compliance with the procedure rules – including time limits.

(4) Morgan J in *Data Select* (at [34]) said that the Tribunal should ask itself the following questions, and make its decision in the light of the answers:

(a) what is the purpose of the time limit;

(b) how long was the delay;

(c) is there a good explanation for the delay;

(d) what will be the consequences for the parties of an extension of time; and

(e) what will be the consequences for the parties of a refusal to extend time?

63. There is considerable overlap in the underlying matters covered by the questions raised by Morgan J in *Data Select* and the (relevant) factors listed in the original CPR 3.9. As CPR 3.9 has been amended, and no longer contains a checklist, I have considered that it would be better to review the circumstances of this case by reference to Morgan J's questions rather than the old rule 3.9 checklist. However, the same underlying matters will be considered whichever approach is adopted.

What is the purpose of the time limit?

64. HMRC submit that the purpose of the s83G(1) time limit is to bring about certainty and promote finality. Time limits are necessary for the efficient operation of the tax system by HMRC and an efficient Tribunals appeal system.

65. BBL submits that there has been no offending of legal certainty or effectiveness, as time limits do not apply to Regulation 38 adjustments. BBL submits that it is not

attempting to dispute prescribed time limits for the making of a claim for overpaid output tax under section 80(4) of the VAT Act 1988, or contending that HMRC made an error in its processing of a claim. Rather BBL wants HMRC to process the 12/11 VAT return, which was submitted within the time limits in 2011, but remains unprocessed by HMRC.

How long was the delay?

66. Four and a half years elapsed between HMRC's decision of 3 July 2012 and BBL lodging their Notice of Appeal on 3 February 2017.

Is there a good explanation for the delay?

67. Mr Tack submits that BBL did not consider the written correspondence from its then representatives (KPMG) to HMRC on 14 September 2012 to constitute a decision not to exercise its right of appeal against HMRC's initial decision on 3 July 2012. For this reason, BBL believed that HMRC would process the adjusted VAT return once the decision in *K E Entertainments* had been handed down, and that avenues for appeal were still open. Once the decision in *KE Entertainments* had been released, BBL dealt with the case promptly, and filed its appeal within the relevant time limit following HMRC's letter of 5 January 2017. BBL submits that there was no intentional failure to comply with any appeal process.

What will be the consequences for the parties of an extension of time?

68. BBL submits that it is in the interests of fairness and justice that they should be granted an extension as otherwise they would be denied a refund of overpaid VAT, to which they are lawfully entitled. It is not in the interest of justice, submits BBL, to refuse it the right to appeal because of an honest error or mistake to lodge the appeal in time. This appeal has merit, as the substance mirrors that of *KE Entertainments* and *Carlton Clubs*, and has good prospects of success on appeal.

69. Whilst I cannot predict with certainty the outcome of this appeal should it be allowed to proceed, BBL clearly has good prospects of success and if it were successful, it would be entitled to a VAT refund of more than £1.6 million (plus interest).

70. HMRC submit that by granting an extension, they would be deprived of certainty and finality.

What will be the consequences for the parties of a refusal to extend time?

71. BBL submits that for HMRC, this simply means there is one less appeal to deal with – but that this would close off for BBL its entitlement to claim relief for the periods in which it overpaid VAT.

Application to allow an appeal out of time – discussion

72. The Tribunal has power to make a direction allowing an amendment to a Notice of Appeal under Rule 5(3)(c) of the procedure rules. Rule 6(2) provides that an application for such a direction must be made in writing or orally during the course of a hearing. No written application to amend the Notice of Appeal has been filed on behalf of BBL; a submission included in a skeleton argument is not a written application for the purposes of Rule 6(2)(a). However, I have decided to treat the submissions made by Mr Tack during the course of the hearing as an oral application under Rule 6(2)(b).

73. Although HMRC do not object to BBL being given leave to amend its Notice of Appeal, they do object to an extension of time being given under s83G(6). In these circumstances, there would be no useful purpose in permitting an amendment unless I also exercised the Tribunal's power under s83G(6) to allow the appeal out of time. I will therefore only give leave to permit the Notice of Appeal to be amended if I am persuaded that I should also allow an extension of the time limit for the appeal.

74. I have addressed earlier in my decision the question of whether any time limits apply to adjustments made under Regulation 38, and have found that they do. I have also found that BBL's 12/11 VAT return has been processed by HMRC.

75. On any basis, there has been a very long delay between HMRC's original decision in 2012 and the Notice of Appeal being filed – four and a half years.

76. I find Mr Tack's explanation for the delay unconvincing. It is clear from KPMG's letter (see [7] above) that BBL made a considered decision (in the light of the Tribunal's decision in *Carlton Clubs*) not to challenge HMRC's decision because of the risk of costs. That decision was made having taken professional advice. There is no question in this case of BBL having made an honest error or mistake.

77. In *Data Select*, Morgan J placed emphasis on the:

> 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 and that point applies to an appeal against a determination by HMRC as it does to appeals against a judicial decision. (at [37])

78. In weighing up all the relevant circumstances and the interests of fairness and justice, I place greater weight on the desirability of finality over the denial of any remedy for BBL for its claim in respect of overpaid VAT. I reach this conclusion in the light not only of the very long delay, but also in the light of the fact that BBL made a conscious decision in 2012 not to pursue an appeal having taken professional advice.

79. I therefore refuse leave to BBL to amend its Notice of Appeal.

Conclusions

80. I have found that HMRC's letter of 5 January 2017 does not include any decision in respect of which an appeal lies to this Tribunal.

81. I therefore strike out BBL's appeal under Rule 8 of the Tribunal's procedure rules, as the Tribunal has no jurisdiction in relation to these proceedings.

82. I refuse to give leave to BBL to amend its Notice of Appeal.

83. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

RELEASE DATE: 8 MAY 2018

Authorities mentioned in skeletons but not in this decision:

Administrazione dell'Economia e delle Finanze v Fallimento Olimpiclub Srl (2009) C-2/08
City of Sunderland College Supplies Ltd v HMCE (1998) VAT Decision 15701
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