



**TC06176**

**Appeal number: TC/2012/06161**

*POCEDURE – VAT – strike out application – whether appeal has no reasonable prospect of success – Rule 8(3)(c) of the Tribunal Rules 2009 – application granted*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CLYDE LEISURE LIMITED**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE HEIDI POON**

**Sitting in public at the Tribunals Centre, George House, 126 George Street, on 9  
May 2017**

**The Appellant in absence**

**Mrs Elizabeth McIntyre, Presenting Officer of HM Revenue and Customs, for  
the Respondents**

## DECISION

### Introduction

1. On 1 February 2017, the appellant (“Clyde Leisure Limited”) applied to the  
5 Tribunal for the appeal to be stood behind Rank (Part 2) judgment. The application  
was lodged by Gilliland & Co (“Gilliland”), chartered accountants, as representative.

2. On 8 February 2017, HMRC lodged their notice of objection to the appellant’s  
application, and at the same time, applied to strike out the appeal under rule 8(3)(c) of  
the Tribunal Procedure (First-Tier Tribunal) (Tax Chamber) Rules 2009.

10 3. In relation to the attendance at the strike-out application hearing, Gilliland  
notified the Tribunal on 27 April 2017 the following:

15 “The applicant has simply asked the tribunal to decide whether there is  
any likelihood that the capping, as decided upon *Leeds City Council*  
litigation, will be affected by the pending Rank (Part 2) judgement. We  
consider that neither the applicant nor our firm can make any further  
representation to the Tribunal as to whether capping may be affected  
by Rank (Part 2) judgment. We made such representation in our  
submission dated 26 January 2017 to the Tribunal.”

20 4. Gilliland requested the Tribunal to decide on the capping issue in the appellant’s  
absence, and stated that:

“... should the Tribunal rule that it considers that capping will not be  
affected by the pending Rank (part 2) judgement, then we will  
withdraw the appeal on behalf of the applicant.”

25 5. The Tribunal was satisfied that the appellant had been notified, and that  
Gilliland gave notice for the hearing to proceed in the appellant’s absence.

### Background to the applications

6. The subject matter of the appeal relates to a claim lodged by letter dated 23  
April 2012 by Gilliland on behalf of the appellant (“the 2012 Claim”).

30 7. The 2012 Claim was to recover overpaid output VAT on gaming machine  
takings of £99,866.12 for the period 6 December 2005 to 31 January 2007.

8. A claim of the same substance was also lodged in respect of the period from 1  
May 2003 to 5 December 2005. HMRC had settled this claim in February 2011.

35 9. For the purposes of determining the current applications, this decision relates  
primarily to the legal analysis of whether the capping issue is in any way affected by  
the pending Rank (Part 2) judgment.

10. Parties are familiar with the long procedural history associated with this appeal, and it serves no good purpose to rehearse it here. Suffice it to highlight the following procedural steps in its history that have led to the applications in front of the tribunal:

5 (1) On 22 June 2016 HM Courts & Tribunals Service (“HMCTS”) issued directions advising that the appeal was to be sisted pending the outcome of Rank group’s litigation on gaming machine takings.

(2) 1 August 2012 HMRC applied to HMCTS to amend the lead case (behind which the case was to be sisted) to *Leeds City Council v Revenue & Customs Commissioners* (“*Leeds*”).

10 (3) On 7 Septemebr 2012, HMCTS issued directions amending the sist so that the appeal stood behind *Leeds*.

(4) On 19 September 2012, Gilliland advised that they had no objection for the case to stand behind *Leeds*. However, they stated that the *Rank* litigation in respect of the gaming machine takings would have to be found in favour of HMRC for the “capping” to take effect.

15 (5) On 15 July 2016, HMCTS asked Gilliland to advise how they wished to proceed with the appeal, and to provide representations.

(6) On 5 October 2016, Gilliland notified HMCTS of their intention that the appeal should be stood behind the *Rank (Part 2)* judgment.

## 20 **The Appellant’s application**

11. The grounds for the appellant’s application as stated in Gilliland’s letter of 26 January 2017 are summarised as follows:

25 (1) It is our understanding that the capping period was under challenge before the European Court of Justice (ECJ) due to the fact that the alleged VAT due from HMRC in respect of gaming machine takings arose as a result of an alleged breach of fiscal neutrality.

(2) Although the Court of Appeal recently ruled that a cap was valid when it found in favour of HMRC in *Leeds*, the overpaid VAT in question in *Leeds* did not arise due to an alleged breach of fiscal neutrality.

30 (3) We consider that the legal complexity involved, when dealing with the issue of VAT in question may not be subject to capping.

(4) We apply for the appeal to be stood over pending the Rank (Part 2) judgment, which if found in Rank’s favour, may call into question the legality of HMRC being able to apply the three-year capping period to claims where fiscal neutrality had been breached.

35 (5) Should the Rank (Part 2) judgment be found in favour of HRMC, then our client’s appeal, which is subject to capping, will automatically fall.

## **HMRC’s grounds of objection to the application**

12. For HMRC, their notice of objection states the following:

(1) The appellant's letter of 26 January 2017 has stated that the Rank (Part 2) judgement could call into question the legality of HMRC applying a three-year cap to claims where fiscal neutrality is being breached.

5 (2) The respondents do not consider that this is the case and therefore object to the stand over behind Rank 2.

(3) The judgement in Rank (Part 2), even if it were to fall against HMRC, would not have any impact on the legality of HMRC applying the three-year cap; and Rank (Part 2) judgment can have no bearing on this appeal.

### **Grounds for the strike-out application**

10 13. The application states as grounds for the proposed striking out as follows:

(1) The decision under appeal is a rejection of a claim based on capping.

(2) Since the decision in the Court of Appeal in *Leeds City Council*, there is no outstanding litigation to be concluded, and the legality of HMRC's imposition of the three-year cap has been found in HMRC's favour.

15 (3) The respondents apply for strike out on the basis that the appeal has no reasonable prospect of success.

### **The relevant legislation**

14. The so-called "capping" provisions are under s 80 of VATA, excerpts of which:

"(1) Where a person—

20 (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.

25 [...]

(2) The Commissioners shall only be liable to credit or repay an amount under this section on a claim being made for the purpose.

(2A) Where—

30 (a) as a result of a claim under this section by virtue of subsection (1) or (1A) above an amount falls to be credited to a person, and

(b) after setting any sums against it under or by virtue of this Act, some or all of that amount remains to his credit,

the Commissioners shall be liable to pay (or repay) to him so much of that amount as so remains.

35 (3) It shall be a defence, in relation to a claim under this section by virtue of subsection (1) or (1A) above, that the crediting of an amount would unjustly enrich the claimant. ...

(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.

5 (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,

10 (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....”

### **Case law on the s 80 VATA provisions on time limits for bringing a claim**

15 15. In *Marks & Spencer plc v Customs and Excise Comrs* [2003] QB 866, the CJEU held that national legislation reducing the period within which repayment of sums collected in breach of Community law could be sought was not in itself incompatible with the principle of effectiveness, but the new limitation period had to be reasonable. At [35] it was stated that:

20 “the court has held that in the interests of legal certainty, which protects both the taxpayer and the administration, it is compatible with Community law to lay down reasonable time limits for bringing proceedings.... Such time limits are not liable to render virtually impossible or excessively difficult the exercise of the rights conferred by Community law. In that context, a national limitation period of three years which runs from the date of the contested payment appears  
25 to be reasonable...”

30 16. In *Revenue and Customs Comrs v Michael Fleming and Revenue and Customs Comrs v Conde Nast Publications Ltd* [2008] 1 WLR 195, [2008] UKHL 2, the House of Lords considered the effectiveness of the three-year time limit as regards input tax claims. The judgment concluded that a new time limit should be fixed *in advance* so as to give legal certainty. If a retrospective limit was introduced, an adequate transitional period had to be legislated to enable those with accrued rights to have a reasonable time within which to make their claims before the new retrospective time limit applies. Where that was not the case it would be a breach of Community law to enforce that time limit in relation to accrued rights at least for a reasonable period. It  
35 was primarily for the national court to decide what constituted an adequate period by reference to the principles of effectiveness and legitimate expectation.

17. In *Leeds City Council v Revenue and Customs Comrs* [2015] EWCA Civ 1293, the issue was the effectiveness of the three-year time limit as regards VAT claims made in respect of periods from 5 December 1996 onwards.

40 18. Delivering the Court of Appeal judgement in *Leeds*, Lord Justice Lewisham summarised the issue at [26] as follows:

“At bottom, therefore, it seems to me that in the first instance the dispute in our case boils down to a relatively narrow issue. Has Leeds been given a readily ascertainable prospective opportunity of a

reasonable length within which to bring claims that it makes (assuming them to be well-founded in law)? If it has, then in the absence of special circumstances, none of the applicable principles of EU law will have been breached. If it has not, they will have been.”

5 19. Endorsing in full the Upper Tribunal’s reasoning in addressing the central issue in *Leeds*, his Lordship continued at [29]:

“In essence this was the reasoning of the Upper Tribunal at [98]:

10 ‘It must have been clear to Leeds on 18 July 1996 (and if it was not, should have been) that the then government intended to implement a three-year limitation period for s80 claims. From that day on, Leeds could have had no more than a hope that Parliament might not enact the necessary legislation; it could certainly not assume that it would not. In fact, on 3 December 1996 Parliament passed a resolution, as we have said, which brought the three-year cap into effect; and from the passing of that resolution the only possible expectation which Leeds could have held, in respect of claims arising thereafter, was that they would be affected by a three-year time limit, and that Parliament would in due course pass (as it did) the legislation which provided for it.’

20 That reasoning is, in my judgment, on the face of it impeccable. Are there any special factors which should lead to a contrary conclusion?”

20. The special factors put forward by the taxpayer in *Leeds* were rejected; those are factors that are particular to the facts of the case.

25 21. In respect of the EU principle of equivalence, his Lordship made the following observations at [50]:

30 “Whether domestic procedural rules for the enforcement of a person’s EU rights infringe the principles of equivalence or effectiveness is essentially a question of fact which, in this sphere, is particularly suitable for determination by a specialist tax tribunal, ...

In our case the Upper Tribunal held that there was no breach of the principle of equivalence because the same time limit applied whether or not the claim for repayment of VAT was based on EU rights or domestic law....” (sub-paragraph division added)

35 22. In *Littlewoods Ltd v HMRC* [2015] EWCA Civ 515, the Court of Appeal confirmed the same reasoning (at [133] to [135]), that the principle of equivalence was not breached because s 80(7) of VATA applied indiscriminately to both domestic and EU law claims for the repayment of overpaid VAT.

40 23. In the case of *Banca Antoniana Popolare Veneta SpA v Ministero dell’Economia e delle Finanze, Agenzia della Entrate* [2012] STC 526, the CJEU considered the question of whether the principles of effectiveness, tax neutrality and non-discrimination preclude national rules which include specific time limits for bringing a claim for a tax refund. The court concluded that it is for the domestic legal system of each member state to lay down the conditions in accordance with which

such claims may be made, but that those conditions must be consistent with the principles of equivalence and effectiveness (at [22]).

## Discussion

24. The appellant's principal reason for having the appeal stood behind the Rank (Part 2) judgement is that the principle of "fiscal neutrality" in relation to a claim for overpaid VAT may somehow override the capping provisions. In the words of the appellant's representations, that the *Rank (Part 2)* judgment "may deem that the overpaid VAT in question may not be subject to capping".

25. HMRC's objection to the application for the sist is that even if *Rank (Part 2)* were determined against HMRC, the issue of fiscal neutrality (however decided) can have no bearing on the appeal. The capping of the claim is determinative in the current appeal, and the capping issue has been conclusively decided in *Leeds City Council v Revenue and Customs Comrs* [2015] EWCA Civ 1293 in HMRC's favour.

26. Juxtaposing the two issues, it is plain that they concern different aspects of the claim. The capping issue concerns whether the Claim is time-barred under domestic law, while the fiscal neutrality issue invokes a principle under EU law and concerns the substantive aspect, or the merits, of the Claim.

27. The differing positions between the parties ultimately boil down to the question: whether the capping provisions within domestic law have *primacy* in the present claim over any consideration of the merits of the claim referential to EU law. Alternatively, to state the question from the appellant's perspective: whether the principle of fiscal neutrality can *disapply* the capping provisions in this Claim.

28. The appellant's proposition may have been influenced by the position in relation to its claim for the period *before* 5 December 1996, (which HMRC had settled in February 2011). The claim for the earlier period from 1 May 2003 to 5 December 2005 had been admitted, in one sense, by "disapplying" the then newly legislated time limits following the *Fleming* decision.

29. Essentially, it was the *Fleming* decision that led to the legislation being introduced to provide an extended period for the making of claims under s 80(4) in respect of periods *ending on or before 5 December 1996*. The reason for that extension of time limits was effectively to create a transitional period following the introduction of the then new time limits under s 80 VATA.

30. As noted, the present appeal concerns the Claim for the period 6 December 2005 to 31 January 2007 – the period fell outside the special provisions consequential to the *Fleming* decision. As such, the Claim is to be governed by the normal time limits set out under s 80(4) of VATA, which has been upheld as fully compliant with EU legal principles. The capping provisions have primacy over any claims therefore, before the merits of the claims can be considered.

31. The appellant can *only* succeed in this appeal if it can argue successfully before the tribunal that its directly enforceable EU rights would be infringed if the time limits set down in s 80(4) of VATA were not disapplied.

5 32. That argument was at the centre of the appellant's appeal in *Leeds*. The relevance of *Leeds* is that so far as the Claim relates to periods arising after 5 December 1996, the reasoning in *Leeds* applies: that the three-year period introduced with effect from that date was effective for claims for periods arising after that date, and no directly enforceable EU rights would be infringed by the capping provisions.

10 33. The appellant has not put forward any reason for distinguishing its circumstances from those in the case of *Leeds*, and the tribunal can see none.

34. Neither can the tribunal see how the outcome of the remaining litigation in the *Rank* case (as referred back to the tribunal in the decision of *HMRC v The Rank Group Plc* [2012] UKUT 347 (TCC)), may affect the appellant's prospect in bringing a claim outside the applicable time limits.

15 35. The appellant submitted that the *Rank (Part 2)* judgment "may deem that the overpaid VAT in question may not be subject to capping". However, whether the capping issue can be disapplied in the context of a substantive appeal concerning the principle of fiscal neutrality simply is not one of the issues which are before the courts as regards the outstanding matters to be determined in the *Rank* case. It follows that  
20 the *Rank (Part 2)* judgment (however determined) can have no bearing on the capping provisions that are directly applicable to the Claim under appeal.

### **Conclusion**

36. Accordingly, given the circumstances, the appellant's case has no reasonable prospect of success.

25 37. It is directed the appeal is hereby struck out.

38. 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  
30 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.

35 **DR HEIDI POON**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 20 OCTOBER 2017**