

Case summary

Issue(s)

(1) Whether the taxpayer (K E Entertainment Ltd)'s claim to a repayment of value added tax (VAT) fell within the scope of the Principal VAT Directive, Articles 73 and 90, together with (if necessary) VAT Regulation 38 (as the taxpayer contends) or within VAT Act section 80 and is therefore time-barred (as the Commissioners contend).

Background

The appellant operates a number of bingo clubs in Scotland. Bingo players pay a session fee to participate in a session of bingo games; there are cash prizes awarded to the winner of each game. The session fee includes a participation fee (consideration received by the appellant for the bingo player's right to play) and a stake (contribution made by each player to the cash prizes). VAT is payable on the participation fee but not on the stake. The participation fee and stake vary game to game depending on the number of players; the fees are variably set by the bingo club manager (save for the jackpot, which is set in advance). Where there is a guaranteed prize for a particular game and the stake available is less than the guaranteed prize, the appellant tops up the stake money by drawing from the participation fees, so that the full prize can be paid to the winner.

Prior to 2007, HMRC charged VAT on a game by game basis. From 2007 onwards, by way of Notice 07/07, HMRC changed its method of VAT calculation and charged VAT on a session by session basis. This latter approach was more favourable to the appellant, because, where participation fees had been used by it to top up the stake amount (where the stake available for a game was less than the guaranteed prize), those could be deducted from the total session fees paid, reducing the amount of VAT payable by the appellant. By notice 07/07 HMRC invited bingo operators to make claims for repayments of overpaid VAT paid as a result of using the previously stated methodology, namely the game by game basis for calculation.

In the appellant's VAT return for the period ending December 2012, the appellant made an adjustment of output tax in the sum of £435,630.40 (later adjusted) in respect of the years 1996 to 2004 and wrote to HMRC explaining its reasons for the adjustment in a letter dated 29 January 2013. The appellant's position is that it was required to make this adjustment by virtue of regulation 38 of the VAT Regulations 1995. HMRC considered that there was no change in consideration and, rather, that by following the guidance in the earlier Notices, the appellant had made a mistake in the earlier periods which it could correct by a claim under section 80 of the VAT Act 1994.

The key practical relevance of the different statutory processes provided for under section 80, on the one hand, and regulation 38, on the other hand, is in relation to the time limits respectively applicable to those processes – a claim under s. 80 could only be made up to 3 years after the overpayment took place whereas an adjustment under regulation 38 was not subject to a time limit. HMRC issued a decision on 21 March 2013 declining to accept the adjustment made by the appellant per regulation 38 in its December 2012 return and assessing for what HMRC considered to be undeclared output tax.

The appellant appealed against that decision by way of statutory appeal. The appeal was allowed by the First-tier Tribunal. HMRC appealed against the Tribunal's decision to the Upper Tribunal, which rejected its appeal. HMRC further appealed to the Inner House of the Court of Session, which allowed its appeal.