



[2021] UKFTT 0481 (TC)

**TC 08355**

*MACHINE GAMES DUTY – claim for repayment of overpaid duty – was the claim limited by the 4 year cap in s 137A CEMA? –yes– appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2020/01930**

**BETWEEN**

**COYLES MILLAR**

**Appellant**

**-and-**

**THE COMMISSIONERS FOR  
HER MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE NIGEL POPPLEWELL  
MR DEREK ROBERTSON**

**Hearing conducted in public remotely by video on 16 December 2021**

**Brendan Corr of Corr & Corr accountants for the Appellant**

**Rupert Davies counsel instructed by the General Counsel and Solicitor to HM Revenue & Customs for the Respondents**

## DECISION

### INTRODUCTION

1. This case concerns Machine Games Duty (“**MGD**” or “**duty**”) which was introduced by the Finance Act 2012 with effect from 1 February 2013. Between 31 March 2014 until 31 March 2018 the appellant overpaid MGD in an amount of £85,823.20 for free play incentives which had been issued to their customers in addition to the duty due on the paid for games. The appellant had included amounts representing the free plays in their net takings upon which they based their duty payments.

2. The respondents (or “**HMRC**”) accept that duty has been overpaid and that no duty is payable on free plays. And they have agreed to repay some of the overpaid duty to the appellant. The issue in this case concerns the period for which HMRC are obliged to make that repayment. HMRC say that by dint of section 137A Customs and Excise Management Act 1979 (“**Section 137A**”) and in particular subsection (4) of that section, there is a statutory four year time limit for repayment of the duty (the “**4 year limit**”) and they are not obliged, therefore, to repay any amount which was overpaid by the appellant (or “**CM**”) more than four years before CM made its repayment claim. Since that repayment claim was not made until 21 June 2019, HMRC could only make repayments in respect of a period which went back to 21 June 2015.

3. The parties have agreed that if this is right, the amount of repayment which is due to CM is £43,385.20 plus an additional £2,291.

4. For the reasons given in more detail below, in our judgment the 4 year limit applies, and the appellant’s claim for repayment of duty is limited to the amount set out in the preceding paragraph.

### THE LEGISLATION

5. Customs & Excise Management Act 1979

137A

Recovery of overpaid excise duty.

(1) Where a person pays to the Commissioners an amount by way of excise duty which is not due to them, the Commissioners are liable to repay that amount.

(2) The Commissioners shall not be required to make any such repayment unless a claim is made to them in such form, and supported by such documentary evidence, as may be prescribed by them by regulations; and regulations under this subsection may make different provision for different cases.

(3) It is a defence to a claim for repayment that the repayment would unjustly enrich the claimant.

(4) The Commissioners shall not be liable, on a claim made under this section, to repay any amount paid to them more than 4 years before the making of the claim.

(5) Except as provided by this section the Commissioners are not liable to repay an amount paid to them by way of excise duty by reason of the fact that it was not due to them.

(6) This section does not apply in a case where the Commissioners are—

- (a) entitled to pay an amount under Part 1 of Schedule 3 to the Finance Act 2001, or
- (b) required to repay an amount under Part 3 of that Schedule.

6. One of the exceptions under section 137A(6) applies to duty but only where an assessment has been visited on a taxpayer. Since no assessment has been visited on the appellant, that exception cannot apply in the context of this appeal.

## **THE EVIDENCE AND FINDINGS OF FACT**

7. We were provided with a bundle of documents. Mr Corr, in addition to making submissions during his representation, also gave evidence of fact on which he was, somewhat informally, cross examined by Mr Davies. Witness evidence was given on behalf HMRC by Mr Colin Tunnah a Higher Assurance Officer of HMRC. From this evidence we find the following facts:

- (1) MGD was introduced by the Finance Act 2012 and took effect on and from 1 February 2013.
- (2) Prior to the introduction of the duty, HM Treasury had publicly consulted on the design of the duty.
- (3) HM Treasury's responses to that consultation exercise date from December 2011 and includes the following at paragraph 2.31:

“The Government recognises the importance of free plays to the gambling industry. It has therefore decided to exclude everything that can reasonably be described as a free play from the calculation of dutiable takings, subject to targeted anti avoidance provisions to safeguard revenue.”

- (4) The explanatory notes to Schedule 24 of the Finance Act 2012 also explain at paragraph 10:

“Sub-paragraph (9) provides that where a game is played for free, or at a lower cost than would normally be the case, it is the lower charge that will be included in the net takings when the game is played.”

- (5) Between 31 March 2014 to date the appellant has operated gaming machines which were subject to duty. And between 31 March 2014 until 31 March 2018 the appellant overpaid duty of £85,823.20 relating to free play incentives. They should not have paid that amount.

(6) The appellant was unclear as to how duty would operate in respect of its business, and consequently telephoned HMRC in 2013. It received no satisfactory response. Accordingly it sought the advice of Mr Corr who professed no expertise in the area and contacted Croner for advice. Croner explained that they were not expert in duty matters. Mr Corr then investigated whether there were other advisers who might have that expertise but found that there were very few. His advice was that the appellant should contact HMRC via Carnaby, the organisation which supplied the gaming machines to the appellant.

- (7) In a letter dated 13 March 2014 from Carnaby to CITEK Written Enquiries Team in Plymouth, Andy Walker, of Carnaby, sought clarification or advice on accounting for free plays on gaming machines since some of its customers wished to offer free plays as a form of

promotion, but were concerned that coins which were gifted to players may still attract duty. Carnaby was proposing a system where free plays were not in the form of a coin but provided by way of an electronic credit which had to be played and could not be cashed out.

(8) Having received no response to his letter, Mr Walker followed up with a second letter dated 24 April 2014 asking what progress if any had been made. He enclosed a copy of his original enquiry. No response to either letter was ever made by HMRC.

(9) The appellant thought that HMRC's refusal to respond to these letters was an indication that the free play incentives were dutiable. That was the reason that between 2014 and 2017 when they reconsidered the position, the appellant had not taken any advice or sought any further clarification from HMRC.

(10) Following a review of the duty position on free plays by a new adviser in 2017 the appellant, sometime considerably later, contacted HMRC in Glasgow. In a letter dated 13 June 2019, which was sent with a covering letter dated 14 June 2019, the appellant explained that since it had registered for the duty, it had been its understanding that all free play incentives were subject to duty and that the duty paid on those free play vouchers between 31 March 2014 and 31 March 2018 was £85,823.20. In the table in that letter, these over payments are referred to as "Duty Paid (£) @ 20%". The letter goes on to say that the appellant would be grateful if HMRC could clarify whether duty is or is not payable on these vouchers and if it is deemed that a refund is due, that HMRC should accept that letter as an application to have the overpaid duty refunded.

(11) On 4 September 2019 there was a telephone call between the appellant and HMRC in which the appellant stated that the amounts should not have been included in their net taking and HMRC stated that they would need to perform a records examination and that any repayment could only go back 4 years.

(12) An examination of the records took place on 24 September 2019 as part of a visit to the appellant's premises.

(13) On 10 December 2019 HMRC wrote to the appellant stating that they would repay the sum of £43,385.20, covering the period from 21 June 2015 until 31 July 2018.

(14) On 6 January 2020, Mr Corr requested an explanation of the calculation of the repayment amount.

(15) On 9 January 2020, HMRC wrote to Mr Corr, giving a breakdown of how the repayment figure had been calculated. The letter stated that repayment could not be made for any payments that were made more than 4 years before the repayment request, pursuant to section 137A(4)

(16) On 3 February 2020, Mr Corr requested a review of the decision. Upon review, HMRC determined that repayment should have been made for the entire quarter that spanned the date 4 years prior to the repayment request, rather than running from the exact date that was 4 years prior to the repayment request date. The repayment request date was taken to be the date that the repayment request letter was received (21 June 2019). Four years prior to this date was 21 June 2015 and the repayments had originally been calculated from that date. However, the quarter in which that date fell ran from 1 May 2019, so the revised calculation would allow repayment from the earlier date. The revised amount included an additional repayment of £2,291.

(17) On 27 February 2019 HMRC contacted Mr Corr and the revised repayment figures were agreed. On 11 March 2020 HMRC wrote to the appellant cancelling the decision dated 10 December 2019 and substituting a new decision including the new repayment amount. On 25 March 2020, Mr Corr requested a review of the new decision. On 4 May 2020, HMRC wrote to the appellant upholding the decision not to repay overpaid MGD received more than 4 years before the date of the claim. That letter included the following text:

“I also considered your representation that during the period of transition to MGD HMRC guidance notes on the proposed legislation indicated that MGD would be payable on free plays. However, based on what you have said you are referring to guidance issued before the legislation was actually in place. Following on from your request I had cause to read a publicly available document titled “Implementing a Machine Games Duty: Consultation on policy design” published in May 2011 which stated that at that time that contrary to the initial draft legislation, a decision had been made to differentiate between “genuine free plays” (as in your circumstances) which would not be subject to MGD and “earned free plays” which would. This demonstrates that the position on free plays had changed prior to the introduction of the legislation.

I am sympathetic to your position and some of your representations are tantamount to a complaint (which you may submit should you wish). However, as I have stated there is no provision to allow an out of time repayment to be made and as such the decision issued by Officer Tunnah is not only correct, it is the only possible outcome.”

(18) On 30 May 2020, the appellant appealed to the Tribunal.

## **DISCUSSION**

8. The burden of establishing that it should be permitted duty repayment for the full period and that the 4 year limit does not apply rests with the appellant. It must show, on the balance of probabilities, that the 4 year limit does not apply.

9. The appellant’s position is that HMRC should have told them, in 2014, and indeed subsequently, that the free play incentives were not subject to duty. And by failing to do so, the appellant has suffered by the imposition of the 4 year limit since it cannot go back and recover all of the overpaid duty which both parties agree has been overpaid.

10. The appellant also submits that what was overpaid was not in fact duty but takings, and thus what it is seeking repayment for is not duty but repayment of those takings, and the 4 year limit does not apply to any such repayment.

11. HMRC’s position is that it denies receipt of the letters sent by Carnaby in 2014. They can find no record of them. But even if they were sent and received, there is nothing in those letters which suggests that the free play incentives were not subject to duty. No positive assurances were given to either Carnaby or to the appellant. Any lack of response should not bind HMRC. It is up to the appellant to ensure that its tax position is correct, and there was ample guidance in the response to the consultation document and in the explanatory notes to the Finance Act 2012 which made clear that there was no duty on free play incentives. Furthermore, HMRC can find no guidance to which the appellant referred which was dealt with by HMRC in their review conclusion letter of 4 May 2020, and even if there had been, it is their view that such guidance, if such it was, predated the introduction of the legislation and it is the legislation which requires to be construed rather than guidance.

12. The legislation is clear on its face should be construed as such. The 4 year limit is a hard limitation period and there is nothing which requires us to look behind it in the circumstances of this case.

13. Regrettably for the appellant, we agree with Mr Davies. We totally appreciate the appellant's position that it acted out of a surfeit of caution in paying duty on the free play incentives. But given the amount of duty overpaid since March 2014, we are somewhat surprised that, given HMRC's silence following the submission of the Carnaby letters in the spring of 2014, that no further advice was sought as to the correct duty treatment. The duty overpaid was 20% of the value of the free play vouchers which was a significant amount (£429,116) and, we would have thought, warranted considerable investigation as to whether it was being correctly paid. We agree with Mr Davies that it is up to the appellant to get its tax affairs right, and it is not up to HMRC to carry out some form of roving brief on the tax affairs of all taxpayers to ensure that they are paying the correct amount of tax. MGD is very different from VAT, and so we are unsurprised that any issues regarding duty of the free pay vouchers were picked up on a routine VAT visit.

14. We appreciate that at the outset, it may not have been possible to find advisers who were able to give advice on the imposition of duty on free paid vouchers. But after a year or so, there must have been advisers, or industry bodies, with that knowledge, and to whom the appellant could have turned. It would also be possible for the appellant to have badgered HMRC, perhaps by way of applying for a non statutory ruling, to force HMRC into coming to a decision on which the appellant could rely. It appears the appellant took neither of these steps.

15. In order to establish some form of legitimate expectation that HMRCs silence to the Carnaby letters of 2014 amount to an assurance that the free play vouchers were not subject to duty, the appellant must do more than simply assert that, with the benefit of hindsight, they thought that HMRC were agreeing that such vouchers were free of duty. The appellant has not come close to this. There is no unequivocal assurance provided by HMRC that the free play vouchers were free of duty. Silence cannot be unequivocal assurance.

16. The principles were set out by Nugee J in *R(oao Veolia ES Landfill Ltd) v HMRC* [2016] EWCA 1880 Admin:

“(1) HMRC may create a legitimate expectation that a person's tax affairs will be treated in a particular way either by the promulgation of general guidance to a body of taxpayers or by a specific statement or ruling given to a taxpayer.

(2) A legitimate expectation will only arise if the guidance or the specific statement is clear, unambiguous and devoid of any relevant qualification.

(3) If a taxpayer approaches HMRC for a ruling, he has an obligation to place all his cards face up on the table, in the sense of giving full details of the transaction on which he seeks the revenue's decision.

(4) Provided there was a clear and unambiguous statement, and provided the taxpayer has placed all his cards face up on the table, he will generally be entitled to rely on an assurance given to him as binding on HMRC. A similar entitlement arises in relation to guidance issued by HMRC.”

17. When tested against the foregoing principles, it is clear that the appellant cannot establish any legitimate expectation. As set out in the aforesaid review conclusion letter, if it feels it has

been poorly treated by HMRC who failed to respond to the Carnaby letters of 2014, then it has the right to invoke HMRC's complaints procedure. But that treatment does not amount, in law, to an assurance which binds HMRC that the free play incentives were not subject to duty.

18. We find no merit in the appellants alternative argument that the overpayments were not duty but of turnover, and consequently any repayments are not of duty but of that, and as a result the 4 year limit does not apply. It is clear that the overpayments were of duty and that the reclaim letter of 13 June 2019, which refers to overpayments of duty also refers to repayments of that duty. The clear statutory path for recovery of overpaid duty is under section 137A. The parties had proceeded on that basis and there is no evidence of this alternative argument in the appellant's notice of appeal. The appellant is not asserting some form of mistake which might give rise to a claim in restitution for monies had and received for example. It has made its claim in respect of overpaid duty, recovery of which must comply with the statutory provisions of section 137A. Our view is that what was paid to HMRC between March 2014 and thereafter was duty and it was overpaid duty since, as both parties agree, it was paid on free play incentives which were not dutiable. We can see no reason why those overpayments have lost their status as duty. Nor can we see any reason why the claim for repayment of those overpayments is for a repayment of anything other than overpaid duty. The payments and overpayments have not somehow morphed from duty into some other category of payment, and, as Mr Davies points out, if these were not payments of duty in the first place, that would drive a coach and horses through the 4 year limit.

## **DECISION**

19. For the foregoing reasons, it is our decision that the 4 year limit applies to the appellant's repayments of the overpaid duty, and thus its appeal against the imposition of the 4 year limit which HMRC has applied, is dismissed.

## **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

20. 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.

**NIGEL POPPLEWELL**  
**TRIBUNAL JUDGE**  
**Release date: 29 DECEMBER 2021**