[2019] UKUT 140 (TCC)

Appeal number: UT/2018/0074

VALUE ADDED TAX – Whether taxpayer appealing against appealable decision – no – whether extension of time should be granted to permit a late appeal against a previous appealable decision – no – taxpayer's appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

BUCKINGHAM BINGO LIMITED **Appellant**

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Respondents**

TRIBUNAL **JUDGE JONATHAN RICHARDS**
JUDGE ANDREW SCOTT

Sitting in public at The Royal Courts of Justice, Strand, London on 25 March 2019

Geoffrey Tack, instructed by DLA Piper UK LLP, for the Appellant

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

DECISION

Introduction

1. The appellant company ("BBL") carries on business as a bingo operator. In a decision released on 8 May 2018 (the "Decision"), the First-tier Tribunal (Tax Chamber) (the "FTT") made the following two decisions:

> (1) It concluded that the FTT had no jurisdiction to consider the appeal that BBL was purporting to make, largely because a letter that HMRC sent BBL on 5 January 2017 did not contain any "appealable decision". Therefore, the FTT struck out BBL's appeal.
>
> (2) It concluded that HMRC had made an appealable decision in a letter dated 3 July 2012 that they sent to BBL. The FTT refused BBL permission to amend its grounds of appeal so as to appeal against that decision letter because the relevant deadline for making an appeal had long since passed and the FTT was not prepared to grant BBL an extension of time.

2. BBL now appeals to this Tribunal against the Decision. References in this decision to numbers in square brackets are to paragraphs of the Decision unless the context otherwise requires.

The Decision and BBL's grounds of appeal against it

The relevant background facts

3. There was no challenge to the FTT's finding of facts.

4. Underlying this appeal is a dispute between HMRC and BBL as to BBL's VAT liability relating to its bingo business. A similar dispute is the subject of litigation in *K E Entertainments Limited v HMRC* [2018] CSIH 78 in which the Inner House of the Court of Session has found in favour of HMRC, but permission to appeal to the Supreme Court has been granted.

5. The nature of the dispute is best understood by reference to the following extract from the decision of the Inner House of the Court of Session in *K E Entertainments*:

> [8] For all its simplicity, bingo has a Value Added Tax regime of some complexity. The fee, which is paid by a player for a session, requires to be divided into two components for each game. The first is called the participation fee, which is that part attributed to the supply of the game to the player. It is subject to VAT. The second is the stake money; being the part said to contribute to the cash prize paid out to the winner. This is not subject to VAT. A problem arises because the value of each component can vary from session to session according to the number of players. It varies also because the promoter may only decide on the prize money at the start of a session, once he or she has reviewed the ticket sales; albeit that the amount is likely to be similar to that selected for the same session during the previous week. The prize money may not be directly related to the number of participants. There may be a guaranteed

> minimum for particular, or all, games. The promoter may therefore require to top up the prize money, where there is a dearth of custom, in respect of one game from the general pool of participation fees in the session.
>
> [9] The amount of VAT payable will vary, depending upon whether it is assessed on a game by game or session basis. If it is the former, the calculation is relatively straightforward, since the level of the participation fee for each game will have been decided at the start of the session. The VAT will be the sum of that element multiplied by the number of players. This is so even if the participation component might theoretically have been reduced, if the prize money required to be topped up. If it is the latter, the total prize money paid out during a session is deducted from the gross receipts for that session in order to calculate the participation fees upon which VAT is levied. The contribution to the VAT exempt prize or stake money is higher and hence the VAT payable is lower. It is the mode of assessment, and by whom and how it is determined, which lies at the heart of the appeal.

6. The dispute between BBL and HMRC (and indeed that between K E Entertainments Limited and HMRC) arose because HMRC changed their policy and required taxpayers to account for VAT on a session basis, instead of a game by game basis. That brought into focus all the complexities referred to above and BBL concluded that, even though calculating VAT on a session basis could not alter the total sums that it received from its customers, it did reduce the proportion of those sums that constituted participation fees that were subject to VAT. BBL therefore sought to recover output tax that it considered it had wrongly overpaid.

7. Between November 2011 and January 2012, there was some correspondence between BBL and HMRC regarding the amount of output VAT due in connection with BBL's session bingo activities. BBL issued an "internal credit note" to seek to adjust the consideration for bingo session income for the period from 1 January 1997 to 30 September 2004. The effect, if any, of that internal credit note was disputed. BBL considers that its effect was to adjust the amount of (taxable) participation fees that it received in that period under regulation 38 ("regulation 38") of the Value Added Tax Regulations 1995 (the "VAT Regulations") by altering the proportion of its total receipts that was treated as participation fees. HMRC deny that it had any such effect.

8. BBL recognised what it regarded as a decrease in taxable consideration in its VAT return for the 12/11 period which it filed on 21 January 2012. As a result, the 12/11 VAT return included a claim for a repayment of output VAT of £1,616,384.44 ([5]).

9. Regulation 38(5) of the VAT Regulations requires the adjustment under regulation 38 to be made in that part of the VAT account for the VAT period in which the increase or decrease in consideration was given effect in the business accounts of BBL. It was common ground that, to the extent BBL was entitled to make an adjustment under regulation 38, it made the adjustment in the correct VAT period. Therefore, by way of shorthand, it was agreed that any regulation 38 adjustment that BBL was entitled to make was made in the "right" VAT period.

10. On 3 July 2012, HMRC issued a decision letter (the "2012 Letter") rejecting the claim for repayment of VAT. It was common ground between the parties that this was an appealable decision and BBL had a right of appeal against it under s83(1)(b) of the Value Added Tax Act 1994 ("VATA").

11. On 14 September 2012, KPMG (who then represented BBL) wrote to HMRC to say that, while they did not agree with the decision set out in the 2012 Letter, BBL had decided not to challenge that decision ([6] and [7]).

12. On 19 September 2016, DLA Piper, who are now representing BBL, wrote to HMRC referring to the regulation 38 adjustment in the 12/11 VAT return and seeking repayment of the sum claimed in reliance on the decision of the FTT in *K E Entertainments Limited v HMRC* [2016] UKFTT 508 (TC). Further correspondence between BBL and HMRC ensued in which BBL specifically requested HMRC to make a decision on whether the regulation 38 adjustment reflected in the 12/11 VAT return "remains extant" ([8]).

13. On 5 January 2017, HMRC wrote to DLA Piper (the "2017 Letter") stating that the 2012 Letter contained their decision on the regulation 38 adjustment. HMRC refused to undertake a late statutory review of that decision. The 2017 Letter stated specifically that it was not a fresh decision and was simply affirming the decision that had already been made on 3 July 2012 ([9]).

14. On 3 February 2017, BBL purported to appeal to the FTT against the "decision" contained in the 2017 Letter ([10]).

The FTT's decision and the reasons for it

15. Before the FTT, in resisting HMRC's application to strike out the appeal, BBL argued that there was no relevant time limit by which it had to make an adjustment of consideration under regulation 38. In the absence of any applicable time limit, BBL submitted that HMRC had a continuous duty to "process" VAT returns pursuant to s58 of, and Schedule 11 to, VATA. HMRC had failed in that continuous duty in both the 2012 Letter and the 2017 Letter. Viewed in those terms, the 2017 Letter was a "decision" (to refuse to "process" the 12/11 return) and BBL had made an in-time appeal against that decision.

16. Therefore, BBL's arguments before the FTT rested on three propositions: first that there was no time limit within which the regulation 38 adjustment had to be made; second that HMRC had breached their (continuous) duty to "process" the 12/11 VAT return that contained the regulation 38 adjustment; and third that the 2017 Letter contained an "appealable decision" (refusing to process the 12/11 return) against which BBL had made an in-time appeal to the FTT. The FTT rejected all three facets of that argument.

17. At [31], the FTT rejected BBL's second proposition. It concluded that the provisions of s58 of, and Schedule 11 to, VATA 1994 were "plainly not relevant to this appeal" and in so doing rejected BBL's argument that an averred failure to "process"

returns could be the basis of a successful appeal to the FTT. At [32], the FTT went further and concluded that, in any event, HMRC had "processed" BBL's VAT return by rejecting BBL's request for repayment in the 2012 Letter.

18. At [45] to [48], the FTT dismissed BBL's third proposition by concluding that the 2017 Letter did not contain an appealable decision. First, the FTT considered that it was doubtful whether authorities that BBL relied on (such as *Adam Maher v HMRC* [2014] UKFTT 1062) on what amounts to a "decision" by HMRC were relevant since they dealt with situations where HMRC had not previously expressed any view on the matter in dispute ([47] and [48]). However, even taking into account the factors referred to in those authorities, the FTT concluded that the 2017 Letter disavowed any intention to make a "decision" and amounted simply to a statement that HMRC considered that there were no outstanding issues as between them and BBL ([48]). Even if, contrary to the FTT's view, the 2017 Letter did amount to a "decision", it was not an "appealable decision" because it did not fall into any of the categories set out in s83(1) of VATA 1994 (see the closing sentence of [48]).

19. By the time of the appeal to this Tribunal, much of BBL's first proposition was common ground. In his oral submissions Mr Mantle accepted on behalf of HMRC that, if the consideration for a supply made in a particular VAT period is increased or decreased, there is no requirement for an adjustment under regulation 38 to be made within four years (or indeed any other period) of the end of that particular VAT period: indeed, in the light of the revocation of paragraphs (1A) and (1B) of that regulation with effect from 1 April 2009, any other view would have been unsustainable.

20. Nevertheless, Mr Tack argued that the FTT had wrongly rejected BBL's first proposition at [35] and [74], in which the FTT said:

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

Later in this decision, when considering BBL's first ground of appeal, we will explain what we consider the FTT to have been deciding in these passages.

21. The FTT decided that, since the 2017 Letter did not contain an appealable decision, it had no jurisdiction to consider an appeal against that decision and it therefore struck out BBL's appeal ([80] and [81]).

22. Before the FTT, BBL argued that if its appeal was struck out, it should be given leave to amend its Notice of Appeal so as to appeal against the 2012 Letter, which both parties agreed was an appealable decision ([58]). HMRC did not object to such an amendment on its own, but did object to BBL being given permission to make a late appeal against the 2012 Letter. At [60] to [63], the FTT considered the principles it should apply when exercising discretion to permit a late appeal. It concluded, broadly,

that its "primary consideration" should be the overriding objective set out in rule 2 of the Tribunal's rules of procedure (see [62(1)]), that the list of matters set out in the original rule 3.9 of the Civil Procedure Rules ("the CPR") was a "helpful checklist" (see [62(2)]), that extensions of time should not be "routinely given" (see [62(3)] and that it should address the four questions set out in *Data Select Ltd v HMRC* [2012] UKUT 0196 (TCC).

23. The FTT then applied the principles it had identified at [74] to [79]. It decided that BBL's delay in seeking to appeal against HMRC's decision of 3 July 2012 was very long (over 4½ years) and that no good reason had been given for such a long delay. It concluded that BBL had made a considered decision in 2012 not to challenge HMRC's decision because it was worried about the risk of costs should its challenge prove unsuccessful. In those circumstances, the FTT concluded that greater weight should be placed on the desirability of not re-opening matters after a lengthy interval than on the prospect that BBL might be successful in appealing against the 2012 Letter. The FTT therefore decided that BBL should not be given permission to make a late appeal against the 2012 Letter and so decided that it should not be given permission to amend its grounds of appeal.

BBL's grounds of appeal against the Decision

24. BBL was granted permission to appeal against the Decision by the FTT on the following grounds.

25. First, BBL argues that the FTT made an error in concluding that there is a time limit for making an adjustment under regulation 38 when there is no such limit ("Ground 1") and this error led the FTT to the incorrect conclusion that the 2017 Letter was not an appealable decision which, in turn, resulted in the FTT incorrectly striking out the appeal.

26. BBL's second ground of appeal ("Ground 2") is that the FTT failed to give proper effect to the overriding objective set out in rule 2 of the Tribunal Procedure (First-tier Tribunal)(Tax Chamber) Rules 2009 (the "FTT Rules") when deciding whether to exercise its discretion to permit BBL to amend its grounds of appeal so as to constitute a (late) appeal against the 2012 Decision.

27. BBL's third ground ("Ground 3") is that the FTT wrongly applied the guidance set out in *Data Select*. Instead of focusing on Morgan J's "five questions", it should have gone through the checklist of matters set out in the original rule 3.9 of the CPR. BBL had made written submissions going through that checklist which BBL argued that the FTT had failed to take into account.

28. Before us, as we have noted, it was common ground that, provided any regulation 38 adjustment is made in the "right" accounting period, there is no time limit within which that adjustment must be made. The parties were also agreed that the 2012 Letter did contain an appealable decision and that, if BBL had made an in-time appeal against that decision, it would have been entitled to appeal under s83(1)(b) of VATA as that

decision was "with respect to the VAT chargeable on the supply of any goods or services".

29. Since the parties have asked us to determine the appeal on that basis, we will do so. We are not, however, sure that the parties' common position is correct. As we have noted, the effect of BBL's adjustment under regulation 38 was that it was claiming £1,616,384.44 from HMRC. It seems to us possible that, in doing so, BBL was making a claim under s80(1) of VATA. If that were right, then any appeal against HMRC's refusal to pay the claim would be under s83(1)(t) of VATA and, moreover, even though there is no time limit for making the regulation 38 adjustment, the time limit for making a claim under s80(1) (set out in 80(4) of VATA) would apply. It seems to us that [54] of the Court of Appeal's decision in *Iveco Limited v HMRC* [2017] EWCA Civ 1982 is consistent with that analysis. However, since we have heard no submissions on these points, and given the common position of the parties, we will make no determination of these matters.

Discussion

Ground 1

30. BBL argues that the FTT made an error of law in the Decision by reaching a conclusion, in [35] and [74], that there was a time limit for making a regulation 38 adjustment. That error of law, BBL argues, caused the FTT wrongly to conclude that it had no jurisdiction to hear the appeal and, therefore, to strike it out.

31. We have not found it entirely straightforward to determine the precise conclusion the FTT was reaching at [35] and [74] of the Decision.

32. Clearly, paragraph [35] reads as a conclusion that, contrary to the agreed position of the parties, there is a four-year time limit for making an adjustment under regulation 38. However, paragraph [35] is the end of a chain of reasoning that involved the FTT accepting submissions that Mr Mantle had made (see [33]). At [27] to [29], the FTT records Mr Mantle's submissions that if BBL had not made a regulation 38 adjustment in the "right" accounting period, it would need to correct that error under regulation 35 and would have only four years to do so. But that was a counterfactual situation since BBL had made the adjustment in the right period. It is not obvious to us that, having accepted Mr Mantle's submission that there would have been an applicable time limit if BBL had not made the adjustment in the "right" accounting period, the FTT was intending to conclude that there was a time limit given that BBL had made the adjustment in the right period.

33. Similarly, paragraph [74] of the Decision reads like a conclusion that there is a time limit for making a regulation 38 adjustment, but such a conclusion sits oddly with what has gone before. Moreover, paragraph [74] appears in the section of the Decision dealing with the question whether the FTT should exercise its discretion to permit a late appeal against the 2012 Decision. It is possible, therefore, that the FTT was simply noting that a four-year time limit would apply for correcting a mistake under regulation 35 (the "counterfactual" situation that Mr Mantle had invited it to consider at [27] to

[29]) and that it was being asked to exercise discretion to permit a late appeal outside the statutory time limit that would apply in this counterfactual situation.

34. Whatever the FTT was saying at [35] and [74], we do not consider that it formed part of the *ratio* (or core reasoning) of the Decision. As we have noted, the FTT concluded that BBL's appeal should be struck out first because it rejected the proposition that HMRC had a continuous duty, based on s58 of, and Schedule 11 to, VATA, to "process" VAT returns or that any failure in that duty could lead to a successful appeal to the FTT against a refusal to repay the sums BBL was claiming and second because it concluded that BBL was seeking to appeal against the 2017 Letter that was not an appealable decision.

35. Nevertheless, even though the FTT's conclusions on time limits did not form a core aspect of its reasoning, BBL argues that a consideration of time limits is important and explains the nature of the FTT's error. BBL's central argument is that because there was no time limit for making an adjustment under regulation 38, it followed (on the authority of *John Wilkins (Motor Engineers) Ltd and others v HMRC* [2010] EWCA Civ 923) that it was entitled to ask HMRC multiple times to repay output VAT following its regulation 38 adjustment. Therefore, when HMRC sent the 2017 Letter in response to BBL's second request for repayment, it was necessarily making an "appealable decision" against which BBL had a right of appeal. BBL had exercised that right of appeal within 30 days of the 2017 Letter and therefore it argued that the FTT was wrong to strike out its appeal.

36. In his oral submissions, Mr Tack accepted, rightly, that this argument relied heavily on the authority of *John Wilkins*. That case concerned claims for interest on overpaid VAT under s78 of VATA. Section 78(10) required a taxpayer to make a claim for interest and s78(11) provided that a claim had to be made within three years of the end of the period to which it related. Very broadly, the taxpayers first made in-time claims for simple interest and those claims were accepted and paid. However, the taxpayers then became aware that they might be entitled to claim compound interest. Before the end of the three-year period specified in s78(11) they wrote again to HMRC to claim compound interest. HMRC refused and the taxpayers sought to appeal. The question arose as to which was the "appealable decision". If it was HMRC's first decision to pay simple interest, the taxpayers had made no in-time appeal against that decision, and so would need an extension of time to appeal against it. By contrast, if the "appealable decision" was HMRC's later refusal to pay compound interest, the taxpayers would not need any extension of time as they had made in-time appeals against that decision. In a majority decision, the Court of Appeal concluded that the later decision (to refuse to pay compound interest) was the relevant appealable decision.

37. The reasoning of Sullivan LJ in reaching that conclusion can be summarised as follows:

> (1) There was nothing in the scheme of the legislation, which was "in many respects a highly prescriptive code" to exclude the possibility of successive claims for interest. There was no need to imply such a restriction (see [59] of the judgment).

(2) The process for claiming interest under s78 of VATA is relatively informal. HMRC are not obliged to respond in any particular way to such a claim (other than by paying any interest that is due). That was very different from other "once and for all" administrative decisions, e.g. to grant or refuse applications for a permission or licence to carry out some activity because in such cases there will be a formal decision notice which will usually inform the recipient of any right of appeal. Therefore, the informality of the process pointed in favour of a conclusion that multiple claims are possible because:

> 65. The time for appealing against a "disputed decision" under the 1986 Rules is very short: only 30 days. It would be most unfortunate, and entirely contrary to the informal procedure for making and determining claims under section 78, if a claimant who was dissatisfied with the Commissioners' initial letter in response to his claim for interest was compelled to appeal within 30 days in order to protect his position, (he could not safely assume that the discretion conferred on the Tribunal by regulation 19 would be exercised in his favour), rather than simply writing to the Commissioners, repeating his claim, and explaining why they had wrongly paid him too little interest because, e.g. they had erroneously adopted too low an interest rate, paid interest for too short a period, or simply made some arithmetical error.

(3) Sullivan LJ did not consider that a repeated claim for compound interest necessarily had to say anything new, but agreed with Laws LJ that HMRC would treat a repeat claim with nothing new to say as abusive (see [65] of the judgment) and so would refuse it. He also observed that any repeat claim would need to be brought within the applicable three-year limitation period specified in s78(11) of VATA.

38. Laws LJ applied essentially similar reasoning as is demonstrated by the following extract from the judgment which refers specifically to the “protection” that HMRC have, in the form of a three-year limitation period, from having to deal with endless repeat claims:

> 76.But repeat claims with nothing new to say would be dealt with summarily by the Commissioners as being abusive, and it is to be expected that such a robust response would be supported when necessary by the Tribunal and by this court. Moreover the possibility of repeat claims, responsibly conducted, may in fact be perfectly appropriate for the sensible conduct of tax affairs between taxpayer and Commissioners. There must often be circumstances where in the course of correspondence between tax experts on either side views will be adjusted on such matters as section 78 interest claims. I doubt whether the taxpayer or the Revenue would be well served by a rigid and inflexible construction of the statute requiring in every case that the taxpayer accept the Commissioners' first response or appeal. As Mr Conlon QC for the appellants other than Lookers observed on the facts of this case (see paragraph 33 of Etherton LJ's judgment), rather than engage immediately in litigation by way of appeal over the issue of compound interest, each of these appellants wrote reasoned letters to the

> Commissioners, setting out their claim and analysis, and then waited for a reasoned response.
>
> 77.In addition the protection offered by the three year limitation period in s.78 (11) has to be borne in mind – and distinguished from the purely procedural (and extendable) time for appealing given by the Rules.

39. For the reasons that follow, we do not accept BBL's submissions on the effect of the *John Wilkins* decision.

40. First, regulation 38 does not involve an "informal" process of the kind analysed in *John Wilkins*. Regulation 38 imposes a mandatory requirement to reflect increases or decreases in consideration for supplies made previously in a taxpayer's VAT return, a formal document which, if completed inaccurately, could attract penalties. By submitting the 12/11 VAT return which contained a claim for a repayment of VAT because of the regulation 38 adjustment reflected in it, BBL was requiring HMRC to make a "once and for all" administrative decision (to use the words of Sullivan LJ) as to whether that repayment was due or not.

41. Second, the parties' agreement as to the absence of a time limit for making a regulation 38 adjustment does not bear the weight that BBL seeks to place on it. The parties agree that, provided BBL reflected the adjustment in the "right" VAT period, there was no express deadline under VATA or the VAT Regulations governing the making of the regulation 38 adjustment. However, it does not follow from this that, once BBL had made the adjustment, in the 12/11 VAT return, and HMRC had refused to make the repayment that BBL said arose as a consequence, Parliament intended BBL to be able to continue indefinitely to request HMRC to make the repayment and treat each successive affirmation of the original refusal as a new appealable decision. As Mr Tack frankly accepted in his oral submissions, the logic of BBL's position is that it could have waited until 2019, or even later, before reopening a claim that it had formally told HMRC it would not be pursuing without needing any permission to make a late appeal. Parliament cannot have intended such a result. Indeed, the very absence of a time limit points against the interpretation that BBL advances given that, in *John Wilkins*, the Court of Appeal considered that Parliament would have been content to permit successive claims for interest since HMRC were protected from such claims being protracted indefinitely by the three-year time limit in s78(11).

42. Therefore, the absence of a time limit for the making of a regulation 38 adjustment does not, of itself, mean that BBL necessarily had a right of appeal against the 2017 Letter.

43. That simply leaves the question of whether the FTT was correct to hold that, having regard to the text of the 2017 Letter, it did not amount to an appealable decision. HMRC accept that this is a question of law on which we are free to substitute our own conclusion, but we are in no doubt that the FTT's conclusion was correct having regard to the relevant factual and legal context. In 2012, BBL made a claim for repayment consequent on the regulation 38 adjustment in its 12/11 return. That claim was refused. When BBL raised the matter again in 2017, HMRC said, in a nutshell, that the matter had been determined in 2012 and that they stood by their decision in 2012. That was

not a new "appealable decision": it was a reaffirmation of an appealable decision that had been made several years previously.

44. Therefore, whether or not the FTT did conclude that there was a time limit for the making of a regulation 38 adjustment, that cannot alter the fact that BBL was purporting to appeal against something other than an appealable decision. In those circumstances, even if the FTT had set out in full the parties' now agreed position that there was no applicable time limit for the purposes of regulation 38, it would have had no alternative but to strike out the appeal.

45. If follows that we have concluded that Ground 1 discloses no error of law that affects the Decision.

Ground 2

46. Mr Tack accepted during the hearing that Ground 2, as BBL had formulated it, could not disclose an arguable error of law. That is because, in deciding whether to permit BBL to make a late appeal against the 2012 Letter, the FTT was, as in *William Martland v HMRC* [2018] UKUT 0178 (TCC), exercising a statutory discretion under s83G(6) of VATA 1994 and not a case management discretion under the FTT Rules. Therefore, the overriding objective set out in rule 2 of the FTT Rules was not itself relevant to the FTT's decision although, as the Upper Tribunal observed in *Martland*:

> ...the principle embodied in the overriding objective is a broad one, and one which applies just as much to the exercise of a judicial discretion of the type involved in this appeal as it does to the exercise of such a discretion in relation to more routine procedural matters.

47. Therefore, while the overriding objective itself was not relevant to the FTT's exercise of discretion, the principle embodied in the overriding objective would be relevant to that discretion since, by exercising its discretion judicially, the FTT would necessarily be seeking to deal with matters fairly and justly. For that reason, during the hearing, Mr Tack reformulated points he made on the overriding objective as challenges to the way that the FTT exercised its statutory discretion and we will consider those challenges in Ground 3 below.

Ground 3

48. In relation to case management decisions, the following statement by Lawrence Collins LJ in *Walbrook Trustee (Jersey) Limited v Fattal* [2008] EWCA Civ 427 at [33] was endorsed by the Supreme Court in *BPP Holdings Limited v Revenue and Customs Commissioners* [2016] EWCA Civ 121:

> An appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion afforded to the judge.

49. As we have noted in our discussion of Ground 2, in deciding whether or not to exercise discretion to permit BBL to make a late appeal against the 2012 Letter, the FTT was not making a "case management" decision. However, in paragraph [56] of *Martland*, the Upper Tribunal explained that the FTT's decision was nonetheless an exercise of judicial discretion and the principles set out above in *Walbrook Trustee* are equally applicable to it.

50. BBL's narrow argument under Ground 3 is that the FTT failed to follow the "correct principles" as, instead of considering the five questions that Morgan J set out in *Data Select*, the FTT should have followed the checklist of matters set out in the original rule 3.9 of the CPR.

51. We reject that narrow point. Although the decision of the Upper Tribunal in *Martland* was not available to the FTT (since that decision was released on 1 June 2018, whereas the FTT released the Decision on 8 May 2018), *Martland* nevertheless contains a statement of the law as applicable at the time of the Decision and does not require a Tribunal considering exercising a statutory discretion to permit a late appeal to apply the original version of rule 3.9 of the CPR. Rather, the correct approach is as set out at [44] and [45] of *Martland* which expressly disavow a requirement to follow any checklist as follows:

> 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*:
>
> (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.
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> 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. By approaching matters in this way, it can readily be seen that, to the extent they are relevant in the circumstances of the particular case, all the factors raised in *Aberdeen* and *Data Select* will be covered, without the need to refer back explicitly to those cases and attempt to structure the FTT's deliberations artificially by reference to those factors. The FTT's

> role is to exercise judicial discretion taking account of all relevant factors, not to follow a checklist.

52. BBL also makes a broader point. Even if rule 3.9 of the CPR did not set out a "checklist" of matters that the FTT was obliged to follow, the matters set out there would be relevant to the judicial exercise of a discretion under s83G(6) of VATA. BBL had made written submissions to the FTT on the matters set out in Rule 3.9 and it submitted that the FTT had made an error of law in failing to take those matters into account.

53. However, that argument does not withstand scrutiny since the exercise of comparing BBL's written submissions to the FTT with the Decision demonstrates that those submissions were taken into account, albeit in some cases they were rejected. For example:

> (1) When considering the "interests of the administration of justice" (a factor set out in rule 3.9 of the CPR), BBL submitted that it made an "honest error or mistake" in failing to appeal against the 2012 Letter within the applicable time limit. The FTT referred to that submission expressly at [68] and rejected it at [78] holding that BBL made " a conscious decision in 2012 not to pursue an appeal having taken professional advice". In doing so, the FTT was also necessarily rejecting BBL's submission that its failure to meet the relevant time limit was not intentional.
>
> (2) When considering whether there was a "good explanation for the failure" (another factor set out in rule 3.9 of the CPR), BBL had submitted that BBL did not consider that KPMG's response to HMRC's letter of 14 September 2012 indicated that BBL would not be exercising its right of appeal. Therefore, BBL argued that it thought HMRC would process the adjusted VAT return once the final decision in *K E Entertainments* was handed down. The FTT rejected this explanation as "unconvincing" at [76] and it was clearly entitled to do so since the relevant letter from KPMG stated explicitly that BBL would not be exercising its rights of appeal.

Overall, we are in no doubt that the FTT properly took into account submissions that BBL made as to the matters referred to in rule 3.9 of the CPR.

54. BBL also argues that the FTT should have concluded that, since the *K E Entertainments* decision would provide a conclusive answer to the central question of whether BBL was entitled to make a regulation 38 adjustment, it should have allowed BBL to make a late appeal against the 2012 Letter since it acted promptly as soon as it became aware of the decision of the FTT in *K E Entertainments*. That is a challenge to the way that the FTT chose to exercise its discretion and we should not interfere with the FTT's decision in that regard unless satisfied that it was "plainly wrong".

55. At the time of the Decision, the Upper Tribunal's decision in *K E Entertainments* was the authoritative decision and, since it was in favour of the taxpayers, the FTT concluded at [69] of the Decision that, if it was permitted to make a late appeal against the 2012 Letter, BBL had "good prospects of success". With the benefit of hindsight, that assessment of BBL's prospects of success may be generous because the Inner

House of the Court of Session has since reversed the decision of the Upper Tribunal in *K E Entertainments*. Nevertheless, it is clear that the issue is arguable since *K E Entertainments* is proceeding to the Supreme Court and Mr Mantle did not invite us to conclude that BBL's prospects of success are less than good. However, even if BBL had good prospects of success, the FTT was entitled to conclude that the fact that BBL had taken a conscious decision on professional advice in 2012 not to appeal against the 2012 Letter, and that over four years then passed without BBL seeking to change its mind, weighed heavily in the balance against allowing BBL permission to make a late appeal. In those circumstances, the FTT was not "plainly wrong" in refusing BBL permission to make a late appeal against the 2012 Letter. We would ourselves have exercised discretion in the same way.

56. Mr Tack valiantly sought to argue that a four-year extension of time in which to appeal is not unheard of, that HMRC would not be put to greater inconvenience in defending this particular claim given the number of other bingo-related claims they will have to defend in the wake of *K E Entertainments* and that the FTT should have been more sympathetic given the length of time *K E Entertainments* will take to resolve. However, that was simply a re-emphasis of relevant considerations that the FTT clearly had in mind when making its decision. Since the FTT was clearly entitled to exercise its discretion in the way it did, these submissions cannot alter the overall outcome: BBL's appeal under Ground 3 must be dismissed.

Disposition

57. Grounds 2 and 3 disclose no error of law in the Decision. We are not satisfied that there is any error of law of the kind set out in Ground 1 as the FTT's conclusions on time limits applicable to regulation 38 did not form part of its core reasoning. Even if the FTT did reach an incorrect conclusion on time limits applicable to regulation 38, the Decision would inevitably have been the same as BBL's appeal had to be struck out since it was not appealing against an appealable decision.

58. BBL's appeal is dismissed.

JUDGE JONATHAN RICHARDS
JUDGE ANDREW SCOTT

RELEASE DATE: 2 May 2019