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Case alert

K E Entertainments Ltd

30 June 2020

Summary

The Supreme Court has issued its judgment in the case of K E Entertainments Ltd v HMRC. The issue concerns a refund of VAT on Bingo participation fees and whether the method of claiming the refund was correct.

In accordance with HMRC policy at the time, the appellant company accounted for VAT on participation fees on a game by game basis. However, in 2007, HMRC changed its guidance and advised that VAT on participation fees should be accounted for on a session by session basis. This meant that Bingo operators were generally entitled to a refund of VAT as the VAT calculated on a session by session basis was less than on a game by game basis.

The appellant submitted a three-year claim for VAT overpaid and the claim was repaid by HMRC. However, following another case (Carlton Clubs), the appellant then adjusted its current VAT return for earlier years. It argued that the new session by session accounting meant that there had been a decrease in the consideration paid by the customers which entitled it to make the adjustment and that there was no applicable time limit for making the adjustment.

The Supreme Court has dismissed the company's appeal. There was no decrease in the consideration paid by the customer, only a different method of apportionment. The correct method of claiming was under section 80 of the VAT Act and the claim for earlier years was, therefore, out of time.

Supreme Court – Judgment – 24 June 2020

Whether the change of policy on participation fees constituted a decrease in consideration paid.

Under established VAT law, a business is entitled to claim a refund of VAT that it has overpaid to the tax authority. In the UK, such a claim can be made under the provisions of section 80 of the VAT Act 1994. Claims made under that section were, at one point, limited to three years but are now limited to four years. VAT law also provides a method of adjustment in cases where, after a supply has been made, there is a decrease in the consideration received for the supply. In such cases, the taxpayer is entitled to adjust its current VAT return and there is no time limit in which to do this.

In this case, the taxpayer operates a Bingo business. Until 2007, in accordance with HMRC guidance at that time, it accounted for output VAT on Bingo participation fees on a game by game basis. In 2007, however, HMRC accepted that VAT on participation fees should be accounted for on a session by session basis and it invited claims from Bingo operators. K E Entertainments Ltd submitted a three-year claim under section 80 and received a full refund of the VAT overpaid. Following the First-tier Tax Tribunal (FTT) decision in Carlton Clubs – which agreed that the new session by session basis of accounting for VAT constituted a decrease in consideration – the appellant made an adjustment (under regulation 38 of the VAT Regulations) to its December 2012 VAT return to recover VAT overpaid in the years from 1996 to 2004. HMRC refused the refund and the company appealed to the FTT. The FTT allowed the company's appeal and HMRC appealed to the Upper Tribunal which dismissed HMRC's appeal. However, the Court of Session in Scotland allowed HMRC's further appeal and now, the Supreme Court has issued its judgment in the company's appeal from the Court of Session.

The appellant argued that the claim for a refund was not covered by section 80. That section only allows a taxpayer to claim back an amount of output VAT that should not have been brought to account as output VAT due. It claimed that, under the published guidance at the time, it had accounted for output VAT correctly and that, as a consequence, section 80 could not apply. IN line with the decision in Carlton Clubs, it considered that the change of accounting to a session by session basis meant that there had been a decrease in the consideration paid by each customer for the right to play Bingo. This, in turn, meant that it was entitled to adjust its VAT return and that no time limit applied.

The Supreme Court has dismissed the appeal. In its judgment issued on 24 June 2020, the Court has ruled that there had been no decrease in consideration paid by the customers to participate. All that had happened following HMRC's change of policy was that the taxpayer had changed its method of calculation (from a game by game basis to a session by session basis) – that did not constitute a decrease in consideration. Under the game by game basis, the taxpayer had brought into account output VAT that was not output VAT due. The correct method of accounting was the session by session basis and, as such, section 80 was the only applicable route for claiming a VAT refund for the output VAT calculated on a game by game basis and the company was out of time to make such a claim for the years in question. Accordingly, the company's appeal was dismissed.

Comment – This is the end of the road for this particular taxpayer – there is no right of appeal from the Supreme Court. It also seems like the end of the road for a number of cases that were stood behind this case. The Court did not accept that the change of accounting basis constituted a decrease in the consideration that was paid by a customer to participate in a Bingo session. All that happened here was that, following the change in HMRC policy, the taxpayer simply changed its method of apportioning the participation fee from the total income it received from customers which also included the stake money returned as prizes.

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