



TC04511

Appeal no: TC/2014/03323

Value Added tax - Penalty for failing to file the European Sales List on time - Unfairness of the delays on the part of HMRC in issuing the penalty notice - Appeal dismissed

FIRST-TIER TRIBUNAL

TAX

LA PERLE BLANCHE

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: JUDGE HOWARD M. NOWLAN

PAUL ADAMS, FCA

Sitting in public at Fox Court, Brooke Street in London on 1 June 2015

Alexandre Le Blanc, partner in La Perle Blanche, on behalf of the Appellant

Jane Ashworth of HMRC Appeals and Reviews section on behalf of the Respondents

DECISION

Introduction

1. This was a simple Appeal in relation to the failure by the Appellant to file a European Sales List (or “EC Sales List”) on time. Such failure involves a daily fine in the manner that we will describe below. There are only two grounds on which the Tribunal can strike out a penalty imposed. One of those grounds was not even advanced in this Appeal and regrettably we are unable to accept that the other ground applied either. This Appeal has, however, raised several points of principle that we consider that HMRC should address, and we would be very disappointed were HMRC to ignore our observations on these points.

The filing requirements in relation to European Sales Lists

2. Traders who make supplies to customers in other member states of the European Union are required to file a form, either in paper form or electronically, that details such supplies. The entries in the form should always mirror the details in the VAT return itself, and the EC Sales List only has to be filed for the reason that it gives HMRC information that enables checks to be made in other member states, so preventing fraud. The filing of the EC Sales List involves no payment obligation on the part of the trader, that being addressed entirely by the VAT return. We were told that the EC Sales lists had to be filed somewhat before the due date for the filing of the VAT return. Thus for a three-month period that ends, say on 30 June, the EC Sales list has to be filed by 14 July if filed in paper form or by 21 July if filed electronically. By contrast the relevant dates for paper and electronic filing of the relevant VAT return are 1 August and 7 August. This, of itself, is slightly inconvenient for traders who will inevitably need to ensure that the EC Sales List and the VAT return provide consistent information, such that they may feel unable to file the EC Sales List until they have prepared their VAT return. Unless they deal with the latter somewhat before the final date, this will delay the submission of the EC Sales List. We were told that HMRC do not generally impose penalties for slightly late filings of the EC Sales List, there apparently being some “period of grace”, so that the filing of the form and the VAT return together on the final date for the submission of the return may not be too serious a consideration.

3. The penalty regime for materially late filings of the EC Sales Lists operates as follows. For the first failure, unless a warning is given on the occasion of the first failure, there is a daily penalty of £5 a day (with a minimum penalty of £50), with the penalty increasing to a maximum of £500 should the filing be late by 100 days. Unless there is a “clean” period of 12 months, since the last late filing with no further late filings, the daily penalty for the second late filing is £10 a day, and for the third and later late filings £15 a day. All three penalties cease to escalate after the 100-day period such that the relevant maximum penalties are £500, £1,000 and £1,500.

4. HMRC was allowed to impose the penalties by issuing penalty notices for a period of up to four years from the date of the failure to file.

The facts in relation to the Appellant’s case

5. The Appellant partnership conducts a jewellery business and apparently always makes some sales to customers in other member states. Since 2009 Mr. Alexandre Le Blanc said that the Appellant had been filing both its VAT returns and its EC Sales lists electronically,

though since it was always sent the relevant paper forms for completion of the EC Sales lists by HMRC, it was possible that when there had been very few sales to European customers, the forms may have been completed in paper form. HMRC's information was, however, that since 2009 all the forms had been submitted electronically until the relevant first failure to file that we now address.

6. The Appellant apparently failed to file its EC Sales list on time for the VAT period 12/12. The due dates for filing the relevant EC Sales list will have been 14 and 21 January 2013 respectively for paper and electronic filings. On 1 March, HMRC wrote to the Appellant drawing this failure to the attention of the Appellant, saying that a penalty would be imposed unless the list was filed by some stated date. It was filed on 15 March 2013 and so there was no penalty. HMRC's letter of 1 March had, however, made it clear that any later filings would suffer automatic penalties, without further warning notices.

7. The Appellant's next required EC Sales list (for the period 03/13) was due to be filed on either 14 or 21 April, but was in fact filed late on 12 May. HMRC imposed no penalty, the period of grace thus implicitly allowing this level of delay on this occasion.

8. The Appellant failed to file any EC Sales list for the next VAT period 06/13. That list should have been filed by 14 or 21 July. The automatic penalty notice was not issued until 28 February 2014. This was the penalty that was the formal subject of the Appellant's present Appeal.

9. The Appellant apparently also failed to file its EC Sales list for the period 09/13, the final date for electronic filing of that list being therefore on 21 October 2013. While a penalty (of course then in the amount of £1,000) was eventually imposed in relation to that late filing, it is noteworthy that the 100-day period for the calculation in relation to this penalty had actually expired about one month prior to the receipt by the Appellant of the Penalty Notice in respect of the 06/13 period, i.e. the one dealt with in the previous paragraph.

10. Whilst we do not know how long the delays were, a letter from the reviewing Officer of the £500 penalty on the Appellant, the Officer coincidentally being a Miss D Blanc, indicated that the filings for the yet later return periods 12/13 and 03/14 had also been late.

The issues in this Appeal

11. The Tribunal only has jurisdiction to strike out a penalty if it is satisfied either that the EC Sales list was submitted, or that there was a reasonable excuse for late or non-filing.

12. The Appellant did not advance any case in relation to reasonable excuse. Indeed he said that, as it was his practice always to compile the VAT return and the EC Sales list at roughly the same time, he felt that he must have completed the EC Sales list. He had consistently done this between 2009 and up to the list for the period 09/12. He was unable to say whether he thought that he would have filed and despatched the missing lists electronically or by post. It was certainly possible that when there were few entries he may have completed the EC Sales list in paper form, HMRC always furnishing him with the relevant forms, but he could not be sure. He felt that if the EC Sales list had been completed in paper form, and he had forgotten to ask the colleague who dealt with post to post it, the form would have turned up a few days later on his desk and it would have been attended to.

Since it had not so “turned up”, he thought that it must have been posted. However he could not say affirmatively that it had been posted, nor indeed that he remembered having aimed to file some of the later forms in paper form. Since we were told that all the filings since 2009 had been made electronically, we suggested to Mr. Le Blanc that surely he would have remembered that paper filings would have been made in the 2013 period, as distinct from in the periods prior to 2009, had some paper filings been completed in this period. He said that he simply could not remember how he thought that the particularly relevant EC Sales list, i.e. that for the period 06/13, had been completed.

13. We would have allowed the Appeal had we been persuaded, on the balance of probability, that the relevant missing form had actually been posted. However, Mr. Le Blanc was entirely honest. He said that he could certainly not assert that the form had been posted, and he could not even remember whether he had aimed to submit it electronically or by post.

14. It follows that we must dismiss the present Appeal.

15. Whilst the facts in relation to the next late filing that has also attracted a penalty (on this occasion of £1,000) and the assertion by Miss D Blanc that we referred to in paragraph 10 above about late filings for the periods 12/113 and 03/14, are not strictly before us, they are of some significance. We do not of course know whether the alleged late filings for the periods 12/13 and 03/14 were late beyond the period of grace. Even, however, on the assumption that they were in fact filed within the period of grace, we still have three material late filings. That for the period 12/12 was in the event filed within the extended deadline, but we can only suppose that, but for HMRC’s letter of 1 March 2013, that filing would never have been made. Ignoring then the late filing for the period 03/13, when the filing was made in the period of grace, there were still the late filings for the periods 06/13 and 09/13. When the Appellant was unable to suggest that the filing for the period 06/13 had definitely been posted, the feature that we appear to be faced with three seriously late, or total non-filings of the relevant forms, with the possibility that there may be two more as well, the prospect that all had been posted and somehow lost by the postal service or HMRC is obviously inconceivable. This fortifies us in the conclusion that we have no alternative but to dismiss this Appeal.

The other serious issues

16. Mr. Le Blanc made however four very telling points that we consider that HMRC should immediately address. We are indeed surprised that these points have not already been addressed by those responsible for issuing penalty notices in relation to late filings of EC Sales lists, because one of Mr. Le Blanc’s points was the subject of various judgments by Judge Gerraint Jones QC in relation to HMRC’s practice in issuing penalties for late filings of Employer’s P35 end of year returns. Although the Upper Tribunal in *HMRC v. Hok Ltd* [2013] STC 226, overturned the decisions by the relevant judge, it is very noteworthy that it was reported in the case that HMRC had changed their practice in relation to deferring the issue of the penalty notices until the maximum penalty had accrued. This was a welcome and very necessary change of practice, and it is deeply regrettable that it appears not to have been mirrored in another area where penalties accumulate on a daily basis and there appears to have been a practice of delaying the issue of penalty notices.

17. Mr. Le Blanc's four points were as follows:

1. It was objectionable for HMRC to wait, before issuing penalty notices, until the 100-day period had elapsed such that the penalty was imposed in the maximum amount, almost it seemed as a "revenue-maximisation" exercise. Since the objective of the whole scheme was to encourage compliance, it seemed that the earlier the notice was given to traders of their failure to file the lists, the more likely it would be that the scheme would operate smoothly, with traders appreciating their failings and being able to address them. It is noteworthy that when the first failing was notified to the Appellant in the letter of 1 March 2013, the 100-day period had certainly not expired, so that HMRC can obviously issue some form of warning in due time if they are minded to do so. We accept that if warnings were sent during the 100-day period, when it would not be clear whether an EC Sales list would be filed shortly after the warning letter, HMRC would not know whether to indicate the penalty that had potentially accrued by that date, when that might later have to be varied.
2. Not only was the point made in 1 above exceptionable, but it was materially worse to delay the issue of the penalty notice in relation to the period 06/13, when the penalty notice was not issued until 28 February 2014, more than a month after the 100-day period material to the next failed filing had expired. In this case, there was no relevant difficulty about knowing whether the delay in relation to the earlier failing had run for 100 days or not. It had done that by a date very shortly after the filing date for the next filing. Had the penalty notice been issued at the end of the 100-day period in respect of the 06/13 period (admittedly an unacceptable procedure under 1 above unless some routine warning had been issued to the trader) the trader would at least have been able to attend to the then marginally late filing for the period 09/13 and any marginal late filing might have been made within the period of grace.
3. When a penalty notice for action, either taken or not taken around the date 14/21 July 2013 is not issued until 28 February 2014, it is much more difficult for a trader to ascertain whether he did or did not have evidence of posting a return. Seven months would have elapsed without the trader having heard anything.
4. We do not fully understand the detail, and indeed neither did Mr. Le Blanc, but we understood generally that, while the trader who makes an electronic filing of his VAT return immediately receives some acknowledgment of the filing that the trader can print off, there is no such procedure in relation to the EC Sales forms. There may conceivably be some long receipt number issued, but we were not clear of that, and we were also told that the trader had to wait for a 12 or 24 hour period before accessing the website again and seeking to review submitted filings. There appeared thus to be a difficulty for traders, filing their EC Sales lists electronically, of knowing with certainty whether their filing had or had not been successful.

18. As we have said, certainly the first two of these complaints were central to the judgments of Judge Gerraint Jones QC, and we understood that HMRC's practice had been changed in response to the judgments. We accept that the judgments were overturned, but we have little doubt that that was on the ground that the Tribunal's jurisdiction was a limited one in this area, and certainly not on the ground that the judgments failed to address the unfairness of the earlier procedures in a realistic and sensible fashion.

19. We should add one further point made by Mr. Le Blanc, namely that the penalties are set at a very significant level when, in the case of the Appellant's business in the period, there was no, or virtually no, income. Particularly if the technical position is that the two further late filings that we mentioned in paragraph 10 above have also attracted full penalties, the total penalties that the Appellant will have suffered will have been in the amount of £4,500. We again accept that we cannot strike them down as being disproportionate, but we do make the point that if HMRC change their practice in the light of the first two points made in paragraph 17 above, and ideally the third as well, this could significantly address the point of excessive penalties.

20. The outcome of this Appeal is of course that the Appeal has to be dismissed, but we hope that some attention will be given to the points very fairly and sensibly advanced by the Appellant.

Right of Appeal

21. This document contains certain findings of fact and the reasons for the decision in relation to the matter considered in paragraph 12 above, though all other matters are the subject of the adjournment. . Any party dissatisfied with the decision given in paragraph 12 above 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.

**HOWARD M. NOWLAN
TRIBUNAL JUDGE**

RELEASE DATE: 1 July 2015