[2016] UKFTT 0701 (TC)

TC05433

Appeal number: TC/2014/03686

VAT – zero-rating exports – lack of evidence of export – whether HMRC should have verified exports with customers – no - whether assessment appropriate where only technical breach of regulations - yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ANGELA McCAMLEY **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
PATRICIA GORDON

Sitting in public at Belfast on 27 November 2015

Mr D McNamee for the Appellant

Ms S Spence, presenting officer, for the Respondents

DECISION

Introduction

1. This is an appeal against an assessment for VAT of £125,145.00 for the periods 12/11 to 06/13 inclusive. Related penalties of £25,263.00 were also issued but have not been specifically appealed.

Background

2. The Appellant operates as a wholesaler of tyres in County Down. She had worked for the previous owner for a number of years, and acquired the business in 2011. She was registered for VAT purposes from 16 August 2011.

3. The Respondents ('HMRC') noted that the bulk of sales from the business were zero-rated as exports to the Republic of Ireland, but that no documentary evidence to support the exports was available. HMRC visited the premises in March 2013 and again in October 2013 but the documentary evidence to support the exports was still not available.

4. The Appellant informed HMRC that customers from the Republic of Ireland generally collected their purchases and that she did not keep documentary evidence to support the movement of goods across the Irish Land Boundary, although she did occasionally check the validity of their VAT numbers.

5. HMRC also found as a result of their visits that sales of scrap by the business were being incorrectly treated as zero-rated; this aspect of the assessment was not disputed in the hearing.

6. HMRC requested documentary evidence of exports on 31 October 2013 and 6 January 2014. No reply was received and an assessment for output VAT was therefore issued on 4 April 2014 for the periods 12/11 to 06/13, with associated penalties.

Appellant's evidence

7. The Appellant gave oral evidence at the hearing. She confirmed that she had purchased the business in 2011, and continued to use the same name as the previous owner. Customer relationships had continued from the previous owner. As she had worked in the business for a number of years, taking orders and maintaining stock levels, she had known the customers for some time, and had records of their details: telephone numbers, VAT numbers and so on.

8. The Appellant's practice was to record sales of goods on the date sold, together with the customer's VAT number, and the price for which the goods were sold. All records were kept by hand, as the business had no computer.

9. Correspondence from HMRC was passed to her accountant, as the Appellant did not understand the contents.

10. The Appellant had not taken any action to obtain evidence of exports following the HMRC visit as she had not understood what was required. She left all VAT matters to her accountant and considered that, as she had the receipts, there was no problem with regard to VAT.

HMRC evidence

11. Officer McGivern provided a witness statement, confirmed at the hearing, and gave oral evidence.

12. The VAT visit to the business in March 2013 was prompted by missing VAT returns and information that there had been significant acquisitions from another EU member state during the periods for which VAT returns were missing.

13. A EU mutual assistance request under Article 5 was made to the Revenue Commissioners of Ireland in respect of the business' main suppliers to establish the nature of the supplies made to the Appellant, who had placed orders and how they were paid for. The response from the Irish Revenue Commissioners indicated that the orders were placed by the Appellant, and addressed to her; payments had been made from a payment bureau and from a bank account in the trading name of the business. The suppliers confirmed that they knew the Appellant, having dealt with her when the business was operated by the previous owner. They believed the business to be the same customer as before, as the account was still in the name of the previous owner.

14. Due to difficulties in contacting the Appellant, a Schedule 36 notice to produce information was issued to the Appellant.

15. HMRC subsequently visited the Appellant's accountants' office in March 2013, where records indicated that the bulk of sales were to customers in the Republic of Ireland but that no documentary evidence to support the zero-rating of the supply was available.

16. A letter was issued to the Appellant in July 2013, setting out the requirements for zero-rating of supplies to customers in other EU member states, with reference to HMRC guidance of exports.

17. A subsequent visit to the Appellant's accountants' office was made in October 2013; again, no documentary evidence was available to support the zero-rating of supplies to customers in the Republic of Ireland. The Appellant was reminded of the requirement to provide evidence of removal of the goods across the Irish Land Boundary, as previously advised by letter, and it was suggested that she should contact her customers to obtain the necessary evidence. Officer McGivern went through the requirements with the Appellant and believed that the Appellant understood those requirements: the Appellant did not state that she was confused or did not understand the requirements.

18. During the visit in October 2013 it was also noted that no EU Sales Lists had been filed. The Appellant was advised to submit the EU Sales Lists as a matter of urgency.

19. Follow up requests for evidence to support zero rating of supplies were made, but no such evidence was provided. In the absence of such evidence, assessments were made for output VAT.

20. The only evidence kept by the Appellant were sales invoices with the customer's VAT number. No evidence was kept of the persons or vehicles collecting goods on behalf of customers.

Relevant law

21. Section 30 VAT Act 1994 (as relevant) states that:

> (8) Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where—
>
> (*a*) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both—
>
> (i) the removal of the goods from the United Kingdom; and
>
> (ii) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10; and
>
> (*b*) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled.
>
> …
>
> (10) Where the supply of any goods has been zero-rated … or in pursuance of regulations made under subsection (8) … above and—
>
> (*a*) the goods are found in the United Kingdom after the date on which they were alleged to have been or were to be exported or shipped or otherwise removed from the United Kingdom; or
>
> (*b*) any condition specified in the relevant regulations under subsection … (8) … above or imposed by the Commissioners is not complied with,
>
> and the presence of the goods in the United Kingdom after that date or the non-observance of the condition has not been authorised for the purposes of this subsection by the Commissioners, the goods shall be liable to forfeiture under the Management Act and the VAT that would have been chargeable on the supply but for the zero-rating shall become payable forthwith by the person to whom the goods were supplied or by any person in whose possession the goods are found in the United Kingdom; but the Commissioners may, if they think fit, waive payment of the whole or part of that VAT.

22. The relevant regulation is Regulation 134 of the VAT Regulations 1995, which states that:

> Where the Commissioners are satisfied that—
>
> (*a*) a supply of goods by a taxable person involves their removal from the United Kingdom,
>
> (*b*) the supply is to a person taxable in another member State,
>
> (*c*) the goods have been removed to another member State, and
>
> (*d*) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to section 50A of the Act, for VAT to be charged by reference to the profit margin on the supply,
>
> the supply, subject to such conditions as they may impose, shall be zero-rated.

23. The conditions referred to in Regulation 134 are set out in sections 4.3 and 4.4 of Notice 725 (October 2012), which have the force of law and state that:

> 4.3 When can a supply of goods be zero-rated?
>
> A supply from the UK to a customer in another EU member state is liable to the zero rate where—
>
> – you obtain and show on your VAT sales invoice your customer's EU VAT registration number, including the two-letter country prefix code; and
>
> – the goods are sent or transported out of the UK to a destination in another EU member state; and
>
> – you obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4.
>
> 4.4 Time limits for removal of goods and obtaining evidence of removal
>
> In all cases the time limits for removing the goods and obtaining valid evidence of removal will begin from the time of supply. For goods removed to another EU member state the time limits are as follows—
>
> — three months (including supplies of goods involved in groupage or consolidation prior to removal); or
>
> — six months for supplies of goods involved in processing or incorporation prior to removal.

24. Notice 725 also sets out what action a taxable person must take where the conditions in section 4/3 cannot be met:

> 4.6 What should I do if I cannot meet all the conditions in paragraphs 4.3, 4.4 …?

> If you cannot obtain and show a valid EU VAT registration number on your sales invoice you must charge and account for tax in the UK at the appropriate UK rate.
>
> If the goods are not removed or you do not have the evidence of removal within the time limits you must account for VAT as described in paragraph 16.10. No VAT is due on goods which would normally be zero rated when supplied in the UK. You may wish to consider taking a deposit for the VAT (see paragraph 5.5) if you have reason to doubt that the goods will be removed. Extra caution may be advisable if your customer:
>
> – is not previously known to you;
>
> – arranges to collect and transport the goods, or their transport arrives without advance correspondence or notice;
>
> – pays in cash; or
>
> – purchases types or quantities of goods inconsistent with their normal commercial practice.

25. The 'valid commercial evidence' required by section 4.3 is set out in section 5 of Notice 725, which specifically includes (at section 5.3) types of evidence that will satisfy the conditions for goods removed across the Irish Land Boundary. Section 5.2 (which has the force of law) sets out the information required in the evidence:

> 5.2 What must be shown on documents used as proof of removal?
>
> The documents you use as proof of removal must clearly identify the following—
>
> – the supplier;
>
> – the consignor (where different from the supplier);
>
> – the customer;
>
> – the goods;
>
> – an accurate value;
>
> – the mode of transport and route of movement of the goods; and
>
> – the EU destination.
>
> Vague descriptions of goods, quantities or values are not acceptable. For instance, "various electrical goods" must not be used when the correct description is "2000 mobile phones (Make ABC and Model Number XYZ2000)". An accurate value, for example, £50,000 must be shown and not excluded or replaced by a lower or higher amount.
>
> If the evidence is found to be unsatisfactory *you* as the supplier could become *liable* for the VAT due.

26. Section 73 of the VAT Act 1994 sets out the provisions for making assessments:

73 Failure to make returns etc

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

(2) In any case where, for any prescribed accounting period, there has been paid or credited to any person—

(*a*) as being a repayment or refund of VAT, or

(*b*) as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.

…

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following—

(*a*) 2 years after the end of the prescribed accounting period; or

(*b*) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

Submissions

27. Submissions were made by both parties at the hearing; additional submissions in respect of the relevance of the *Carlin* case (referred to below) were made in writing as the case had not been identified as relevant prior to the hearing.

Appellant's submissions

28. For the Appellant, Mr McNamee submitted that all relevant information had been made available to HMRC, and that only the format of that information was incorrect. This should not be regarded as a case where there is no evidence: the sales invoices were available which clearly show the VAT number and address of each customer. He submitted that the first port of call for HMRC investigating a potential loss of revenue should be to contact the customers of the business.

29. HMRC had used the EU mutual assistance Article 5 procedure in this case at an early stage to obtain information from a supplier to the business but had not used it to confirm exports. It was submitted that HMRC have, in other cases, used the Article 5 procedure to confirm customer information. For example, in *Orbis* [2014] UKFTT 658 (TC), HMRC had used the procedure to check information provided by the business regarding exports made. Despite that, there had been no attempt by HMRC in this case to ask the customers whether they had in fact received the goods and it was submitted the failure to do so was wholly unusual and bordered on irrationality.

30. Mr McNamee submitted that the case of *Carlin* [2014] UKFTT 782 (TC) had established that a failure by HMRC to make basic enquiries amounted to a gross failure such that they could not deem themselves to be satisfied as to any liability.

31. The overriding concern of the Tribunal should be to establish whether there was any tax liability that should be fixed on the Appellant: that is, does the Appellant owe the tax.

32. The Appellant's business operates at a very low technical level, and the Appellant has no accounting or tax knowledge. Mr McNamee submitted that all HMRC correspondence regarding the requirement to obtain evidence of export took place after the VAT periods in question and was not the clearest of instructions in relation to completed trading. It could be considered to be of assistance as to future trading but of limited assistance to completed trading, particularly given that the instructions from HMRC were all provided outside the three month period in which documentation should be obtained.

33. Mr McNamee also submitted that Notice 725 only had the force of law when brought to the attention of the taxable person; the fact that the Notice existed did not mean that a taxable person would be aware of it. Notices produced by HMRC in the normal course of affairs do not take effect until brought to the attention of the person required to comply. There would be no need for an HMRC officer to refer a person to the notice if it was simply a matter for the person to search these documents out. He submitted that it would create huge unfairness on the taxpayer if one was required to be aware of all requirements of VATA 1994 or the subsidiary legislation thereunder.

34. McNamee submitted in conclusion that the issue should be whether the trade took place, not whether the taxable person had ticked a particular box or had completed a particular document. HMRC are not entitled to rely upon technical breaches of the regulations to assess an individual trader if it is clear that the trade actually took place. The Tribunal should undertake a balancing exercise and take into account that the Appellant had relied heavily on her accountant and had family difficulties at the time: there was no evidence that the goods had not been exported and so the assessment would be grossly disproportionate. It would be a breach of Article 6 and Article 1 of the European Convention on Human Rights to interpret VAT regulations to create a VAT liability in these circumstances.

HMRC submissions

35. HMRC submitted that the Appellant is required by law to obtain and keep satisfactory evidence that goods supplied to customers in another member state for export have been removed from the UK. A taxable person cannot zero-rate a supply under section 30 VAT Act 1994 if they have failed to comply with provisions which have the force of law, such as those in Notice 725.

36. HMRC submitted that it is not for HMRC to do the work of the taxable person in these matters: that person is required by law to obtain and keep the necessary documentation. It is not the role of HMRC to verify the transactions with the relevant customers. The Appellant's submission that the Tribunal should disregard legislative requirements on the taxpayer and rely on HMRC to carry out verification checks in other member states with without foundation or merit, being completely contrary to the clear words of the legislation.

37. The Appellant's submission that it is wholly unusual for HMRC not to verify information using the EU mutual assistance Article 5 procedure is, HMRC submits, unsupported by evidence. Further, the Article 5 procedure is a formal system for co-operation and exchange of VAT information between EU member states; requests under this system are not routine usual checks. The system is used where necessary to verify evidence as to removal provided, such as in the *Orbis* case. In this case, however, there was no such evidence or removal produced.

38. Further, HMRC submitted that it was established in *Twoh International BV v Staatssecretaris van Financien* C-184/05l [2008] STC 740 that a supplier who claimed exemption must furnish the proof that the conditions for exemption are fulfilled. The ECJ also held that Article 28c(A)(a) of the Sixth Directive does not require the tax authorities of the Member State of dispatch or transport, on an intra-Community supply of goods, to request information from the authorities of the destination Member State alleged by the supplier.

39. The onus is on the taxable person to comply with legislative requirements and keep valid commercial evidence of the removal of goods from the UK in order to be able to rely on the zero-rating provisions in section 30 VAT Act 1994.

40. The Appellant was given a number of opportunities to get the necessary documentary evidence (in correspondence and at visits) before the assessment was raised, but failed to do so. All that was provided were sales invoices with VAT numbers and the name and address of the customer; no evidence as to removal from the UK was recorded.

41. Similarly, Notice 725 is widely available and taxable persons dealing with the export of goods are required to familiarise themselves with the VAT requirements in respect of exports.

42. In the absence of the documentary evidence required to be kept, the Appellant's submission that no loss of revenue occurred and that the trade took place as described cannot be accepted.

Decision

43. The burden of proof in this case is on the Appellant to show that she is entitled to zero-rate the supplies made. It is not disputed by the Appellant that the law requires documentary evidence to be kept in order to support zero-rating of supplies of goods which are exported from the UK. It is also clear from the Appellant's own submissions that the documentary evidence required by law to support zero-rating of the goods which she supplied was not obtained.

44. The Tribunal does not agree with the Appellant's submission that HMRC should have verified the exports by contacting customers directly, or using the EU mutual assistance Article 5 procedure. The requirements for zero-rating supplies of exported goods are set out in legislation; it is not the role of HMRC to make up for the shortcomings of taxable persons in complying with those requirements, as is clear from the *Twoh International BV v Staatssecretaris van Financien* case, which is binding upon this Tribunal.

45. With regard to the decision in the *Carlin* case, which is not in any case binding upon this Tribunal, we note that the information which was referred to in that case (information as to the registered owner of a vehicle) was not described in that case as being information which a taxable person is required to keep by law. As such, it is not comparable to the documentary evidence required to be kept in this case and cannot establish any requirement that HMRC make enquiries to fill in missing information where the taxpayer has not satisfactorily complied with statutory requirements to keep information.

46. We further disagree with the Appellant's submission that Notice 725 is not binding until drawn to the attention of the taxpayer. Relevant sections of Notice 725 have the force of law and it is a long-established principle that ignorance of the law is no defence. There is no requirement in tax law for a person to be made aware of legislative provisions before those provisions are binding upon that person. The Appellant's submissions that the business operated at a low technical level, and that the Appellant had no accounting or tax knowledge, similarly do not remove the obligation upon her to comply with the requirements of the law.

47. The Appellant's submission that the issue should be whether the trade took place, not whether the taxable person had ticked a particular box or had completed a particular document, is equally unsustainable. The issue in this case is not whether the trade took place but, instead, whether the export took place and was evidenced as required by law. The Appellant has provided no evidence that the goods supplied were in fact removed from the UK.

48. The Appellant's submission that there would be a breach of Article 6 and Article 1 (presumably of Protocol 1, although this was not specifically stated) of the European Convention on Human Rights if the Appellant were to be liable for the VAT assessment was not accompanied by any information or evidence as to how those Articles would be breached. It has been established in a number of cases that VAT law in the UK is not incompatible with the European Convention on Human Rights. Despite the absence of any detail to the Appellant's submission as to why this

case differs from previous decisions in this area, or indeed why the imposition of a VAT liability would breach the relevant Articles of the Convention, the Tribunal considered the point.

49. The Tribunal considers that the failure of the Appellant to comply with statutory requirements would not give rise to a breach of the Convention as the legislation requiring evidence of removal from the UK to be kept pursues a legitimate aim (ensuring that zero-rating is only available where there is evidence of export), and the requirements of the law balance the interests of the individual against the interests of the community, ensuring that the export rules cannot be used to avoid a liability to UK VAT that would otherwise arise. The Appellant's own submissions make it clear that she did not comply with the statutory requirements.

50. The appeal is therefore dismissed. The Tribunal finds that HMRC were entitled to raise the VAT assessments referred to, and the associated penalties.

51. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 21 OCTOBER 2016