TC03577

Appeal number: TC/2013/03068

Input tax disallowed – sale of goods located outside UK outside scope of tax – penalties for careless return – power of tribunal to increase penalty – VATA 1994 s7 & s24 – FA 2007 sch 24 paras 3, 15 & 17 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SWJJ LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE MALACHY CORNWELL- KELLY
MR MICHAEL SHARP

Sitting in public at 45 Bedford Square, London, on 28 April 2014

The taxpayer did not appear and was not represented

Ms Rita Pavely of HMRC for the Crown

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DECISION IN PRINCIPLE

1 We were satisfied under Rule 33 that the taxpayer had been notified of the hearing and that, given that we were in possession of all the taxpayer's written evidence, it was in the interests of justice to proceed with the appeal. We received oral evidence from Mrs Susan Bush, the case officer.

2 The appeal concerns three matters: (i) a penalty of £8,485 assessed on 20 March 2013 in respect of an allegedly careless return for the period 02/12 in which input tax was claimed in respect of a supply of wooden flooring, and a transaction involving a supply of goods said to be outside the scope was included, (ii) whether the input tax in question was wrongly claimed, (iii) whether the transaction said to be outside the scope of the tax was indeed so. It will be convenient to address these three issues in the reverse order.

Facts

(i) The 'outside the scope' transaction

3 This transaction consisted of the sale of certain machinery located at Rotterdam by the taxpayer to a buyer in Latvia, evidenced by a receipted CMR showing transport of the goods from Rotterdam to Latvia on 2 February 2012, and by two invoices selling the goods to the taxpayer dated 1 and 2 February 2012 for a total of £106,680. Evidence from the taxpayer's bank statements shows that £92,100 was received in respect of this sale; there is no explanation for the shortfall as against the purchase price, but we are satisfied on the balance of probabilities that the sale actually took place.

4 Whether this transaction should have been recorded in the return for 02/12 depends on the rules as to place of supply in section 7 of the Value Added Tax Act 1994. We were shown a printout from HMRC's website on which appears the manual of guidance to officers in regard to various VAT matters; the relevant page shows the internet address as http://home.inrev.gov.uk/vatposmanual/VATPOSG3300.htm . The printout we had was dated 15 April 2014, but the page is stated to have been published on 15 April 2008 so that it would have been extant when this return was being made.

5 It was made clear in this webpage that the effect of section 7 was to make supplies of goods which were at no point in the UK fall outside the scope of UK VAT, even if the supplier was VAT registered in the UK. No copy of the corresponding public notice (Notice 725) was in evidence, but the clear probability is that it contained a statement in the same or similar terms.

(ii) The wooden flooring

6 In its 02/12 return, the taxpayer had claimed input tax of £11,975 in respect of a purchase of a quantity of wooden flooring from a seller called IKT Limited. The invoice for the sale to the taxpayer and the tax at issue is dated 23 February 2012, and there are various payments into the taxpayer's

bank account totalling £51,500; again, there is no explanation for the difference between this figure and the invoice figure.

7 In this case there is no other confirmation of the sale, such as the CMR for the machinery, and there is reason to doubt that it took place. HMRC have been unable to contact the taxpayer, all contact having been through its accountant by email; they have made several unsuccessful attempts to verify the existence of the flooring, and are now told that it is in a warehouse at Ipswich.

8 The taxpayer at first appeared to be based at a private address and later at a business unit at Watford (for which the taxpayer's accountant was unable on its behalf to produce any evidence of a rental agreement). An initial visit for 8 June 2012 was cancelled by the taxpayer, who has been uncooperative in response to three further attempts to rearrange it. The seller of the goods has also not cooperated with enquiries by HMRC.

9 Moreover, the taxpayer when registering for VAT in October 2011 described its business as "postcard wholesale", which bears no relation to the types of business under appeal. We find that it has not been established on the balance of probabilities that this sale took place or that, if it did, the goods were purchased for the purpose of a business carried on by the taxpayer.

(iii) The penalty assessment

10 A tax-related penalty of £20,840.70 was assessed on 20 March 2013 in respect of the inaccuracies in the return, which we understand HMRC characterised at that time as deliberate and concealed, and whose disclosure was prompted by HMRC's investigation. On reconsideration, the penalty has been reduced to £8,485, being 28.5% of the tax potentially lost, on the basis that the error was careless i.e. that the taxpayer failed to take reasonable care in preparing the return.

Legislation

11 So far as relevant, section 7 of the Value Added Tax Act 1994 provides:

> 7 *Place of supply of goods*
>
> (1) This section shall apply (subject to sections 14, 18 and 18B) for determining, for the purposes of this Act, whether goods are supplied in the United Kingdom.
>
> (2) Subject to the following provisions of this section, if the supply of any goods does not involve their removal from or to the United Kingdom they shall be treated as supplied in the United Kingdom if they are in the United Kingdom and otherwise shall be treated as supplied outside the United Kingdom.

12 Section 24(1) of the 1994 Act provides:-

> 24 *Input tax and output tax*
>
> (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say—
>
> (a) VAT on the supply to him of any goods or services;
>
> (b) VAT on the acquisition by him from another member State of any goods; and

> (c) VAT paid or payable by him on the importation of any goods from a place outside the member States,
>
> being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

13 The relevant provisions of Schedule 24 to the Finance Act 2007, as amended, regarding the penalties are:-

> *Degrees of culpability*
>
> 3(1) For the purposes of a penalty under paragraph 1, inaccuracy in a document given by P to HMRC is—
>
> (*a*) "careless" if the inaccuracy is due to failure by P to take reasonable care,
>
> (*b*) "deliberate but not concealed" if the inaccuracy is deliberate on P's part but P does not make arrangements to conceal it, and
>
> (*c*) "deliberate and concealed" if the inaccuracy is deliberate on P's part and P makes arrangements to conceal it (for example, by submitting false evidence in support of an inaccurate figure).
>
> (2) An inaccuracy in a document given by P to HMRC, which was neither careless nor deliberate on P's part when the document was given, is to be treated as careless if P—
>
> (*a*) discovered the inaccuracy at some later time, and
>
> (*b*) did not take reasonable steps to inform HMRC.
>
> *Appeals*
>
> 15(1) A person may appeal against a decision of HMRC that a penalty is payable by the person.
>
> (2) A person may appeal against a decision of HMRC as to the amount of a penalty payable by the person.
>
> (3) A person may appeal against a decision of HMRC not to suspend a penalty payable by the person.
>
> (4) A person may appeal against a decision of HMRC setting conditions of suspension of a penalty payable by the person.
>
> 17(1) On an appeal under paragraph 15(1) the tribunal may affirm or cancel HMRC's decision.
>
> (2) On an appeal under paragraph 15(2) the tribunal may—
>
> (*a*) affirm HMRC's decision, or
>
> (*b*) substitute for HMRC's decision another decision that HMRC had power to make.

Discussion and conclusions

14 With regard to the sale of machinery located at Rotterdam, the law is quite clear that the transaction was indeed outside the scope of VAT, and the question is whether the taxpayer was 'careless', within the meaning of paragraph 3(1)(a) of Schedule 24 above. We interpret 'careless' as not taking reasonable care or, put another way, as not taking the care which a reasonable taxpayer would take.

15 VAT is a self-assessed tax, and international business is necessarily an area demanding careful attention to its tax implications; we consider that a reasonably careful taxpayer would have checked the correct position, and that the answer was not difficult to find in the Public Notice or on HMRC's website, or by telephone enquiry to a Revenue office. We find that HMRC have discharged the burden of showing on the balance of probabilities that

the taxpayer did not act with reasonable care, and that in this regard the penalty was correctly imposed by reference to paragraph 3(1)(a).

16 So far as concerns the input tax claimed for the purchase of wooden flooring, the position is different. Although we have found that the evidence does not discharge the burden of proof which rests upon the taxpayer to show that the goods actually were supplied to it for the purposes of the VAT registered business it carried on, it does not follow that the input tax claim was 'careless'. If it could be shown that the supply took place as claimed, and that the goods were for the purpose of the taxpayer's business, then the return would have been completed correctly; if not, it may have been completed dishonestly.

17 It is difficult to see however that there is any evidence to support a conclusion that the return in question was completed without reasonable care. Assuming the return to be incorrect, further enquiry is needed before HMRC can establish on the balance of probabilities to which category of culpability described at paragraph 3 of the Schedule 24 the taxpayer's action belongs. Reference to paragraphs 15 and 17 of the Schedule confirm the tribunal's powers in the matter: the appeal falls within paragraph 15(1), with the tribunal's powers in relation to it described at paragraph 17(1), namely either to "affirm or cancel HMRC's decision".

18 A single penalty was assessed in respect of both the alleged errors in the 02/12 return and we have found that it was well-founded in relation to the international transaction, but not so in relation to the input tax claim. No argument was addressed to us with regard to the exact extent of the tribunal's power in such circumstances, and a possible view could be that the penalty assessment stands or falls as a whole.

19 Such an interpretation of the statute would, however, be inconsistent with the approach of paragraph 3 of Schedule 24 in identifying degrees of culpability in relation to erroneous conduct, and of paragraph 15 where each type of appeal is carefully distinguished. The legislator's intention is evidently to differentiate between cases in which the quantum of the penalty is at issue (where reference is made at paragraph 17(2) to the formulae for calculating it) and cases in which it is claimed that there should be no penalty at all, such as the present.

20 It would thus defeat the intention of the legislation if the tribunal were unable to identify discrete matters, within a composite assessment, in respect of which no penalty should have been imposed – especially since a recalculation of the overall tax-related penalty in relation to any particular error is easily undertaken.

21 We therefore decide that the assessment is affirmed in respect of the inclusion in the return of the international transaction, but must be cancelled in regard to the input tax claim. Accordingly, the penalty amount must be recalculated and communicated to the taxpayer. There is liberty to apply in the event that this exercise gives rise to any difficulty.

Further appeal rights

5 22 The taxpayer, not having been present or represented at the hearing of this appeal, is entitled pursuant to Rule 38 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 to make an application in writing to be received by the tribunal no later than 28 days after this Decision is sent to it for the Decision to be set aside and remade.

10 23 This document contains the full findings of fact and reasons for the Decision. Any party dissatisfied with this Decision has a right to apply in writing 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 the tribunal no later than 56 days after this
15 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.

20 **MALACHT CORNWELL-KELLY**
TRIBUNAL JUDGE

RELEASE DATE: 9 May 2014