[2018] UKFTT 0537 (TC)

TC06721

Appeal number: TC/2017/02545

VAT – Personal Export Scheme – whether conditions met – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Hofmanns Henley Limited **Appellant**

- and -

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

TRIBUNAL: JUDGE ABIGAIL MCGREGOR
JOHN CHERRY

Sitting in public at Reading employment tribunal centre on 22 February 2018

Chris Randall and Duncan Hodgkinson, directors, for the Appellant

Dermot Ryder, presenting officer of HM Revenue and Customs, for the Respondents

DECISION

The appeal

1. This is an appeal against HMRC's decision, confirmed on review, to refuse to allow the personal export scheme to apply to the appellant's export of a vehicle to a customer based in Jersey in 2016.

Facts

2. The following facts were not in dispute on this appeal:

(1) Hofmanns Henley Limited (HHL) is a car dealership in Henley-on-Thames, conducting sales of new and second hand cars and car repairs.

(2) In October 2016 they agreed the sale of a Lotus car to a customer resident in Jersey.

(3) It was intended that the Personal Export Scheme (PES) would be used in order to export the car to Jersey such that the supply of the car from HHL to the customer was zero-rated for VAT purposes.

(4) To that end, Mr Michael Smith, sales manager at HHL, contacted HMRC to establish what procedures he needed to follow in order to ensure HHL could supply the car at zero-rate VAT under the PES. Further discussion of the contents of this telephone call (and others) is set out below.

(5) HHL received the form VAT 410 on 27 October 2016.

(6) The customer signed the VAT 410 on 10 November 2016.

(7) The car was supplied to the customer between 31 October 2016 and 10 November 2016 (further details below).

(8) HMRC received the signed form VAT 410 on 28 November 2016.

(9) On 30 November 2016, HMRC refused the application to use the PES because the PES is a pre-approval scheme and the car had already been supplied when the scheme was applied for.

(10) Following further correspondence, HMRC reconfirmed their decision on 13 January 2017.

(11) On 2 March 2017, HMRC upheld their decision following a statutory review.

The Law

3. Section 30 of the Value Added Tax Act 1994 (VATA 1994) provides for zero-rating of goods and services. Under VATA 1994, s 30(8), a supply of goods may be zero-rated, under conditions set out in regulations, where the Commissioners are

satisfied that the goods have been or are to be exported to a place outside the Member States of the EU.

4. VAT Regulations 1995 (SI 1995/2518), regs 132 and 133 provide for motor vehicles to be supplied at zero rate to:

(1) Overseas visitors who intend to depart from the Member States within 15 months and remain outside them for a period of at least 6 months; and

(2) Any person who intends to depart from the Member States within 9 months and remain outside them for a period of at least 6 months,

provided the vehicle is for subsequent export and 'subject to such conditions' as the Commissioners may impose.

5. Public Notice 707 (PN 707), issued by HMRC, has the force of law and sets out the additional conditions, imposed by the Commissioners in accordance with those Regulations, and that therefore must be met in order for a vehicle to be supplied at zero rate under regulations 132 and 133 of the VAT Regulations 1995.

6. PN 707 provides at paragraphs 1.1 and 1.4 that the notice sets out the conditions that must be met in order for the scheme to apply.

7. After the introductory paragraphs PN 707 is structured as follows:

(1) paragraph 2 sets out the basic principles of the scheme;

(2) paragraphs 3 to 7 address the position of the buyer of a vehicle;

(3) paragraphs 8 to 10 address the position of the seller of a vehicle;

(4) paragraph 11 sets out the format for a certificate for urgent delivery;

(5) paragraph 12 sets out the records that the supplier must keep;

(6) paragraph 13 provides a 'Supplier's checklist';

(7) paragraph 14 sets out the VAT territory of the EU; and

(8) paragraph 15 sets out contact details for the DVLA offices.

Parties arguments

Appellant's submissions

8. The appellant accepts that errors were made in the process by HHL, in particular not waiting until they had received confirmation of acceptance of the PES from HMRC before supplying the vehicle.

9. However, the appellant submits that they had done all they could reasonably have done to comply with the scheme but were hampered by:

(1) Mr Smith being given misleading information by the VAT advice helpline call handlers; and

(2) Inconsistencies between sections of Public Notice 707 that made it unclear whether pre-approval was necessary.

10. In the transcripts of the three telephone calls made by Mr Smith to HMRC's VAT helpline, Mr Randall drew particular attention to:

(1) The fact that Mr Smith had been directed specifically, more than once, to paragraphs 9.1 and 9.2 of PN 707 (which related to licensing the vehicle with the DVLA);

(2) The VAT advice call handler stating that:

(a) (more than once) there was no need to request a code from HMRC;

(b) the form VAT 410 needed to be filled out at the time of the purchase; and

(c) there was nothing else the supplier needed to do other than send in the form VAT 410.

11. In Public Notice 707, Mr Randall drew particular attention to:

(1) Paragraph 10.1 of, which is headed "What do I need to do before I deliver the vehicle?" and states, in relation to second hand cars, "If you have followed the procedures in paragraphs 9.2 and 12.2, you do not need to do anything else.", where

(a) paragraph 9.2 relates to the supplier's obligations in relation to licensing the vehicle with DVLA; and

(b) paragraph 12.2 refers to the obligations on internal record-keeping when selling a Margin Scheme vehicle, which includes recording the serial number on the VAT form 410; and

(2) Paragraph 13 which provides a "Supplier's checklist" that contains no reference whatsoever to the need for the supplier to wait to make the supply until it has received form VAT 412 from HMRC.

HMRC's submissions

12. HMRC accept that mistakes were made by HMRC staff in dealing with the telephone calls and sending out the wrong form initially. However, HMRC submit that these mistakes have been referred to their complaints team which is the correct forum for dealing with these mistakes.

13. HMRC submit that:

(1) HHL was referred to PN 707 and told to read it;

(2) Since PN 707 has the force of law, it is not unreasonable to expect HHL to read the notice;

(3) PN 707 is not confusing and follows a sensible trajectory to enable a supplier to comply with the conditions;

(4) One of the conditions, set out in paragraph 8.4 of PN 707, of using the PES is that the supplier must receive VAT form 412 back from HMRC confirming its acceptance of the VAT form 410 in relation to the particular supply before zero-rating the supply;

(5) HHL did not send in form VAT 410 until at least 2 weeks after the supply had been made at zero rate and never received the form VAT 412, therefore this condition of the PES had not been met and the zero-rate should not have been applied to the supply by HHL.

Discussion

14. As is accepted by both HHL and HMRC, neither party proceeded through this transaction without fault. However the task of this tribunal is to establish:

(1) What the requirements of the PES are;

(2) Whether the facts meet with these requirements; and

(3) If they don't, whether this tribunal has any other powers to consider the impact of HMRC's mistakes.

What are the relevant requirements of the PES?

15. We find that the relevant requirements (by which we mean relevant to this appeal – there is no dispute about whether or not the vehicle was being taken out of ht EU etc) of the PES are as follows, with appropriate paragraphs of PN 707 referred to in brackets:

(1) The supplier must make sure that the customer is entitled to use the scheme (8.3);

(2) The supplier must give the customer a copy of sections 1 – 7 of PN 707 and form VAT 410 (8.3);

(3) Once the customer has completed form VAT 410, the supplier must send the blue copy of the form (which is carbonated and has 4 different coloured copies) to HMRC's personal transport unit (PTU) at least two weeks before the date of delivery of the vehicle (8.4);

(4) If the form is completed accurately, HMRC will send the supplier VAT form 412 (8.4);

(5) The supplier must not zero rate the sale in their records until they have received form 412 (8.4);

(6) If the supplier needs to supply the vehicle urgently, the PTU can phone the supplier with the approval number, but only after they have received:

(a) the completed form 410 (8.4); and

(b) a Certificate for Urgent Delivery, which must be sent at least three working days before the date of delivery of the vehicle (10.3).

16. Contrary to HMRC's submissions, we do not agree that the notice is abundantly clear throughout and we agree with HHL's comments that the absence of the requirement for pre-approval in the checklist for suppliers in paragraph 13 of PN 707 is unhelpful. However, we do not believe that this alters the conditions that needed to be met from those set out above.

Did the export in question comply with the requirements?

17. The export did not comply with the requirements of PN 707 because:

(1) VAT form 410 was not sent to HMRC until after the export had been completed;

(2) VAT form 412 was never received from HMRC; and

(3) No application was made by HHL for urgent delivery.

18. On that basis, the export of the vehicle did not comply with the personal export scheme and the zero rate should not have been applied to the supply.

Does this tribunal have power to consider HMRC's mistakes?

19. Although HHL did not express it is as such, the assertions made in their submissions were that HHL had a legitimate expectation that there were no pre-conditions that had to be met before the delivery of the vehicle and that the completion of the necessary forms could take place at the point of sale because that was what they had been told over the phone by three different call handlers at the VAT helpline.

20. In *R&J Birkett* [2017] UKUT 89, the UT considered the various authorities, including that of the *BT Pension Scheme Trustees* [2015] EWCA 713 in the Court of Appeal, on the question of the scope of the tribunal's powers to consider issues of public law, including legitimate expectation. The UT set out the following principles:

> "The principles that we understand to be derived from these authorities are as follows:
>
> (1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 ("TCEA") "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: Hok at [36], Noor at [25], BT Trustees at [133].
>
> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): Hok at [41]-[43], Noor at [25]-[29], [33], BT Trustees at [143].
>
> (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public

> law in the course of exercising the jurisdiction which it does have. In Oxfam at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In Hok at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (Wandsworth LBC v Winder [1985] AC 461), or whether a compulsory purchase order had been vitiated (Rhondda Cynon Taff BC v Watkins [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In Noor at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.
>
> (4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.
>
> (5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

21. The particular statutory language that we have to interpret here is that found in section 83(1)(b) of the Value Added Tax Act 1994, which states that an appeal shall lie to the tribunal with respect to "the VAT chargeable on the supply of any goods or services".

22. This right of appeal contains no discretion and therefore confers no supervisory jurisdiction on the tribunal. The question is only whether VAT was chargeable on the supply. In this case the answer to that question depends entirely on whether the conditions for zero-rating, set out in the combination of VATA 1994, s 30, VAT Regulations 132 and 133 and Public Notice 707, were met in relation to the particular supply. None of those conditions includes any discretion on the part of HMRC that would affect the chargeability of the VAT and as set out above, we have found that those conditions were not met and therefore VAT was chargeable at the standard rate on the supply of the vehicle. There is nothing in the right of appeal in section 83(1)(b) that gives us jurisdiction to consider matters of fairness or legitimate expectation in the application of those principles. The only avenue for pursuing such a claim is therefore in a claim for judicial review.

23. As a result we do not consider here whether the comments of the call handlers on the VAT helpline amounted to a legitimate expectation.

Decision and appeal rights

24. As set out above, we find that the conditions for zero-rating under the personal export scheme were not met and therefore the appeal of HHL is dismissed.

25. For the sake of completeness, there was some limited discussion about the provisions under which HMRC would seek to recover the VAT chargeable on this supply of the vehicle, in particular whether HMRC are in a position to pursue HHL for the VAT or are required, under VATA 1994, s 30(10) to pursue the customer. We did not hear full argument on this issue and there was some uncertainty in post-hearing submissions about whether the VAT in question had in fact been paid by HHL. We therefore make the decision on the application of the PES only.

26. 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.

ABIGAIL MCGREGOR
TRIBUNAL JUDGE

RELEASE DATE: 17 SEPTEMBER 2018